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CONTENTS

RICHARD B. LILLICH MEMORIAL LECTURE: NEW DIRECTIONS IN THE STRUGGLE AGAINST HUMAN TRAFFICKING

MARK SIDEL*

I. INTRODUCTION

I am honored to have the opportunity to deliver this year's Richard B. Lillich Memorial Lecture, on the topic of *New Directions in the Struggle against Human Trafficking*. I am especially honored to be asked to give this lecture, and to give it here, because of the leadership role that Florida State University (FSU) and its Center for the Advancement of Human Rights (FSU's Center) have played in the struggle against human trafficking and involuntary servitude in the United States.[1]

I am also honored to be giving a lecture named for the late Richard B. Lillich, one of our finest scholars of international claims, investment, human rights, and other important topics in interna-

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* Professor of Law, Faculty Scholar, and Lauridsen Family Fellow, University of Iowa; Research Scholar, Obermann Center for Advanced Studies, University of Iowa. I am grateful to Tahirih Lee, Associate Dean Donna Christie, Dean Don Weidner, Shaina Brenner, and Buddy Musgrove and the editors and staff of the *Florida State University Journal of Transnational Law & Policy* for the opportunity to deliver the 2007 Lillich Lecture and to adapt the Lecture for publication, and to Terry Coonan, Kathleen Kim, and other participants in the symposium on human trafficking at the FSU College of Law in November 2007 for their cogent comments. My thanks as well to Nellie Viner for superb research assistance at the University of Iowa College of Law and to the University of Iowa College of Law, Obermann Center for Advanced Studies, and Office of the Provost for research support.

1. Fla. State Univ. Ctr. for the Advancement of Human Rights, Florida Responds to Human Trafficking (2003) [hereinafter Florida Responds], *available at* http://www.cahr.fsu.edu/the%20report.pdf. Other information about the Center's fine work on human trafficking, including curriculum development, training, advocacy and other activities is available at www.cahr.fsu.edu.

tional law. Professor Lillich was the first holder of the Ball Eminent Scholar Chair at the Florida State University College of Law, and a respected member of the faculty here and at other law schools. I am also honored to join previous Lillich Lecturers, David Caron, Philip Alston, Linda Malone, and Jerome Reichman.

I never had the privilege of working with Professor Lillich. But I did have some brief contact with him. In the early and mid 1990s, I headed the Ford Foundation's programs in Vietnam and worked closely with the Vietnamese Ministry of Foreign Affairs on building the capacity of Ministry and other government personnel in such areas as human rights and international law. Senior officials at the Ministry asked me for help in identifying an American scholar who might be able to assist Vietnam in understanding the U.S. law on settlement of international claims as they undertook complex negotiations with the United States on Vietnamese and American claims arising out of the end of the Vietnam War.

I remember very well calling Professor Lillich from Hanoi and his willingness to help Vietnam understand the American law of claims settlement. He understood that a better and deeper understanding of legal processes would result in more informed negotiations that would have better results and speed the process of normalizing relations between our countries. And, indeed, Vietnam and the United States resolved their mutual claims, and the resolution of that important and contentious issue helped to pave the way to the normalization of diplomatic relations between the two countries that occurred in 1995.[2]

My topic today is *New Directions in the Struggle Against Human Trafficking*. I must start by pointing out that FSU's Center was among the earliest American academic institutions to recognize the scourge of human trafficking and to promote and produce serious research, policy advocacy and teaching on trafficking, forced labor, and involuntary servitude. In fact, the Center has helped to pioneer several of the new directions in the struggle against human trafficking that I will discuss today. Let me briefly outline several of those areas.

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2. On Vietnam-US normalization, see Mark Sidel, The United States and Vietnam: The Road Ahead (Asia Society 1996) (on file with the *Journal of Transnational Law & Policy*); Mark Sidel, *The United States and Vietnam: Three Years after Normalization*, *in* Emerging from Conflict: Improving U.S. Relations with Current and Recent Adversaries 1 (1998), *available at* http://www.stanleyfoundation.org/publications/archive/Vantage98.pdf; Mark Sidel & Sherry Gray, *Some Thoughts on the Vietnam-US Experience*, *in* Emerging from Conflict: Improving U.S. Relations with Current and Recent Adversaries 18. For recent developments, see Mark E. Manyin, Cong. Res. Serv., U.S.-Vietnam Relations: Background & Issues for Congress (2008), *available at* http://assets.opencrs.com/rpts/RL33316_20080103.pdf.

In the fall of 2003, the Center published a report entitled *Florida Responds to Human Trafficking*.[3] The report was one of the first comprehensive reports on the problem of human trafficking, forced labor, and involuntary servitude at the state level. The report resulted from strong cooperation between the Center, other academics at the University, state officials, and nongovernmental organizations (NGOs) and social service agencies around Florida.[4]

The Center's study recommended that Florida adopt a state law to criminalize human trafficking, prevent trafficking and forced labor, and protect victims, as a counterpart to the federal law against human trafficking, the Trafficking Victims Protection Act (TVPA) enacted by Congress in 2000.[5] And the report, and other work from the Center, supported adoption of a state law that would include a method by which victims of trafficking and related crimes could sue or otherwise seek compensation from their victimizers.[6]

In 2007, none of this is particularly surprising. A number of states – including Minnesota,[7] California,[8] Washington,[9] and Ohio[10] – have now issued detailed reports on human trafficking, involuntary servitude and forced labor in their states. Well over twenty states have now adopted state anti-trafficking laws.[11] Many mandate that human traffickers and others convicted of similar

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3. *See* Florida Responds, *supra* note 1.

4. *See id.* at *4.

5. Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (codified as amended at scattered sections of 8 and 22 U.S.C.).

6. *See* Florida Responds, *supra* note 1; Terry Coonan, *Human Rights in the Sunshine State: A Proposed Florida Law on Human Trafficking*, 31 Fla. St. U. L. Rev. 289 (2004).

7. Minn. Statistical Analysis Ctr., Minn. Office of Justice Programs, Human Trafficking in Minnesota: A Report to the Minnesota Legislature (2006), *available at* http://www.dps.state.mn.us/OJP/cj/publications/Reports/2006_Human_Trafficking.pdf.

8. Cal. Alliance to Combat Trafficking & Slavery Task Force, Human Trafficking in California (2007), *available at* http://www.safestate.org/documents/HT_Final_Report_ADA.pdf. *See also* Human Rights Ctr., Freedom Denied: Forced Labor in California (Feb. 2005), *available at* www.law.berkeley.edu/clinis/ihrlc/pdf/Freedom_Denied.pdf.

9. Wash. State Task Force Against Trafficking of Persons, State of Wash. Dep't of Cmty., Trade & Econ. Dev., Human Trafficking: Present Day Slavery (2004), *available at* http://www.wcsap.org/advocacy/PDF/trafficking%20taskforce.pdf.

10. Jeremy M. Wilson & Erin Dalton, Rand Corp., Human Trafficking in Ohio: Markets, Responses, and Considerations (2007), http://www.ocjs.ohio.gov/research/RAND _MG689.pdf.

11. Ctr. For Women & Policy Studies, Report Card on State Action to Combat International Trafficking 4-5 (May 2007) [hereinafter Report Card], *available at* http://www.centerwomenpolicy.org/documents/ReportCardonStateActiontoCombatInternationalTerrorism.pdf. The Center for Women Policy Studies (CWPS) in Washington has been a national institutional leader in compiling information and providing analysis on state laws against human trafficking. For the CWPS website on state laws against trafficking, see http://www.centerwomenpolicy.org/programs/ trafficking/map/default_flash.asp.

crimes forfeit their assets, and that trafficking victims should have a private right of action to sue their traffickers is now part of federal law as well as well over thirty states' laws against trafficking.

But in 2003, though we were moving in these directions, none of this was assured, and none of these developments were preordained. The Center's report and other activities, including an early article by Professor Coonan,[12] pioneered state-based policy research on human trafficking, forced labor, and involuntary servitude, including the gathering of important data at the state level, and played a major role in spurring Florida's adoption of one of the nation's first state anti-trafficking laws, and then its revision and expansion.[13]

This brief mention of some of FSU's, and the Center's work in this area has identified several of the themes I want to discuss today. After some initial remarks about our national concern and interest in human trafficking, forced labor, and involuntary servitude, I want to turn to a discussion of several important new directions in the struggle against human trafficking in the United States and, to some degree, other countries. These are:

- The rapid growth, and the complicated role, of state laws against human trafficking
- The development of private rights of action by trafficking victims against their traffickers or, in less formal terms, an ability for victims to sue their traffickers for civil compensation, along with other issues in civil litigation against traffickers

Finally, I address the situation in research on human trafficking, forced labor, and involuntary servitude in the United States, the emergence of new, innovative and challenging research on human trafficking and forced labor in the United States, and the continuing need for considerably more policy and academic research on these complex phenomena and solutions to them.

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12. *See* Florida Responds, *supra* note 1; Coonan, *supra* note 6.

13. The first Florida law provided for felonies of sex trafficking, obtaining forced labor, and trafficking for purposes of forced labor or prostitution, and for gradations of the felonies. *See* 2004 Fla. Laws 391 (codified as amended at Fla. Stat. § 787.06 (2007)), *available at* http://election.dos.state.fl.us/
laws/04laws/ch_2004-391.pdf. The second Florida law expanded the reach of those felonies and added a private right of action for trafficking victims, among other provisions. *See* 2006 Fla. Laws 168 (codified at Fla. Stat. § 787.06 (2007)), *available at* http://www.flsenate.gov
/data/session/2006/Senate/ bills/billtext/pdf/s0250er.pdf. Further details on the Florida statutes are also available from the CWPS at http://www.centerwomenpolicy.org/programs/
trafficking/map/lawdetail.cfm?state=FL#31.

II. HUMAN TRAFFICKING, FORCED LABOR, AND INVOLUNTARY SERVITUDE IN THE UNITED STATES

Let me start by trying to dispel some myths about trafficking, perhaps particularly for those who are generally aware of this problem but have not yet worked in the area, taken a course, or conducted research on it.

First, human trafficking in the United States is about both trafficking of various kinds across borders, but also sometimes entirely within the United States. Some trafficking is, of course, about cross-border issues. The case that brought me into this field is one good example, a case we now know as the largest human trafficking case in the United States since the Civil War.[14] It involved the trafficking, forced labor and other crimes committed against over 200 Vietnamese and Chinese women on the American territory of American Samoa in the late 1990s and early part of this decade, a case prosecuted by the U.S. Department of Justice in cooperation with the Federal Bureau of Investigation, Department of Labor, and other agencies.

We often focus on cross-border trafficking issues, but there is of course substantial trafficking within the United States as well – forced prostitution and forced labor, for example, that involves transport of people within the United States. In my part of the country, we have seen this with forced prostitution rings and the transport of trafficked people within the Midwest,[15] and domestic trafficking occurs in all other parts of the country as well. So this is both an international and a domestic phenomenon.

Second, because activists and some scholars often call human trafficking "modern-day slavery,"[16] we often assume that it has all the characteristics of the slavery that we know from the history books. But, as Kevin Bales and other researchers, activists and policy analysts have pointed out, there are many varieties of the trafficking and trafficked experience and not all of them look like

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14. U.S. v. Lee, et al., 1:01-cr-00132-SOM-BMK-1 (D. Hi. jmt. entered June 21, 2005), *aff'd,* 472 F.3d 638 (9th Cir. 2006), *cert. denied,* 127 S. Ct. 2284 (2007).

15. *See*, *e.g.*, Marty Denzer, *Midwest No Safe Harbor From Human Trafficking*, Catholic News Serv., Aug. 22, 2007, http://www.catholicbishops.org/mrs/humantrafficking.shtml; *Truckers Haul Sex Slaves on Midwest Highways*, CitizenLink (Focus on the Family Action), July 16, 2007, http://www.citizenlink.org/content/A000005061.cfm. For an interesting preliminary study of policy perceptions of trafficking in the Midwest, see Vicky Luttrell, Human Trafficking in the Midwest: Experience and Perception Among Kansas Law Enforcement Officers -- An Exploratory Study (2005) (unpublished paper, Washburn University), www.washburn.edu/wu-csi/summer%2005%20reports/vicky%20human%20trafficking2005.doc.

16. *E.g.*, Florida Responds, *supra* note 1, at 14.

traditional slavery.[17] Some trafficking, forced labor, and involuntary servitude begins in chains, in involuntary, forced removal or imprisonment. That is the idea of slavery that we are often most familiar with.

But, again as Bales and others have pointed out, much of modern human trafficking, forced labor, and involuntary servitude begins not with chains but with job offers, contracts, and passports–situations in which people voluntarily take up work and move to other locations, only to find that what was voluntary quickly changes its face, turning more involuntary with time and with distance, and transitioning from the voluntary acceptance of work into forced labor, often under very different terms and involving different work.[18]

What is not a myth is that human trafficking, forced labor, and involuntary servitude exist in the United States. And we can clearly identify the primary types of these activities. These are sex trafficking, usually for purposes of forced prostitution or sexual abuse, and labor trafficking, in which the goal of the activity is labor against the victim's will.

Along with those two basic categories, there are a number of forms in which sex trafficking and labor trafficking, or more generally forced labor, often takes place in the United States. Studies and reports by the Center here at FSU, by the Center for Human Rights at Berkeley, Free the Slaves, a leading anti-trafficking organization, and by the U.S. Justice Department have identified the primary areas and forms in which trafficking and forced labor take place in the United States.

They include prostitution, domestic labor and domestic service, forced labor and trafficking in agriculture, sweatshops and sweatshop factories, service work, including food, nursing homes and other forms of service case, sexual exploitation of children, mail order brides, and other forms of trafficking and forced labor. [19] In the United States, at least, these appear to comprise the most significant categories and forms of human trafficking and forced labor.[20]

How much human trafficking and forced labor is there in the United States? Here there is considerably more debate. Based on

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17. *See*, *e.g.*, Kevin Bales, Disposable People: New Slavery in the Global Economy (2d ed., Univ. of Cal. Press 2004) [hereinafter Bales, Disposable People].

18. *Id.*

19. Among the studies to have shown these typologies are Florida Responds, *supra* note 1; Free the Slaves & Human Rights Ctr., Univ. of Cal. (Berkeley), Hidden Slaves: Forced Labor in the United States (2004), *available at* www.hrcberkeley.org/download /hiddenslaves_report.pdf.

20. *See* sources cited *supra* note 19.

the definitions in the Victims of Trafficking and Violence Protection Act of 2000 (the 2000 Trafficking Act), the U.S. government has estimated that 14,500 to 17,500 people are trafficked into the United States each year.[21] But–and this is an issue to which I will return later–we are not discovering and prosecuting nearly that number of cases of trafficking and forced labor and, as the Berkeley report has pointed out and many others agree, "it is unclear how these figures were calculated."[22]

That report suggests that

> at any given time ten thousand or more people are working as forced laborers in the United States. It is likely that the actual number reaches into the tens of thousands. Determining the exact number of victims, however, has proven difficult given the hidden nature of forced labor and the manner in which these figures are collected and analyzed. Data on victims of forced labor is further complicated by the U.S. government's practice of not counting the *actual* number of persons trafficked or caught in a situation of forced labor in a given year. Instead, it counts only survivors (defined by the Trafficking Act as victims of a "severe form of trafficking") who have been *assisted* in accessing immigration benefits. By this definition, the U.S. government reports that it has assisted approximately four hundred and fifty survivors over the past three years.[23]

But in more specific terms, what does trafficking look like? I could give examples from anywhere in the country, but let me give you several from Florida to provide a sense of the different types of trafficking and forced labor we face. And the fine work of the Center here and of the Department of Justice in Washington, from whose reports these examples are drawn, enables me to do this.

In March 2004, Ramiro Ramos was sentenced to fifteen years in prison, ordered to turn over assets of over $3 million, and ordered deported for conspiring to hold workers in involuntary

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21. Free the Slaves & Human Rights Ctr., *supra* note 19, at 10.

22. *Id.* (discussing calculations in U.S. Dep't of Justice et al, Assessment of U.S. Government Activities to Combat Trafficking in Persons 8-9 (June 2004), *available at* http://www.usdoj.gov/crt/crim/wetf/us_assessment_2004.pdf).

23. Free the Slaves & Human Rights Ctr., *supra* note 19, at 10.

servitude and harboring undocumented workers.[24] His brother was also convicted and sentenced later, also to fifteen years and to share the forfeiture of $3 million.[25] As the Justice Department explained:

> [they] were Florida labor contractors who supplied migrant farm laborers to citrus growers. Undocumented Mexican citizens were transported to Florida to work for the Ramos brothers. Once in Florida, they were forced to work until they had paid off their transportation debt. The defendants threatened the workers with violence if they left prematurely, and brutally beat a van driver and several of his employees to prevent them from taking workers away from the area.[26]

The two brothers were convicted in June 2002 of "conspiring to hold workers in involuntary servitude and of harboring undocumented workers."[27] The $3 million in assets was forfeited to the government "because it was used in furtherance of the conspiracy or was obtained as a result of the criminal enterprise."[28]

In another Florida case, in 2002, Hugo Cadena-Sosa and other defendants were charged with "conspiring with others to hold women and girls from Mexico in involuntary servitude" between 1996 and 1998.[29] The defendants conspired, again in the words of the Justice Department, "to lure women and girls from Mexico to Florida with promises of good jobs and better lives, and forcing them into prostitution and holding them as sexual slaves in brothel houses in Florida and the Carolinas . . . ."[30]

They were forced to work as prostitutes until they paid a smuggling fee of $2,000, and "[i]n some cases . . . [they] were locked in a room with no windows and given no money . . . [and]

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24. U.S. v. Ramos, et al., No. 2:01-cr-14019_KMM-1(S.D. Fla. jmt. entered March 2, 2004). Press Release, U.S. Dep't of Justice, Florida Man Sentenced on Human Trafficking-Related Charges (March 2, 2004), http://www.usdoj.gov/opa/pr/2004/March/04_crt_133.htm.

25. Press Release, U.S. Dep't of Justice, Three Florida Men Sentenced in Conspiracy to Detain Workers in Conditions of Involuntary Servitude Charges (Nov. 20, 2002), http://www.usdoj.gov/opa/pr/2002/November/02_crt_687.htm

26. Press Release, U.S. Dep't of Justice, *supra* note 2424.

27. *Id.*

28. *Id.*

29. Press Release, U.S. Dep't of Justice, Florida Man Part of Mexican Trafficking Ring Pleads Guilty to Involuntary Servitude Charges (Sept. 13, 2002), http://www.usdoj.gov /opa/pr/2002/September/02_crt_525.htm; U.S. v. Cadena-Sosa et al., No. 2:98-cr-14015-JEM6 (S.D. Fla. jmt. entered Dec. 12, 2002).

30. Press Release, U.S. Dep't of Justice, Florida Man Part of Mexican Trafficking Ring Pleads Guilty to Involuntary Servitude Charges (Sept. 13, 2002), http://www.usdoj.gov /opa/pr/2002/September/02_crt_525.htm

threatened with beatings and reprisal attacks against their families in Mexico."[31] When several escaped they "were hunted down and returned to the brothels, where they were punished by beatings and confinement."[32] The FSU Center's report calls "[t]he *Cadena* case . . . one of the most high profile--and most egregious--instances of human trafficking in modern America."[33]

In yet another Florida case–also reported in detail in the Center's fine report–a young indigenous woman from Guatemala was kidnapped by a trafficker, smuggled in South Florida, had her Guatemalan national ID card destroyed, and was forced to work in tomato fields during the day and sexually abused at night by a trafficker named Jose Tecum.[34] Tecum was convicted of kidnapping, immigration violations, slavery, and conspiracy to manufacture false documents and sentenced to nine years in prison.[35]

As documented by the Center, the *Tecum* case is a useful example of the physical and psychological trauma that is often inflicted on victims. In the words of the Center's report, she

> found herself in a world completely removed from that of her indigenous culture in Guatemala. The trafficker coerced her [by] threatening her entire family in her home country. Her trafficker also employed psychological coercion unique to their native culture: at one point he stole a lock of her hair and one of her shoes and told her that the objects had been used in witchcraft ceremonies that would bind her to him willingly or unwillingly . . . . Her cultural isolation, financial dependence, and the threats of reprisals against her family sufficed to keep her compliant and subjugated. It took the victim advocate six visits in the same day to the Tecum house before she could convince the victim that she was actually free to leave the premises. When she finally did so, the victim was able to gather all her personal belongings in a single grocery bag. Even as the young girl was liberated and taken away from the house where she had been kept a prisoner, she was unable to comprehend that she was being set free: her most insistent request was that the victim advocate pay off the remainder of the debt she sup-

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31. *Id.*
32. *Id.*
33. Florida Responds, *supra* note 1, at 38.
34. *Id.* at 50-52.
35. *Id.* at 51. U.S. v. Tecum et al., No. 2:00-cr-00005-JES (jmt. entered Feb. 8, 2001), *aff'd* 48 Fed. Appx. 739 (11th Cir. 2002).

> posedly owed to Tecum. During the ensuing court proceedings against Tecum, he threatened the victim repeatedly in the courtroom in their native K'iche dialect.[36]

Against this threat and challenge there have been many successes. Since the 1990s, the federal government, the NGO community, the faith-based community and others began identifying cases of human trafficking and forced labor, and the federal government began prosecuting cases. The prosecution of trafficking cases, the prevention of trafficking, and the protection of trafficking victims–what we often call the "three Ps" of trafficking law and policy in the United States–was a clear priority of the Clinton Administration and has been a clear priority of the Bush administration as well. And this sustained attack on trafficking, and on prevention and protection, has borne at least some fruit, both in prosecutions and in victims assisted.[37]

It is also important to recognize that we in the United States are not the only country with some success in the struggle against human trafficking, forced labor, and involuntary servitude. A great number of other countries have taken up this struggle, sometimes through the efforts of NGOs, sometimes through the efforts of governments, sometimes through the media and other sectors of civil society, and sometimes–perhaps most effectively, when all those groups are involved.

III. NEW DIRECTIONS IN THE STRUGGLE AGAINST HUMAN TRAFFICKING

Let me mention several specific issues, what we might call "second generation" problems in the struggle against human trafficking and forced labor in the United States, and issues that have specifically come to the fore in the last several years.

A. State Laws against Human Trafficking

The first of those issues is the increasing propensity of states in the United States, urged on by the federal government, anti-

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36. Florida Responds, *supra* note 1, at 52.

37 For recent official data, see, e.g., U.S. Dep't of Justice, Assessment of U.S. Government Efforts to Combat Trafficking in Persons in Fiscal Year 2006 (Sept. 2007), http://www.usdoj.gov/ag/annualreports/tr2007/assessment-of-efforts-to-combat-tip0907.pdf; U.S. Dep't of Justice, Attorney General's Annual Report to Congress on U.S. Government Activities to Combat Trafficking in Persons - Fiscal Year 2006 (May 2007), http://www.usdoj.gov/ag/annualreports/tr2006/agreporthumantrafficing2006.pdf.

trafficking activists, NGOs, and local legislators, to legislate at the state level about human trafficking.

Earlier in our history, we had a number of weapons in the fight against human trafficking and forced labor. Since the Civil War, those have included the Thirteenth Amendment to the Constitution, which states that "[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction,"[38] and that "Congress shall have power to enforce this article by appropriate legislation."[39]

Congress did enforce the Thirteenth Amendment by legislation, and the results were the federal statutes against involuntary servitude,[40] against debt servitude, or what we call peonage,[41] and criminalizing conspiracy against civil rights.[42] In the years before the TVPA of 2000, these statutes were important weapons in the struggle against human trafficking and forced labor: The first two–the statutes against involuntary servitude and debt peonage–carried jail terms of up to ten years.[43] The last–conspiracy against rights–carried a sentence of up to ten years and up to life in cases of death, kidnapping, or aggravated sexual abuse.[44]

By the 1990s these and other criminal statutes used against traffickers and the overlords of forced labor–such as kidnapping, assault, and other crimes–were insufficient. *United States v. Kozminski*, decided by the United States Supreme Court in 1988, was important in these developments.[45] *Kozminski* interpreted the coercion requirement of the post-Civil War statutes (particularly involuntary servitude, § 1584, and conspiracy against rights, § 241) by holding that "our precedents clearly define a Thirteenth Amendment prohibition of involuntary servitude enforced by the use or threatened use of physical or legal coercion. The guarantee of freedom from involuntary servitude has never been interpreted specifically to prohibit compulsion of labor by other means, such as psychological coercion."[46] The Court stated:

> Absent change by Congress, we hold that, for purposes of criminal prosecution under § 241 or § 1584, the

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38. U.S. Const. amend. XIII, § 1.
39. *Id.* § 2.
40. 18 U.S.C. § 1584 (1999 Supp.).
41. *Id.* § 1581 (1999 Supp.).
42. 18 U.S.C. § 241 (1994).
43. 18 U.S.C. §§ 1581, 1584 (1999 Supp.).
44. 18 U.S.C. § 241 (1994).
45. 487 U.S. 931, 944 (1988).
46. *Id*.

> term "involuntary servitude" necessarily means a condition of servitude in which the victim is forced to work for the defendant by the use or threat of physical restraint or physical injury, or by the use or threat of coercion through law or the legal process.[47]

Faced with *Kozminski* and the wider difficulties in using the post-Civil War statutes and criminal charges alone, an important and now well-document legislative and political process culminated in the TVPA of 2000, since amended and reauthorized in 2003 and 2005.[48] The 2000 Trafficking Act focused on "severe forms of trafficking,"[49] broadened the definition of "coercion" that could lead to a criminal conviction under the Act,[50] and expanded

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47. *Id.* at 952. The *Kozminski* Court also stated: This definition encompasses those cases in which the defendant holds the victim in servitude by placing the victim in fear of such physical restraint or injury or legal coercion. Our holding does not imply that evidence of other means of coercion, or of poor working conditions, or of the victim's special vulnerabilities is irrelevant in a prosecution under these statutes. As we have indicated, the vulnerabilities of the victim are relevant in determining whether the physical or legal coercion or threats thereof could plausibly have compelled the victim to serve. In addition, a trial court could properly find that evidence of other means of coercion or of extremely poor working conditions is relevant to corroborate disputed evidence regarding the use or threatened use of physical or legal coercion, the defendant's intention in using such means, or the causal effect of such conduct. We hold only that the jury must be instructed that compulsion of services by the use or threatened use of physical or legal coercion is a necessary incident of a condition of involuntary servitude.
Id. at 952-53.

48. Trafficking Victims Protection Act of 2000, *supra* note 5. For a brief review of this history, see *Developments in the Law – Jobs and Borders II. The Trafficking Victims Protection Act*, 118 Harv. L. Rev. 2180-2202 (2005) [hereinafter *Jobs and Borders*]. For the 2003 revision and reauthorization of the TVPA, see Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875. For the 2005 revision and reauthorization of the TVPA, see Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558 (2006). On the 2005 reauthorization, see Angela D. Giampolo, *The Trafficking Victims Protection Reauthorization Act of 2005: The Latest Weapon in the Fight Against Human Trafficking*, 16 Temp. Pol. & Civ. Rts. L. Rev. 195 (2006-2007).

49. 22 U.S.C. § 7102(8) (2000). Severe forms of trafficking were defined as: sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or . . . the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.
Id.

50. 22 U.S.C. § 7102(2) (2000). Coercion was now defined as: (A) threats of serious harm to or physical restraint against any person; (B) any scheme, plan or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or (C) the abuse or threatened abuse of the legal process.
Id. In the words of the Justice Department, the Act deals with coercion and the restrictive requirement in *Kozminski* by "permit[ting] prosecution where nonviolent coercion is used to force victims to work in the belief they would be subject to serious harm." Civil Rts. Div., U.S. Dep't of Justice, New Legislation, Victims of Trafficking and Violence Protection Act of 2000, http://www.usdoj.gov/crt/crim/traffickingsummary.html (last visited July 4, 2008). For more on *Kozminski*, see Kathleen Kim, *Psychological Coercion in the Context of*

federal law to include not only the prosecution of traffickers under four new trafficking and forced labor offenses, but also committed the United States to extensive programs seeking to prevent trafficking and protect trafficking victims, including the provision of special visas for trafficking victims who are assisting in investigations and prosecutions, as well as their family members.[51]

Maximum penalties were increased from ten to twenty years, and, in cases of attempted or actual murder, kidnapping, or aggravated sexual abuse, up to life imprisonment.[52] For the first time, federal law mandated that courts order restitution of the "full amount of the victim's losses" and forfeiture of property by traffickers.[53] And these are just the bare outlines of the 2000 Trafficking Act–it did much more as well.[54] In 2003, the Trafficking Act was amended and reauthorized to provide a private right of action for trafficking victims and to make numerous other changes.[55] And the Act was again re-authorized, amended, and somewhat expanded in 2005 as well.[56]

Within several years after the adoption of the federal Trafficking Act, both the federal government and a range of NGOs, anti-trafficking activists, research centers such as the Center for the Advancement of Human Rights here at FSU, and others were asking states to enact their own anti-trafficking laws as a counterpart to the federal legislation. There were many reasons for the push at the state level, but two stood paramount: first, the federal government and NGOs were not finding as many trafficking victims as they knew, or at least assumed, were around the country, and second, state legislators around the country, Democratic and Republican, began to realize how easy, budget neutral, and politically valuable a vote for human rights and against human trafficking at the state level could be.

With the help of the Justice Department, the anti-trafficking organization known as the Freedom Network, and other organiza-

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Modern-Day Involuntary Labor: Revisiting United States v. Kozminski *and Understanding Human Trafficking*, 38 U. Tol. L. Rev. 941 (2007) [hereinafter Kim, *Psychological Coercion*].

51 *See* 8 U.S.C. § 1101(15)(T) (2000).

52. *See*, *e.g.*, 18 U.S.C. §§ 1581, 1583, 1589-1592 (2000).

53. 18 U.S.C. §§ 1593-1594 (2000).

54. Among the many useful discussions of the 2000 Act, see particularly Anthony M. DeStefano, The War on Human Trafficking: U.S. Policy Assessed (Rutgers Univ. Press 2007); Jennifer M. Chacon, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 Fordham L. Rev. 2977 (2006); Susan Tiefenbrun, *The Cultural, Political, and Legal Climate Behind the Fight to Stop Trafficking in Women: William J. Clinton's Legacy to Women's Rights*, 12 Cardozo J.L. & Gender 855, 876-78 (2006) [hereinafter Tiefenbrun, *Clinton's Legacy*]; *Jobs and Borders*, *supra* note 48.

55. *See* Trafficking Victims Protection Reauthorization Act of 2003, *supra* note 48, § 4(a)(4).

56. *See* Trafficking Victims Protection Reauthorization Act of 2005, *supra* note 48.

tions that drew up overlapping model state anti-trafficking statutes, states began to enact state anti-trafficking law in quick succession. The first state statutes began appearing in the first years of this decade and, by now, well over thirty American states have criminalized human trafficking, at least twelve have created statewide anti-trafficking tasks forces, at least four have new statutes regulating international marriage brokers and international matchmaking organizations, and at least five regulate sex tourism.[57]

The extraordinary diversity of these state statutes typifies the spirit which with state legislators took to enacting laws on a topic that they could, almost without opposition, all rally behind. Some statutes barred human trafficking and/or forced labor; others criminalized overlapping conduct but called it by other terms. Others added broader new kinds of criminal offenses, such as "benefitting financially from trafficking" in Arkansas.[58]

To cite but one example–an example close to you here in Florida, and one well-known to Professor Coonan and his colleagues–the Florida statute criminalizing human trafficking was enacted in 2004, establishing a first degree felony of sex trafficking for parents, legal guardians, or other persons having custody of a minor who sell, transfer custody, or offer to sell or transfer the minor for the purpose of sex trafficking or prostitution, and established several second degree felonies for obtaining forced labor, and for sex trafficking and human trafficking for those who knowingly participate in trafficking for purposes of forced labor or prostitution, with enhancements to a first degree felony for death or activity against a person under fourteen years old.[59]

In 2006 Florida even moved to a second generation of state trafficking law, adopting an amendment that expanded the definition of forced labor or services in the first statute and included the second degree felony of knowingly benefitting from human trafficking.[60] It also established a civil cause of action that allowed for recovery of three times the profits obtained from trafficking, estab-

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57. *See* Ctr. for Women Policy Studies, State Laws/Map of the United States, http://www.centerwomenpolicy.org/programs/trafficking/map/default_flash.asp (last visited on July 5, 2008). *See also* Report Card, *supra* note 11.

58. Ark. Code Ann. § 5-11-108(b)(2) (2008). Florida also has a benefiting-from-trafficking provision. *See* Fla. Stat. § 787.06(3)(b) (2007). For other states with this particular expansion on trafficking legislation and other innovative forms of trafficking legislation, see Ctr. for Women Policy Studies, Fact Sheet on State Anti-Trafficking Laws from National Institute on State Policy on Trafficking of Women and Girls (Sept. 2006), http://www.centerwomenpolicy.org/programs/trafficking/documents/TraffickingStateLawsFactSheetSeptember2006_000.pdf (last visited on July 5, 2008).

59. 2004 Fla. Laws 391, *supra* note 13.

60. 2006 Fla. Laws 168, *supra* note 13.

lished trafficking as a racketeering offense for purposes of the Florida RICO Act, and encouraged state-level prosecutions.[61]

In well less than a decade, we have seen a great majority of the states adopt statutes criminalizing various elements of human trafficking and forced labor. A significant number go even further: They may mandate restitution to victims, forfeiture of property, or even a private right of action by trafficking victims against their traffickers. They usually include enhancements for certain kinds of particularly serious actions or injuries, or based on time in servitude, or the number of victims. They may provide for mandatory training for local police and law enforcement on trafficking, as the law does in my state of Iowa.

Some states mandate a statewide report on trafficking and forced labor, as, again, my state does, along with an assessment of needs for protection of victims and prevention of trafficking, and the collection of data.[62] They may focus more on sex trafficking and slight labor trafficking. They may–and this has proven particularly controversial in some states, and has been removed from draft bills in other states–impose corporate liability on companies engaging in or knowingly benefitting from trafficking or forced labor. They may provide for protection for trafficking victims, including eligibility for a narrow or wider range of state benefits, state certification for purposes of federal protections, including the T visa status, access to medical, professional, social, legal and other services, and so on.

These moves toward anti-trafficking legislation in the states have become a national movement. But it is not the only area in which states have moved quickly to legislate on a topic previously reserved–in practice if not necessarily in law–to the federal government. We see the same phenomenon occurring in immigration law, where state-level statutes on immigration and immigrant control are rising rapidly, and in other fields.

None of us oppose state-level laws against human trafficking and forced labor. But a few words of caution about this extraordinary phenomenon are in order. Much of this legislation at the state level is what we call, in trafficking and other contexts, "expressive" legislation.[63] It is intended to express the revulsion and the policy

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61. *Id.* For an assessment of the Florida legislation, see Report Card, *supra* note 11, at 24-25. For another discussion of the effects of the Florida state legislation, see Anne Marie Apollo, *Human Trafficking Responsibility Falling to Local Agencies*, Naples Daily News, May 17, 2006, *available at* http://www.naplesnews.com/news/2006/may/17/human_trafficking_responsibility_falling_local_law/.

62. Iowa Code § 710A.2 (2007).

63. *See*, *e.g.*, Baher Azmy, *Unshackling the Thirteenth Amendment: Modern Slavery and a Reconstructed Civil Rights Agenda*, 71 Fordham L. Rev. 981, 1047-49 (2002-2003);

contempt of legislators of the right and left, conservatives and liberals, of both parties and other parties, to a practice that is universally condemned around the United States and far beyond. And there is nothing so wrong with expressive legislation that we should oppose it–though we certainly should be aware of what it is, and what it is not in most cases.

There are at least two issues with the rush toward expressive state legislation in the trafficking context. First, the laws that result from this bipartisan commitment toward condemning a human rights abuse, like much bipartisan expressive legislation in other areas, tends to follow a "least common denominator" pattern: Some provisions–such as those emphasizing criminalization and enforcement against labor trafficking, imposing corporate liability on companies engaging in or knowingly benefitting from trafficking or forced labor, or providing a wide range of protections for trafficking victims, including eligibility for a wider range of state benefits–tend to be dropped from such bills in favor of quick bipartisan passage without a fight. The result is expressive but sometimes relatively denuded laws, expressing voice but not necessarily with strong teeth.

The second issue leads from the first problem. Turning expressive legislation into a real weapon, into a real toolbox for working on trafficking and forced labor, rather than merely a powerful but ultimately temporary sentiment by state legislators who are eager to condemn human trafficking and often not so eager to spend money on enforcement, protection, and prevention, is a very difficult task indeed. Expressive legislation is its own reward, and in many states work on trafficking virtually ends on the day that both political parties come together to pass a state anti-trafficking law. And coming back to a state legislature to pass the tougher provisions deleted from an original bill in the interest of rapid bipartisan passage is rarely successful.

What can we do so that state-level expressive legislation against trafficking and forced labor goes beyond mere expression and actually has some real, definable, measurable effect on the ground, something more than expressing revulsion? The experiences of several states, including Florida, help to answer the question of how we convert expressive legislation that does little more than express a general policy into a weapon for real use and real effects.

Jobs and Borders, *supra* note 48, at 2200-01. More generally, see Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. Pa. L. Rev. 1503 (2000), and Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 Harv. L. Rev. 413 (1999), for more on expressivism.

We have learned from several states that it helps if the statute requires steps beyond the mere criminalization of trafficking. Those steps may include training policy, establishing a state task force that is required to report back, mandating data collection and release, and other steps. Such real work provides an opportunity to continuing pushing for action at the state level. We have learned that it helps if the state has an active, ongoing anti-trafficking organization or research center that incorporates the new state law into its work and serves as a watchdog for its enforcement. We have learned that it helps to re-focus attention on a state anti-trafficking law when, within a few years, an amended law is proposed, with bipartisan support, that fills remaining gaps and mandates continued observation.

In the end, however, despite these tactics, the initial years since the state anti-trafficking laws were enacted have been somewhat disappointing. There is often little action on prosecution, prevention and protection after the heady days in which a statute is passed. State law enforcement, judges and others often have little to do in an area in which federal prosecution has always come first. And there is, I must say with regret, relatively little evidence thus far that the enactment of state anti-trafficking laws has had a causal effect in bringing more trafficking cases to light, as clearly the Justice Department, the anti-trafficking organizations, and others hoped it would. We can and should do better.

B. Civil Litigation Against Traffickers

Civil litigation against the perpetrators of human trafficking and forced labor in the United States has a more recent history than criminal prosecution of these traffickers. A number of options have developed for civil litigation against traffickers: Victims may sue for torts committed against trafficking victims; sue for other civil wrongs (such as breach of employment contract); sue for breach of contract relating to wages, room and board, unstipulated fees, and other contractual issues.

In the United States, victims may also be able to sue for violation of the FLSA, particularly sections 206 (violation of minimum wage standards),[64] Section 207 (violations of overtime wage standards,[65] Section 215 (discrimination, such as firing, for raising wage issues),[66] and Section 216 (the damages provision, covering

64. 29 U.S.C. § 206 (2004 Supp.).
65. 29 U.S.C. § 207 (2004 Supp.).
66. 29 U.S.C. § 215(a)(3) (2004 Supp.).

unpaid back, minimum and overseas wages, attorneys' fees, costs, liquidated damages, and other damages).[67] But this does not end the panoply of civil options in the United States. Victims may sue for violation of other federal (or state) labor and/or employment laws; they may sue for withholding of passports and other identification documents; they may, in some cases, be able to sue for violation of other federal statutes, such as the pre-TVPA involuntary servitude or peonage statutes; and they can try–though often the U.S. courts will not allow–to sue under implied rights of action under the Thirteenth Amendment and Anti-Peonage Act.

There are still other options as well–the Alien Torts Claim Act, which allows civil action by an alien for a tort committed in violation of the law of nations or a treaty of the United States,[68] although the United States Supreme Court has limited its application to a relatively narrow class of torts covering a modest range of international law violations.[69]

The TVPA of 2000 began the process of allowing a limited civil recovery for trafficking victims. The 2000 Act provided for mandatory restitution of the "full amount of the victim's losses"[70] and full forfeiture of property derived from trafficking.[71] But that provision

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67. 29 U.S.C. § 216 (2004 Supp.).

68. 28 U.S.C. §1350 (2000).

69. The growing literature on civil actions in the trafficking context includes Kathleen Kim & Daniel Werner, Civil Litigation on Behalf of Victims of Human Trafficking (Legal Aid Found. of Los Angeles 2005), *available at* http://www.lafla.org/clientservices/specialprojects/VictimsTrfficking0405.pdf; Kathleen Kim & Kusia Hreshchyshyn, *Human Trafficking Private Right of Action: Civil Rights for Trafficked Persons in the United States*, 16 Hastings Women's L.J. 1 (2004); Jorene Soto, *Show Me the Money: The Application of the Asset Forfeiture Provisions of the Trafficking Victims Protection Act and Suggestions for the Future*, 23 Penn St. Int'l L. Rev. 365 (2004); Jennifer S. Nam, Note, *The Case of the Missing Case: Examining the Civil Right of Action for Human Trafficking*, 107 Colum. L. Rev. 1655 (2007); Rachel Stevens, Note, *The Trafficking of Children: A Modern Form of Slavery, Using the Alien Tort Statute to Provide Legal Recourse*, 5 Whittier J. Child & Fam. Advoc. 645 (2006); and Note, *Remedying the Injustices of Human Trafficking Through Tort Law*, 119 Harv. L. Rev. 2574 (2006).

70. 18 U.S.C. § 1594 (2000). This includes any costs incurred by the victim for— (A) medical services relating to physical, psychiatric, or psychological care; (B) physical and occupational therapy or rehabilitation; (C) necessary transportation, temporary housing, and child care expenses; (D) lost income; (E) attorneys' fees, as well as other costs incurred; and (F) any other losses suffered by the victim as a proximate result of the offense[,]
18 U.S.C. § 2259(b)(3) (2000), along with "the greater of the gross income or value to the defendant of the victim's services or labor or the value of the victim's labor as guaranteed under the minimum wage and overtime guarantees of the Fair Labor Standards Act (29 U.S.C. 201 et seq.)", 18 U.S.C.A. § 1593(b)(3) (2000).

71. 18 U.S.C. § 1594 (2000). The "full amount of the victim's losses" includes "any costs incurred by the victim for— (A) medical services relating to physical, psychiatric, or psychological care; (B) physical and occupational therapy or rehabilitation; (C) necessary transportation, temporary housing, and child care expenses; (D) lost income; (E) attorneys' fees, as well as other costs incurred; and (F) any other losses suffered by the victim as a proximate result of the offense," 18 U.S.C.A. § 2259(b)(3), along with "the greater of the gross income or value to the defendant of the victim's services or labor or the value of the

was implemented somewhat inconsistently by prosecutors and the courts–for example, not all prosecutors requested restitution or forfeiture, not all courts gave it, and the measures of restitution and forfeiture were inconsistent.[72]

When Congress reauthorized the TVPA in 2003 it added to the civil remedies and private rights available, providing for the first time a private right of action for trafficking victims that allowed victims to sue in federal district court for damages and reasonable attorneys' fees. The statute required that civil actions be held in pendency for criminal actions, giving criminal prosecutions priority over civil actions.[73] The next reauthorization of the Trafficking Act in 2005 made modest expansions to civil remedies, expanding the provision for forfeiture of assets to extraterrorial jurisdiction prosecutions as well as domestic prosecutions.[74] These provisions and the various civil remedies available under state law result in a wide variety of strategies used by lawyers for victims of trafficking, and a wide variety of calculations for losses suffered by trafficking and forced labor victims depending on the particular theory or statute sued on.

The range of issues involved in civil litigation is extraordinarily complex. They include jurisdictional issues involved class action

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victim's labor as guaranteed under the minimum wage and overtime guarantees of the Fair Labor Standards Act (29 U.S.C. 201 et seq.)," 18 U.S.C.A. § 1593(b)(3). Property forfeiture under 18 U.S.C. § 1594 includes:

> irrespective of any provision of State law . . . such person's interest in any property, real or personal, that was used or intended to be used to commit or to facilitate the commission of such violation; and . . . any property, real or personal, constituting or derived from, any proceeds that such person obtained, directly or indirectly, as a result of such violation

id., as well as

> (c)(1) … (A) Any property, real or personal, used or intended to be used to commit or to facilitate the commission of any violation of this chapter. (B) Any property, real or personal, which constitutes or is derived from proceeds traceable to any violation of this chapter.

Id.

72. *See* Soto, *supra* note 70, at 373-74; *Remedying the Injustices of Trafficking Through Tort Law*, *supra* note 70, at 2583.

73. 18 U.S.C. § 1595 (Supp. 2005). The statute provided that:

> (a) [a]n individual who is a victim of a violation of section 1589, 1590, or 1591 of this chapter may bring a civil action against the perpetrator in an appropriate district court of the United States and may recover damages and reasonable attorneys fees. (b)(1) Any civil action filed under this section shall be stayed during the pendency of any criminal action arising out of the same occurrence in which the claimant is the victim. (2) In this subsection, a "criminal action" includes investigation and prosecution and is pending until final adjudication in the trial court.

18 U.S.C. § 1595. For the full 2003 revision and reauthorization of the TVPA, see Trafficking Victims Protection Reauthorization Act of 2003, *supra* note 47.

74. For the 2005 revision and reauthorization of the TVPA, see Trafficking Victims Protection Reauthorization Act of 2005, *supra* note 48.

and standing; jurisdiction over defendant foreign organizations; relationship to foreign states and sovereign immunity (such as the Jurisdictional Immunities of Foreign States Act);[75] jurisdiction over defendant foreign persons; issues of subject matter jurisdiction (such as the Fair Labor Standards Act (FLSA))[76]; the preclusive effects of executive action; the question of who is an employer, and other issues. Other vexing civil litigation issues include the question of class action certification under FLSA or other statutes; issues of damages; injunctions and receivership; problems of proof; choice of law; individual vs. corporate liability; and the liability of "joint employers" (such as Vietnamese labor service companies).

But these difficulties and complications should not hide the very real importance of civil litigation against those who perpetrate human trafficking and forced labor. As a number of commentators have pointed out, the possibility of civil litigation, and particularly the private right of action now ensured by the TVPA, provides trafficking victims with some control and agency in their actions against traffickers, some possibility of a reasonable monetary recovery, some hope of putting traffickers out of business, and some possibility of full punishment against those who have victimized them. Recent work by Jennifer Nam and others has indicated clearly that civil remedies remain underused, and we must find ways of enabling victims and their advocates to fully utilize these important weapons because civil litigation is an increasingly important tool in the struggle against trafficking and forced labor.

C. New Frontier: Civil Remedies for Trafficking and Forced Labor Beyond the United States

Thus far the discussion of civil remedies and private rights of action by trafficking and forced labor against their victimizers has been very much an American topic. And there are some good reasons for that: Civil remedies and private rights of action by trafficking and forced labor victims have developed earliest, most quickly and in a more detailed way in the United States–though of course the field is still highly problematic and is still developing rapidly. But civil remedies and private rights of action against trafficking and forced labor are not limited to the United States, and they are developing abroad as well.

To take one very limited measurement–which almost certainly does not provide the full range of countries that employ civil reme-

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75. 28 U.S.C.A. §§ 1602-1611 (2008).
76. 28 U.S.C.A. §§ 201 *et seq.* (1938), as amended.

dies against trafficking and forced labor–the State Department identifies nearly thirty countries that employ some form of civil remedies (such as civil penalties, civil damages, restitution, or forfeiture) and/or private rights of action against traffickers and forced labor bosses in the 2006 and 2007 *Trafficking in Persons Reports*.[77] Our traditional notion that civil remedies for trafficking and forced labor originate from and may be limited to the United States and several other developed countries certainly needs to be reconsidered, and our sense of the countries involved in considering, strengthening and enforcing civil remedies for trafficking and forced labor needs to be expanded. Several examples may serve to indicate the progress, or lack of progress, and discussions of civil remedies in other regions and countries.

In South Asia–one of the world's most active areas for modern slavery and human trafficking–the push for civil remedies in trafficking and forced labor cases has its roots in civil penalties for cases of domestic violence, violence against women, and sexual harassment. At the 6th Commonwealth Ministerial Women's Affairs Meeting in New Delhi in 2000, the well-known Sri Lankan legal scholar Radhika Coomaraswamy addressed "critical issues confronting Commonwealth women in the area of human rights"[78] and noted that:

> [t]he next decade should witness the promulgation of legislation that attempts to deal with various aspects of violence against women. In this regard there is the need to draw up model legislation in different spheres. Though model legislation with regard to domestic violence exists, the other areas such as rape and sexual harassment have received less attention. *The important thing about legislation with regard to domestic violence and sexual harassment is*

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77. A review of the 2006 and 2007 *Trafficking in Persons Reports* indicates that Albania, Bosnia, Bulgaria, Burma, Cambodia, Colombia, Croatia, East Timor, France, Guyana, Hong Kong, Israel, Kenya, Korea, Kuwait, Macedonia, Montenegro, Morocco, Nigeria, Philippines, Portugal, Russia, Serbia (and Kosovo), Thailand, Ukraine, and Vietnam had some forms of civil remedies for trafficking and/or forced labor, though of course widely variegated. U.S. Dep't of State, Trafficking in Persons Report (2006) [hereinafter TIP Report 2006], *available at* http://www.state.gov/documents/organization/66086.pdf; U.S. Dep't of State, Trafficking in Persons Report (2007) [hereinafter TIP Report 2007], *available at* http://www.state.gov/documents/organization/82902.pdf.

78. Radhika Coomaraswamy, Critical Issues Confronting Commonwealth Women in the Area of Human Rights, 6th Commonwealth Ministerial Women's Affairs Meeting (2000) (emphasis added), http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/%7B64E29F5F-DF88-4393-8DB6-A0A9BBFB7CDE%7D_6WAMM%20Human%20Rights.pdf.

> *that they attempt to combine both criminal and civil remedies. This allows for the accountability of the perpetrator but also ensures that the victim does not suffer economic hardship for having reported the crime. This combination of criminal and civil remedies allows for greater protection of victims of violence.*[79]

By 2007, some progress had been made on this front. As the Indian representative to the Committee on the Elimination of Discrimination Against Women (CEDAW) noted in January, 2007,

> [t]he National Common Minimum Programme (NCMP) of the present government emphasizes its commitment towards women's empowerment. A number of laws have been reviewed and new ones, such as the one on sexual harassment, are on the anvil. The newly enacted Domestic Violence Act provides civil remedies to prevent domestic violence as well as protects against such violence by providing immediate and emergency relief to women caught in such situations.[80]

Despite the developing recognition of the importance of civil remedies and private rights of action in cases of domestic violence, violence against women, and sexual harassment, there remains as yet, at least in India, no direct civil remedy or private right of action for trafficking and forced labor. The bridge from the first category of cases to the civil remedies in the trafficking and forced labor context can be quite long and arduous. But local practice can sometimes provide a type of civil remedy even in the absence of explicit recognition of civil remedy or private right of action. The leader of an Indian anti-trafficking organization recently explained that

> [u]nder The Immoral Traffic (Prevention) Act, 1956, there is no civil remedy for recovery of money from the trafficker . . . . Therefore the possibility of recovering money from the trafficker as a civil remedy is ruled out

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79. *Id.* ¶ 30, at 7 (emphasis added).

80. Deepa Jain Singh, Sec'y & Leader of Indian Delegation, Ministry of Women & Child Dev., Statement at the Thirty Seventh Session of the Committee on the Elimination of Discriminating Against Women (Jan. 18, 2007), http://www.un.int/india/2007/ind1312.pdf.

> unless a suit for recovery is filed in the Civil Courts under the existing civil procedure . . . . As the offences under the above mentioned Act are criminal in nature, as a practice, the fine which is imposed upon the accused are made to pay to the victim in form of compensation. This again is subjected to the discretion of the judges who presides [sic] [over] the case.[81]

This situation–where civil remedies and private rights of action for trafficking and forced labor in India are not statutorily available–may have some inspiration for its reform and improvement in the new Domestic Violence Act.[82] Certainly the discretionary practice of paying criminal fines to the victim as a "form of compensation,"[83] while interesting as an aspect of Indian trafficking law, is not a long-term solution to the need for civil remedies.

Its flaws are immediately apparent: such payments depend entirely on the discretion of judges, there is no statutory authority for civil remedies or private rights of action, and even this limited solution may be perverted by corrupt behavior by police and court officers, skimming off part of the criminal fines as a condition for victims to receive anything at all. So there are still major obstacles ahead for civil remedies and private rights of action in India, despite the availability of an analogous remedy in the new Domestic Violence Act.

There is also some movement toward civil compensation for trafficking victims in other countries, as the United Kingdom. In a superbly detailed report issued by the Organisation for Security and Cooperation in Europe (OSCE) in 2008, the OSCE reported on significant problems in moving toward civil litigation and compensation for trafficking victims in the United Kingdom under existing laws and victim compensation statutes. But it also pointed out that the UK's Criminal Injuries Compensation Authority (CICA) "granted the first successful claim to victims of trafficking" in July 2007, a recovery of 66,000 pounds Sterling to one victim for the sexual abuse and loss of earnings she suffered, and 36,500 pounds to another victim, also for sexual abuse and loss of earnings.[84] And

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81. Comment by Roma Debabrata, President, STOP (STOP Trafficking & Oppression of Children & Women) to research assistant to Mark Sidel (Oct. 18, 2007).

82. The Protection of Women from Domestic Violence Act, No. 43 of 2005..

83. Comment by Roma Debabrata, President, STOP (STOP Trafficking & Oppression of Children & Women) to research assistant to Mark Sidel (Oct. 18, 2007).

84. Katy Thompson & Allison Jernow, Organisation for Sec. & Cooperation in Europe Office for Democratic Instit. & Human Rights, Compensation for Trafficked & Exploited Persons in the OSCE Region 113 (2008), *available at* http://www.osce.org/publications/odihr/2008/05/31284_1145_en.pdf.

the OSCE reported that "the CICA would ... enable victims of forced prostitution and false imprisonment to ensure compensation claims are more accessible to trafficked persons who have been sexually exploited."[85]

D. The Problems of Civil Remedies in Comparative Perspective

The international context also accentuates some of the ambiguities and problems in strengthening civil remedies in trafficking and forced labor cases. It may seem strange or counter-intuitive to note negative implications of strengthening civil remedies, because the idea that victims should be able to obtain financial redress is a popular notion with strong support. Yet there are indeed problems, and they can arise in multiple contexts. I focus here on two issues: situations where the state encourages private actions as a substitute for the public action it refuses to take against trafficking or forced labor, and situations in which civil remedies and private actions are a failure and the state refuses to improve their efficacy.

Take Brazil as an example. Brazil has serious problems of trafficking and forced labor,[86] and its government has not addressed those issues consistently or comprehensively. The U.S. State Department's *Trafficking in Persons Interim Assessment*, Released by the Office to Monitor and Combat Trafficking in Persons in January, 2007, sets the scene:

> [T]he Government of Brazil has made minimal improvements in addressing its trafficking in persons problem since the release of the 2006 Report. Concrete progress has yet to be realized however, in passage of anti-trafficking legislation and convicting and punishing traffickers. During the last six months, the government has taken some important steps to improve its law enforcement capacity to combat trafficking.

In October 2006, the President issued an executive order establishing a comprehensive national anti-TIP Policy. Since March 2006, high-level government officials have spoken out condemning trafficking and the use of forced labor . . . .

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85. *Id.* at 114.

86. *See*, *e.g.*, Osha Gray Davidson, *In the Land of Slavery*, Rolling Stone, Sept. 8, 2005, at 74.

> Brazilian law enforcement has continued to investigate and prosecute a modest number of commercial [or] sexual exploitation cases. During 2006 the government investigated 173 cases of forced labor using teams of federal labor inspectors, police, and prosecutors. This resulted in some victims being rescued from their exploiters; however, the government has yet to prosecute these cases . . . . The government took steps to remedy this by obtaining a December 1, 2006 Supreme Court ruling that all slave/forced labor cases fall under the jurisdiction of, and must be turned over to, the federal court system. This ruling is expected to lead to successful criminal prosecutions in the federal court system.[87]

So, with some slow improvements, criminal measures against trafficking and forced labor are largely ineffective in Brazil. And what that led to was a less than entirely appropriate reliance by the government on civil remedies as a substitute for ineffective criminal action. As the State Department noted, "[i]n the absence of adequate criminal sanctions against forced labor, the government utilized alternative civil remedies, including the use of increasingly stiffer fines and a program backed by federal regulation to get private lenders to deny them credit."[88]

Such remedies–civil fines and denial of credit–are useful and should be endorsed, but they can never take the place of criminal processes against perpetrators of forced labor "[i]n the absence of adequate criminal sanctions."[89] Six months after the Interim Assessment was issued in January 2007, the regular *Trafficking in Persons Report* covering 2007 noted the continuing lack of criminal process, and the concomitant rise in civil actions: "Although there were no known convictions of slave labor offenders, the number of civil actions against practitioners of slave labor rose in 2006."[90]

So one clear problem with civil remedies are situations in which the state encourages private actions as a substitute for state action through criminal enforcement. That cynical support for civil remedies is an expressive endorsement of rights that may well be a

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87. U.S. Dep't of State, Trafficking in Persons Interim Assessment (Jan. 19, 2007) (Brazil section), *available at* http://www.state.gov/g/tip/rls/rpt/78948.htm (last visited Sept. 30, 2008)

88. *Id.*

89. *Id.*

90. TIP Report 2007, *supra* note 78, at 68.

hollow, ineffective process and masks a lack of state support for public action.

For the State Department, the substitution of private rights for public action against trafficking or forced labor was also a particular issue in 2007 for trafficking in the household context. "Many governments," wrote the State Department in the 2007 Trafficking in Persons report,

> do not regard forced domestic servitude as a trafficking issue. *Rather than criminally punish employers for forced labor, governments generally encouragevictims to return to the household or seek civil penalties from abusive employers.* Victims, traumatized from the abuse or fearing forcible deportation, often agree to allow the government to sweep the issue under the rug. They return home having lost recruitment fees they invested and wages they were owed as well as months or years of their lives. The traffickers, however, remain free and undeterred from exploiting again.[91]

A related but additional problem with the enthusiasm and reliance on civil remedies and private rights of action is the very real inefficacy of these remedies in many countries. The State Department has identified the failures of civil remedies in a number of countries. Two of them–Albania and Venezuela–may seek to illustrate the point and are likely applicable to many other countries as well:

> The Government of Albania continued its modest efforts to protect and reintegrate victims of trafficking during 2006. Albania encourages victims to testify against traffickers, but they often refuse as a result of intimidation by traffickers. In 2006, only 20 out of 227 suspected or identified trafficking victims offered testimony against their traffickers. *Albanian law allows victims to file civil lawsuits; victims generally do not initiate these due to their distrust of the police and judiciary.*[92]

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91. *Id.* at 13 (emphasis added).
92. *Id.* at 52 (emphasis added).

Similarly, for Venezuela, "[i]n theory, victims could seek civil action against their traffickers, but laws made no provision for victim restitution."[93]

Thus there is a need for skepticism when faced with civil remedies and private rights of action, for their existence (as a cynical substitute for public action), and the ineffectiveness may indicate a state that refuses to take trafficking and forced labor seriously rather than a government expanding the array of weapons in this struggle. How can we not be skeptical of the goals and efficacy of civil remedies when we learn from the State Department *Trafficking in Persons Report*, that even in Burma–one of the world's centers for trafficking and forced labor–"[v]ictims have a right to file civil suits and seek legal action against the traffickers"?[94] Of course, the State Department notes, "no such civil suits have been documented," making Burma an example of both cynical substitution of a formal right to seek civil remedies when the state itself is complicit in trafficking and forced labor, and the complete inefficacy of those formal remedies.[95]

IV. PATHWAYS TO THE FUTURE: THE DIVERSIFICATION OF RESEARCH ON HUMAN TRAFFICKING

Returning to the United States, we have made some real progress on the fronts of prosecuting traffickers, preventing trafficking, and protecting victims. And we have a host of NGOs and policy advocacy groups working on the issue around the country. But for purposes of our discussion today I particularly want to point out the innovative and pathbreaking work that has been underway in the legal academy on aspects of human trafficking, forced labor, and involuntary servitude.

First, of course, there have been some significant research efforts on human trafficking and slavery more generally in recent years. The superb work of Kevin Bales stands out, for example: *Disposable People: New Slavery in the Global Economy* and Bales's other works are important milestones in the new research on human trafficking and modern slavery, particularly in its international dimensions.[96]

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93. U.S. Dep't of State, Trafficking in Persons Report 225 (2005), *available at* http://www.state.gov/documents/organization/47255.pdf.

94. TIP Report 2007, *supra* note 77, at 72.

95. *Id.*

96. Bales, Disposable People, *supra* note 17; Kevin Bales, Ending Slavery: How We Free Today's Slaves (Univ. of Cal. Press 2007); Kevin Bales, Understanding Global Slavery: A Reader (Univ. of Cal. Press 2005). I have used both editions of *Disposable People* in my courses on human trafficking, forced labor and involuntary servitude at Harvard, Iowa, and

We have other useful academic work on international and regional dimensions of trafficking and/or forced labor outside The United States,[97] including research and advocacy work on prostitution and sex trafficking,[98] some more research-focused and some focused on taking sides in the still-difficult issues of prostitution and trafficking. In particular, we have useful research on the situation in Western, Central and Eastern Europe, the product of both a significant problem–trafficking across European borders–a vibrant European research community, and scholarly publishers in Europe able to publish unabashedly research-focused volumes on an important issue that are not intended for a mass audience.

In the United States we have useful advocacy volumes,[99] and moving first person stories.[100] We have important policy volumes on trafficking, such as journalist Anthony DeStefano's excellent volume on the development of American policy toward trafficking called *THE WAR ON HUMAN TRAFFICKING: U.S. POLICY ASSESSED*.[101] In the legal field, the work of Jennifer Chacon,[102] Grace Chang,[103] Terry Coonan,[104] Kathleen Kim,[105] Mohamed Mattar,[106]

Vermont, and its capacity to educate students on trafficking and forced labor is truly impressive.

97. *E.g.*, Data and Research on Human Trafficking: A Global Survey (Frank Laczko & Elzbieta M. Gozdziak eds., Int'l Org. for Migration 2005), *available at* http://www.nswp.org/pdf/IOM-GLOBALTRAFFICK.pdf; Human Trafficking, Human Security, and the Balkans (H. Richard Friman & Simon Reich eds., Univ. of Pittsburgh Press 2007).

98. Challenging Trafficking in Persons: Theoretical Debate & Practical Approaches (Sector Project against Trafficking in Women ed., 2005); Kathryn Farr, Sex Trafficking: The Global Market in Women and Children (Worth Publishers 2005); Int'l Human Rights Inst. & Captive Daughters Media, Pornography: Driving the Demand in International Sex Trafficking (David E. Guinn ed., 2007); Zach Hunter, Be the Change: Your Guide to Freeing Slaves and Changing the World (Zondervan 2007); Craig McGill, Human Traffic: Sex, Slaves and Immigration (Vision Paperbacks 2003); Victor Malarek, The Natashas: Inside the New Global Sex Trade (1st U.S. ed., Arcade Publ'g 2004); Measuring Human Trafficking: Complexities And Pitfalls (Ernesto U. Savona & Sonia Stefanizzi eds., Springer 2007); Prostitution, Trafficking and Traumatic Stress (Melissa Farley ed., Haworth Maltreatment & Trauma Press 2003);Trafficking and the Global Sex Industry (Karen Beeks & Delila Amir eds., Lexington Books 2006).

99. *E.g.*, David Batstone, Not for Sale: The Return of the Global Slave Trade–and How We Can Fight It (HarperOne 2007).

100. *E.g.*, Louisa Waugh, Selling Olga: Stories of Human Trafficking and Resistance (Weidenfeld & Nicolson 2006).

101. DeStefano, *supra* note 54.

102. Chacon, *supra* note 54.

103. Grace Chang & Kathleen Kim, *Reconceptualizing Approaches to Human Trafficking: New Directions and Perspective from the Field(s)*, 3 Stan. J. C.R. & C.L. 317 (2007).

104. Coonan, *supra* note 6.

105. Kim & Werner, *supra* note 70; Chang & Kim, *supra* note 103; Kim, *Psychological Coercion*, *supra* note 50; Kim & Hreshchyshyn, *supra* note 70.

106. Mohamed Y. Mattar, *Incorporating the Five Basic Elements of a Model Antitrafficking in Persons Legislation in Domestic Laws: From the United Nations Protocol to the European Convention*, 14 Tul. J. Int'l & Comp. L. 357 (2006); Mohamed Y. Mattar, *Trafficking in Persons, Especially Women and Children, in Countries of the Middle East: The Scope of the Problem and the Appropriate Legislative Responses*, 26 Fordham Int'l L.J. 721 (2003).

Susan Tiefenbrun,[107] and others has led the way toward innovative analyses of the successes and failures of trafficking law and policy in the United States. In the emerging areas of state and local responses to trafficking, we have the superb early article by Stephanie Richard on the ambiguities and problems of state anti-trafficking legislation,[108] other very useful and more recent work on state and local responses,[109] the excellent work by Terry Coonan on the situation here in Florida and the need for a state anti-trafficking law here,[110] and discussions of recent state anti-trafficking legislation in California[111] and Illinois.[112]

On civil litigation by victims against traffickers, we have superb early work by the Los Angeles lawyer Kathleen Kim and her collaborators on civil remedies, private rights of action, and civil litigation,[113] as well as useful work by others on this important theme.[114] Other superb research in the field has also been carried out, on themes as important and diverse as feminist legal approaches to human trafficking, the anti-prostitution mandate in U.S. trafficking legislation,[115] the perspective of immigration law and policy,[116] and other important topics.

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107. Susan W. Tiefenbrun, *Copyright Infringement, Sex Trafficking, and Defamation in the Fictional Life of a Geisha*, 10 Mich. J. Gender & L. 327 (2004); Susan W. Tiefenbrun, *Sex Slavery in the United States and the Law Enacted to Stop It Here and Abroad*, 11 Wm. & Mary J. Women & L. 317 (2005); Tiefenbrun, *Clinton's Legacy*, *supra* note 54; Susan W. Tiefenbrun, *The Saga of Susannah: A U.S. Remedy for Sex Trafficking in Women: The Victims of Trafficking and Violence Protection Act of 2000*, 2002 Utah L. Rev. 107; Susan W. Tiefenbrun, *Updating the Domestic and International Impact of the U.S. Victims of Trafficking Protection Act of 2000: Does Law Deter Crime?,* 38 Case W. Res. J. Int'l L. 249 (2007).

108. Stephanie Richard, *State Legislation and Human Trafficking: Helpful or Harmful?*, 38 U. Mich. J.L. Reform 447 (2005).

109. *E.g.*, Marshaling Every Resource: State and Local Responses to Human Trafficking (Dessi Dimitrova ed., Princeton Univ. 2007); Ellen L. Buckwalter et al., *Modern Day Slavery in Our Own Backyard*, 12 Wm. & Mary J. Women & L. 403 (2006); Michael C. Payne, Comment, *The Half-Fought Battle: A Call for Comprehensive State Anti-Human Trafficking Legislation and a Discussion of How States Should Construct Such Legislation*, 16 Kan. J.L. & Pub. Pol'y 48 (2006); Shashi Irani Kara, Comment, *Decentralizing the Fight Against Human Trafficking in the United States: The Need for Greater Involvement in Fighting Human Trafficking by State Agencies and Local Non-Governmental Organizations*, 13 Cardozo J.L. & Gender 657 (2007).

110. Coonan, *supra* note 6.

111. *E.g.*, Matthew Garber, Recent Legislation, *Chapter 240: Human Trafficking–Combating the Underground Slave Industry in California*, 37 McGeorge L. Rev. 190 (2006).

112. Vanessa B.M. Vergara, *Looking Beneath the Surface: Illinois' Response to Human Trafficking and Modern-Day Slavery*, 38 U. Tol. L. Rev. 991 (2007); John Tanagho, Comment, *New Illinois Legislation Combats Modern-Day Slavery: A Comparative Analysis of Illinois Anti-Trafficking Law with Its Federal and State Counterparts*, 38 Loy. U. Chi. L.J. 895 (2007).

113. *See* sources cited, *supra* note 105.

114. *See* sources cited, *supra* note 70.

115. *E.g.*, Melissa Ditmore, *New U.S. Funding Policies on Trafficking Affect Sex Work and HIV-Prevention Efforts World Wide*, 33 SIECUS Rep. 26 (Spring 2005); Edi C.M. Kinney, *Appropriations for the Abolitionists: Undermining Effects of the U.S. Mandatory Anti-*

V. CONCLUDING REMARKS

But despite this important work, human trafficking, forced labor, and involuntary servitude in the United States remains a field in which research has not yet caught up to policy. We need more in-depth studies of trafficking cases and the dynamics of exploitation, rescue, protection, and prosecution to go along with the very useful case studies already published.[117] We need a full-fledged understanding of the new state anti-trafficking laws and whether–in the short time many of them have been in existence–they show any real promise of helping in the struggle against human trafficking and involuntary servitude. We need to understand the dynamics, process and results of ten years of episodic civil litigation against traffickers, to gain a better understanding of how we can do more to promote civil as well as criminal penalties against traffickers.

But that is not all. We need to understand the murky boundaries between human trafficking, forced labor, and other forms of serious unfair labor violations that may be partly punished under the labor laws but which are not punished as trafficking. We need to understand better how trafficking interfaces with immigration enforcement, and the special problems that immigration detainees who are also trafficked, including trafficked children, face in our immigration morass. We need to understand better the multiple and overlapping motivations of modern traffickers, if possible through interviews with them and their family members.[118] In these and many other ways, academic research can build upon the stellar contributions of those cited here and many others to contribute to humane law and policy in this important human rights field, and to pave the way for the new directions in the struggle against human trafficking.

Prostitution Pledge in the Fight Against Human Trafficking and HIV/AIDS, 21 Berkeley J. Gender L. & Just. 158 (2006).

116. Among other work, *see, e.g.,* Chang & Kim, *supra* note 103.

117. *E.g.*, Patricia Medige, *The Labyrinth: Pursuing a Human Trafficking Case in Middle America*, 10 J. Gender Race & Just. 269 (2007); Michael A. Scaperlanda, *Human Trafficking in the Heartland: Greed, Visa Fraud, and the Saga of 53 Indian Nationals "Enslaved" by a Tulsa Company,* 2 Loy. U. Chi. Int'l L. Rev. 219 (2005).

118. One interesting feature of this need for more and better research is that this is a field in which some exceptional work has already been done by students. Law students and others have participated actively in several of the studies of trafficking at the state level. Law students have produced useful case studies of trafficking, summaries of the state of the law, and other useful work. Whether in working with anti-trafficking organizations, with immigrant rights or policy organizations, with centers such as the Center for the Advancement of Human Rights here at FSU, or on their own (a strategy I would not recommend), law students can contribute in important ways to advancing, through research, our understanding of the dynamics of human trafficking and forced labor in the United States.

PROSTITUTING PEACE: THE IMPACT OF SENDING STATE'S LEGAL REGIMES ON U.N. PEACEKEEPER BEHAVIOR AND SUGGESTIONS TO PROTECT THE POPULATIONS PEACEKEEPERS GUARD

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I. INTRODUCTION

Prostitution has many meanings. Its most obvious is in the context of selling sexual relations for monetary or other gain. However, it is not only in this way that people can be prostituted and, certainly, it is possible to prostitute things other than people.

> *Many nations and societies have outlawed the act of prostitution in its transactional sense. Prostitution of commonly held human values has also been theoretically outlawed within the international community, with torture, genocide, and discrimination against women and girls being only a few areas of international legal focus. In order to stop the prostitution of peoples and the peace by forces of violence and oppression, the United Nations (U.N.) created peacekeeping operations to assist the local populations affected by such conflicts and to implement political measures that are intended to restore calm. However, in the process of its peacekeeping missions, the U.N. has itself given rise to the prostitution of the idea of peace it seeks to foster.*

This prostitution of peace has happened for over a decade and has, until recently, gone largely unnoticed or accepted by the international community generally and legal scholars in particular. It happened – and still happens – when a deployed peacekeeper rapes a woman or child whom he was sent to protect. It happened – and still happens – when a deployed peacekeeper patronizes a brothel full of women who are prostitutes because the conflict he was there to stop did away with these women's normal lives and left them destitute. It happened – and still happens – when a deployed peacekeeper procures sexual relations with a starving young girl in exchange for food for her and her family. It happened – and still happens – every time a peacekeeper patronizes a brothel or other facilities whose prostitutes are held in human slavery and have been trafficked from their homes to serve as prostitutes against their will and understanding. It happened – and still happens – every time a peacekeeper sent to protect the peace for the victims of conflict uses this power to create a victim of that peace. Yet, despite public outcry from the U.N. and the general public, as well as reform proposals commissioned by the U.N. itself, this prostitution of peace continues to happen unabated by the law.

To date, the focus of law in regards to this problem has been to emphasize that the U.N. cannot itself try peacekeepers for sexual or other misconduct and to commend the U.N. for remanding errant peacekeepers to their sending states, which exercise jurisdiction over them. What has gone unexamined are the legal and socio-legal structures of sending states whose peacekeepers

commit sexual and other crimes while deployed to a U.N. peacekeeping mission. This article is an in-depth study of the penal and, to the extent available to the public, military laws of sending states which have had allegations of sexual and other misconduct made against their peacekeepers. This article explores the socio-legal structures of these states that inform law and society in regards to sexual and other crimes. The goal of this article is to demonstrate that there is indeed a link between the laws and socio-legal structures of these sending states and the illegal and immoral acts committed by their peacekeepers. The caveat to the study conducted by this article is that it discusses sending states with reported and publicly divulged allegations made against their peacekeepers. It is certainly possible that there are other sending states affected by the phenomenon of errant peacekeepers which, due to reluctant victims and the U.N.'s method of reporting allegations, have not been made public.[1]

> *Part II of this article catalogues the types of misconduct allegations made against U.N. peacekeepers and the issues associated with victim reporting of these incidents. Part II also identifies the sending states that have been the subject of these allegations and the U.N. peacekeeping mission locations where these allegations have been made. Part III discusses the legal constraints and rules that govern the relationship between the U.N., host states, and sending states in terms of peacekeeping missions and the activities of peacekeepers deployed to them. Part III further discuses U.N. attempts to implement the policies that it deemed necessary in light of the sexual misconduct charges brought against its peacekeepers. This Part highlights the importance of implementing certain provisions of the 2005 Zeid report which are, in the author's view, critical in*

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1. It should be noted here that, while the U.N. has started a process of issuing data on reported and investigated sexual and other allegations made against deployed peacekeepers, the reports it issues do not provide sending state identities. *See* Letter from the Permanent Representative of Cyprus, United Nations, to the Secretary-General, United Nations, (Apr. 8, 2005) (on file with United Nations, U.N. Doc. A/59/777); The Secretary-General, *Report of the Secretary-General, Special Measures for Protection from Sexual Exploitation and Sexual Abuse,* U.N. Doc. A/59/782 (Apr. 15, 2005); The Secretary-General, *Report of the Secretary-General, Special Measures for Protection from Sexual Exploitation and Sexual Abuse,* U.N. Doc. A/60/861 (May 24, 2006); The Secretary-General, *Report of the Secretary-General, Special Measures for Protection from Sexual Exploitation and Sexual Abuse,* U.N. Doc. A/61/957 (June 15, 2007).

> *order to assist the victims of errant peacekeepers and yet have gone unimplemented to date.*

Part IV provides a study of the legal and socio-legal structures of the thirty-four sending states which have, to date, been the subject of sexual and other misconduct allegations. For ease of reading, the sending states are presented in alphabetical order, not in order of allegation propensity or severity. Part V of this article analyzes the information presented in Part IV and divides the sending states into three categories based on their legal and socio-legal structures. These categories are used to discuss the reasons why some of these states are similar and why some should be allowed to continue as peacekeeping force contributors in the future while others should not be allowed to participate in U.N. peacekeeping missions because of their present legal and socio-legal structures and the societal tenets they reflect.

> *Part VI discusses the author's suggestions for using the legal and socio-legal structures of sending states as a guide to whether such states should be allowed to participate in peacekeeping. Part VI suggests that the top five funding states of U.N. peacekeeping operations (currently the United States, Japan, Germany, the United Kingdom, and France) should form a sending state selection body – comprised of a military and legal representative from each state – to evaluate each would-be peacekeeping force-sending state using a set of five factors and to determine whether the state should be allowed to participate in peacekeeping. This body would also be tasked with periodic reevaluation of each sending state's suitability to contribute peacekeeping personnel and would be required to conduct a reevaluation of a sending state's suitability in the event that misconduct allegations are made against its peacekeepers. Reevaluation of a sending state's suitability would be conducted by this body in the event that the sending state were to engage in massive violations of the human rights of its citizens or citizens of another state or otherwise engage in conduct deemed unacceptable to the idea of promoting peace and stability during conflict. The body would have oversight representatives at each U.N. peacekeeping mission and would be authorized*

to implement certain Zeid report suggestions which are critical to creating some semblance of accountability for the damage done to the victims of peacekeeper misconduct. Key among the Zeid report suggestions is the implementation of a victims' assistance structure. Part VI further suggests that the U.N. must change its policy on HIV/AIDS testing for soon-to-be deployed peacekeepers in order to better protect the local population in the event that an act of sexual misconduct is committed by a peacekeeper in the future. It would require that deployed peacekeepers be tested for HIV/AIDS every six months during deployment as well. The rationale for mandating HIV/AIDS testing is that, while the U.N.'s goal of avoiding discrimination against those infected with HIV/AIDS is important, a balance of the harms suggests that it is more important to protect the local populations of sending states from HIV/AIDS exposure. This is demonstrated by the drastic increase in HIV/AIDS rates in the local populations of areas to which U.N. peacekeepers were deployed, such as Cambodia. In Part VII, this article concludes that the only way for peace to be saved from further prostitution is for the U.N. and its members to understand the realities of how sending state laws and socio-legal systems impact on peacekeeper behavior and to use that knowledge to protect the victims.

II. ABUSE ALLEGATIONS

The primary forms of abuse allegations made against U.N. peacekeepers involve sexual misconduct and violence. Allegations involving peacekeepers and economic crimes have been made on several occasions as well, though they tend to receive less press attention because they are not as shockingly sensational. While economic crimes are important and well within the scope of this article, it should be stressed that the vast majority of proven and alleged crimes have been of a sexual nature. These crimes merit the closest scrutiny and discussion because they have a different and far more devastating impact on their victims and host societies than do purely

economic crimes. For ease of understanding and to demonstrate the areas of prevalence clusters, each type of crime alleged is broken down and discussed separately below.

A. Rape

The commission of rape by members of U.N. peacekeeping forces is alarming in and of itself given the mission statements of peacekeeping forces and the general concept of peacekeeping. It is also alarming that rape is widespread both in the number of U.N. missions at which it has been alleged and in the number of sending states' members who are alleged to have committed it. As of the time of writing, allegations of rape have been made at numerous missions, specifically: United Nations Transitional Administration in East Timor (UNTEAT),[2] United Nations Operation in Burundi (ONUB),[3] United Nations Mission in Sierra Leone (UNAMSIL),[4] United Nations Stabilization Mission in Haiti (MINUSTAH),[5] United Nations Mission in Liberia (UNMIL),[6] United Nations Mission in the Sudan (UNMIS),[7] United Nations Peacekeeping Force in Cyprus (FICYP),[8] United Nations Operation in Cote D'Ivoire (UNOCI),[9] United Nations Organization Mission in the

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2. Shukuko Koyama & Henri Myrttinen, *Unintended Consequences of Peace Operations on Timor Lester from a Gender Perspective, in* UNINTENDED CONSEQUENCES OF PEACEKEEPING OPERATIONS 27-31 (Chiyuki Aoi, Cedric de Coning & Ramesh Thakur eds., 2007).

3. Vanessa Kent, *Protecting Civilians from UN Peacekeepers and Humanitarian Workers: Sexual Exploitation and Abuse, in* UNINTENDED CONSEQUENCES OF PEACEKEEPING OPERATIONS 44, 47 (Chiyuki Aoi, Cedric de Coning and Ramesh Thakur eds., 2007); *New Sex Misconduct Claims Hit UN*, BBC NEWS, Dec. 17, 2004, *available at* http://news.bbc.co.uk/go/pr/fr/-/2/hi/africa/4106515.stm (last visited Mar. 11, 2008).

4. "WE'LL KILL YOU IF YOU CRY": SEXUAL VIOLENCE IN THE SIERRA LEONE CONFLICT, HUMAN RIGHTS WATCH, (2003), *available at* http://www.hrw.org/reports/2003/sierraleone/ (last visited Mar. 24, 2008).

5. *UN Haiti Troops Accused of Rape*, BBC CARIBBEAN.COM, Nov. 30. 2006, *available at* http://www.bbc.co.uk/caribbean/news/story/2006/11/printable/061130_unrapehaiti.shtml (last visited Mar. 11, 2008).

6. *Id.*; Melissa Chea-Annan, *Liberia; UN Sec. Gen. Warns Employees Against Sexual Abuse*, THE INQUIRER (Liberia), Mar. 14, 2006; FROM CAMP TO COMMUNITY: LIBERIA STUDY ON EXPLOITATION OF CHILDREN, SAVE THE CHILDREN UK, *available at* http://www.savethechildren.it/2003/download/pubblicazioni/Liberia/Liberia_sexual_exploitation_edited_LB.pdf (last visited Jan. 2, 2008) [hereinafter SAVE THE CHILDREN UK].

7. *Sudan: Allegations of Sexual Abuse Reveal Weak Monitoring and Investigation*, UN INTEGRATED REG'L INF. NETWORK, Jan. 3, 2007, *available at* 2007 WLNR 115883; Edith M. Lederer, *Four UN Peacekeepers Sent Home for Alleged Misconduct and 13 Peacekeepers Under Investigation in Southern Sudan*, AP ALERT – CRIME, Jan. 4, 2007, *available at* Westlaw, 1/4/07 APALERTCRIM 20:33:29.

8. Reed Lindsay, *Peace at a price in Haiti*, NEWSDAY, Jan. 8, 2007, at A4.

9. *Id.*

Democratic Republic of the Congo (MONUC),[10] United Nations Mission in Ethiopia and Eritrea (UNMEE),[11] United Nations Mission in Georgia (UNMIG),[12] and United Nations Mission for the Referendum in Western Sahara (MINURSO).[13] Unsubstantiated claims of rape were made against a Canadian peacekeeper in Bosnia.[14] Allegations have been made against many peacekeeping contingents, including those from Jordan,[15] Indonesia,[16] Guinea,[17] Ukraine,[18] Nigeria,[19] Bangladesh,[20] Russia,[21] South Africa,[22] Brazil,[23] Nepal,[24] Senegal,[25] Ethiopia,[26] Benin,[27] Togo,[28] France,[29]

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10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. Koyama & Myrttinen, *supra* note 2, at 36-37.
16. Before the introduction of outside peacekeepers to East Timor, Indonesian soldiers were stationed there under the guise of preserving the peace. While there, they committed their own alleged acts of sexual abuse. *See generally* ELISABETH REHN AND EILEEN JOHNSON SIRLEAF, WOMEN, WAR AND PEACE: THE INDEPENDENT EXPERTS' ASSESSMENT ON THE IMPACT OF ARMED CONFLICT ON WOMEN AND WOMEN'S ROLE IN PEACE-BUILDING, UNIFEM (2002), *available at* http://dagdok.org/pages/documents/pdf/unicef-WomenWarPeace%5B1%5D_64.pdf (last visited Jan. 2, 2008). In addition, once UN peacekeeping forces were stationed in East Timor, there is evidence that they assisted forces from other states in committing sexual violations against the local populations. *See* Mark Dodd, *Stories of Jordan peacekeeper rape hushed,* THE AUSTRALIAN, March 26, 2005, *available at* http://www.natashatynes.org/newswire/2005/03/hushed_rape_of_.html. Indonesia is included in this study because of its intensive involvement in UN peacekeeping operations and the collusion of its forces in East Timor.
17. WE'LL KILL YOU IF YOU CRY, *supra* note 4; *Afraid of the protectors*, NEW ZEALAND HERALD, July 12, 2003, *available at* 2003 WLNR 10734139.
18. WE'LL KILL YOU IF YOU CRY, *supra* note 4.
19. *Id.*; *Nigeria; Sex Scandal – UN Expels 4 Nigerian Soldiers*, DAILY CHAMPION, Dec. 5, 2006, *available at* Westlaw, 12/5/06 ALLAFRICACOM 23:51:57 [hereinafter *Sex Scandal*]; *Liberia; No Impunity for Rapists, Vows President Elect*, UN INTEGRATED REG'L INF. NETWORK, Dec. 5 2005, *available at* Westlaw, 15/5/05 ALLAFRICACOM 22:30:45.
20. WE'LL KILL YOU IF YOU CRY, *supra* note 4; Lederer, *supra* note 7 (detailing rape allegations involving young boys and girls).
21. *See* Fatoumata Fofana, *For Money, Food and Favor: Aid Workers, Powerful Men, Peacekeeper Sexually Exploit Children*, LIBERIAN OBSERVER, May 10, 2006, *available at* Westlaw, 5/10/06 ALLAFRICACOM 23:20:39 (explaining that, when allegations of Russian peacekeepers committing a gang rape of several Liberian girls were made, these troops were removed from their peacekeeping posts and taken away from Liberia before legal issues could ensue).
22. *See* Prega Govender, S*tatistics Show 'Huge' Number of RSA Peacekeepers Found Guilty of Misconduct*, WORLD NEWS CONNECTION, July 16, 2006, *available at* Westlaw, 7/16/06 WRLDNWSC 13:54:27 (citing rape as one of many crimes alleged against South African peacekeepers and discussion the rampant culture of covering up these crimes within the South African military organization); *Sex Scandal, supra* note 19.
23. *See UN Official Admits Abuse of Citizens by Peacekeepers 'Is Going On*,' AGENCE FRANCE PRESSE ENGLISH WIRE, Dec. 1, 2006, *available at* Westlaw, 12/1/06 AGFRP 00:27:00.
24. *Sex Scandal, supra* note 19; U.S. DEPT. OF STATE, TRAFFICKING IN PERSONS REPORT 230 (2007), *available at* http://www.state.gov/documents/organization/82902.pdf (last visited Dec. 19, 2007) [hereinafter U.S. DEPT. OF STATE].
25. *Sex Scandal, supra* note 19.

Ghana,[30] India,[31] Niger,[32] Sri Lanka,[33] Morocco,[34] Pakistan,[35] and the United States.[36]

B. Prostitution

It is often argued that prostitution in conflict and post-conflict settings is a natural outgrowth of the interaction between soldiers and other military personnel and those who are displaced or otherwise not in their normal settings. According to this view, prostitution might be a social ill on peacekeeping missions but it is not akin to more serious sexual crimes, such as rape.[37] It is the author's firm belief that such a view is an entirely artificial construct, and that prostitution in conflict and post-conflict situations, such as those to which peacekeepers are deployed, is a serious sexual offense more akin to rape than to prostitution in most legal and social systems. This belief is based on the exploitative nature of prostitution in the areas where peacekeepers are deployed and evidence that suggests that the women, girls, and young boys who are prostitutes patronized by U.N. peacekeepers become prostitutes out of the need for self-preservation and to preserve their families. There are several known motivating factors for prostitution during and after conflict, which are discussed below. Also discussed below is the very real threat posed to the local population – and peacekeepers themselves – by the interaction between HIV/AIDS and prostitution.

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26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*; U.S. DEPT. OF STATE, *supra* note 24.
30. *Sex Scandal, supra* note 19; *Ghana's Army Investigating Allegation of Sexual Abuse in Liberia*, VOICE OF AMERICA NEWS, May 9, 2006, *available at* 2006 WLNR 7962755.
31. *Sex Scandal, supra* note 19; U.S. DEPT. OF STATE, *supra* note 24.
32. *Sex Scandal, supra* note 19.
33. Reed Lindsay, *Teen Rape Claims Dog UN Peacekeepers*, WASH. TIMES (Wash., D.C.), Dec. 17, 2006, at A4.
34. *See World Briefs: Wire Reports*, TULSA WORLD (Okla.), Aug. 8, 2007, at A12 (noting that the entire Moroccan peacekeeping contingent stationed in the Ivory Coast was confined to its barracks indefinitely sue to widespread allegations of sexual violence and misconduct involving Ivorian women and girls); Emmanuel Duparcq, *Mixed-Race Babies Support ICoast Sex Abuse Claims*, AGENCE FRANCE PRESSE ENGLISH WIRE, Aug. 8, 2007, *available at* Westlaw, 8/8/07 AGFRP 01:36:00 (noting that many of the allegations involving Moroccan peacekeepers also center on prostitution); Christophe Koffi, *UN Peacekeeper Accused of Sexual Abuse in Ivory Coast*, AGENCE FRANCE PRESSE ENGLISH WIRE, Jul. 21, 2007, *available at* Westlaw, 7/21/07 AGFRP 17:59:00; U.S. DEPT. OF STATE, *supra* note 24.
35. C.S.R. Murthy, *Unintended Consequences of Peace Operations for Troop-Contributing Countries from South Asia*, *in* UNINTENDED CONSEQUENCES OF PEACEKEEPING OPERATIONS 165 (Chiyuki Aoi, Cedric de Coning and Ramesh Thakur eds., 2007).
36. *See* Carol Rosenberg, *Soldier Probed on Sex Abuse in Haiti*, MIAMI HERALD (Fla.), Nov. 6, 2000, at 1A, *available at* 2000 WLNR 3641348.
37. *See* Kent, *supra* note 3, at 53–54.

1. Sex for Necessities

One of the first U.N. peacekeeping missions to face somewhat public allegations of widespread sexual misconduct was the United Nations Transitional Authority in Cambodia (UNTAC) during the period from 1992-93.[38] The alleged misconduct primarily related to acts involving patronizing prostitutes from Cambodia as well as from other areas who had been trafficked to Cambodia to service U.N. personnel, including peacekeepers.[39] Similar vague allegations have been made against U.N. peacekeepers stationed in Eritrea,[40] Haiti[41] and Mozambique, to name a few missions.[42]

Many women and young girls become prostitutes for U.N. peacekeepers in order to obtain food, money, and other supplies necessary for themselves and their families to survive.[43] Indeed, it is well documented that, in refugee camps, families with young girls frequently are denied proper rations of food and other items unless they are willing to trade sex with their daughters, sisters, spouses, or other female relatives for these rations with a variety of U.N. mission personnel.[44] In the Congo, peacekeepers from unspecified sending states were accused of having created and patronized a child prostitution ring.[45] Sending states implicated in patronizing prostitutes include South Africa,[46] India,[47] Morocco,[48]

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38. MUST BOYS BE BOYS?: ENDING SEXUAL EXPLOITATION & ABUSE IN UN PEACEKEEPING MISSIONS, REFUGEES INTERNATIONAL (2005), *available at* http://www.refugeesinternational.org/content/publication/detail/6976/ (last visited Jan 2, 2008) [hereinafter MUST BOYS BE BOYS?]; Koyama & Myrttinen, *supra* note 2, at 32-33.

39. MUST BOYS BE BOYS?, *supra* note 38.

40. *Id.*

41. *Id.*

42. Stanley Meisler, *Prostitution Report Accuses UN Troops in Mozambique*, L.A. TIMES, Feb. 26, 1994, at A11; *UN Focuses on Peacekeepers Involved in Child Prostitution*, N.Y. TIMES, Dec. 9, 1996, at 9.

43. SAVE THE CHILDREN UK, *supra* note 6; Kent, *supra* note 3, at 47; REHN & SIRLEAF, *supra* note 16; *Kosovo UN Troops 'Fuel Sex Trade*,' BBC NEWS, May 6, 2004, *available at* http://news.bbc.co.uk/go/pr/fr/-/2/hi/europe/3686173.stm (last visited Mar. 11, 2008); SAVE THE CHILDREN UK, *supra* note 6.

44. SAVE THE CHILDREN UK, *supra* note 6.

45. *UN Probes Child Prostitute Ring*, BBC NEWS, Aug. 17, 2006, *available at* http://news.bbc.co.uk/go/pr/fr/-/2/hi/africa/5260210.stm (last visited Mar. 11, 2008); *New Allegations of Sexual Abuse by UN Troops in DR Congo*, AGENCE FRANCE PRESSE ENGLISH WIRE, Aug. 17, 2006, *available at* Westlaw, 8/17/06 AGFRP 16:07:00.

46. Isabelle Ligner, *The Misery of DR Congo's Child Prostitutes*, AGENCE FRANCE PRESSE ENGLISH WIRE, Sept. 27, 2006, *available at* Westlaw, 9/27/06 AGFRP 10:58:00.

47. *Id.*

48. *See* Duparcq, *Mixed-Race Babies Support ICoast Sex Abuse Claims*, *supra* note 34.

Ethiopia,[49] the Netherlands,[50] Canada[51] Italy,[52] Ireland,[53] Pakistan,[54] and Bulgaria.[55]

2. Sex for Status and Protection

Women in conflict and post-conflict situations are frequently vulnerable, especially if they have lost members of their family or have suffered trauma during the conflict.[56] Particularly in conservative cultures where sexual relations outside marriage are taboo and a victim of sexual violence is regarded as a taint on her or his family, victims of sexual violence during conflicts are far more vulnerable and isolated from their standard support systems.[57] At U.N. peacekeeping missions around the world, this vulnerability is routinely exploited so that these women, young girls, and even boys will become prostitutes for peacekeepers in exchange for economic support and the perceived physical and economic protection of particular peacekeepers.[58] In many missions, it is not uncommon for peacekeepers – even those who are already married – to provide these women with places to live, cell phones, and other things while they are deployed to the mission.[59] When the peacekeeper's deployment is over, however, the relationship typically ends and the women involved are again

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49. *Burundi: Two UN Peacekeepers to be Expelled Following Sex Scandal*, BBC INTERNATIONAL REPORTS (AFRICA), Jul. 21, 2005, *available at* Westlaw, 7/21/05 BBC-AFRICA 00:00:00.

50. Ramesh Thakur, *Comment: When the Peacekeepers Become the Problem*, GLOBE & MAIL, May 21, 2007, at A15.

51. As the result of an internal investigation which ultimately led to a reform in the Canadian peacekeeping policy in general, Canadian peacekeepers returning from Bosnia were punished for alcohol-related infractions and having purportedly consensual sex with local women. LuAnn LaSalle, *22 Soldiers Punished for Actions in Bosnia; 38 Others Cleared of Wrongdoing*, GLOBE & MAIL, June 9, 1998, *available at* 1998 WLNR 6268623.

52. Claims were also advanced against Italian peacekeepers in terms of patronizing child prostitutes while on assignment in Mozambique in 1994. *See* Sam Kiley, *U.N. Soldiers 'Using Child Prostitutes*,' TIMES (London), Jan. 28, 1994, *available at* 1994 WL 4088177.

53. The primary allegation made against Irish peacekeepers is that roughly seven of them patronized prostitutes while stationed in Eritrea. Martha Kearns, *Peacekeepers 'Paid for Sex with Girl*,' IRISH INDEPENDENT, June 13, 2003, *available at* http://www/independent.ie/national-news/peacekeepers-paid-for-sex-with-girl-15-216994.html (last visited May 10, 2008).

54. Murthy, *supra* note 35, at 165.

55. Bulgarian peacekeepers earned a negative reputation for their patronizing of prostitutes during deployment in Cambodia. *See* James Bone, *Condom a Day for UN Troops to Combat Aids*, TIMES (London), Mar. 10, 2000, *available at* 2000 WLNR 3186435.

56. *See* Letter from the Secretary-General, United Nations, to the President of the General Assembly, United Nations (Mar. 24, 2005) (on file with the United Nations, U.N. Doc. A/59/710, at 8).

57. SAVE THE CHILDREN UK, *supra* note 6.

58. *See id.*

59. *See id.*

left to fend for themselves – many times with the additional burden of a child from the relationship and the social stigma attached to themselves and their child.[60]

3. HIV Patterns

Interestingly, in Nepal and Ethiopia – two U.N. sending states having a habitual problem with their peacekeeping contingents committing acts of sexual misconduct while deployed – medical studies have found a dramatic correlation between the deployment of their troops to quell domestic issues and HIV/AIDS rate increases in the local populations near these troops.[61] Worldwide, there is a strong correlation between the presence of U.N. peacekeepers and HIV spread in host populations regardless of the mission's identity or location.[62]

Many areas which contribute peacekeeping forces are struggling with the issue of a decent percentage of their military being infected with HIV/AIDS, but it has been documented that the greatest area of military concern with HIV/AIDS infection rates is sub-Saharan Africa.[63] The U.N. does not require that sending states test their peacekeepers prior to deployment and refuses to track such information or require testing of troops prior to deployment on a peacekeeping mission.[64] The stated reason for the U.N.'s recalcitrance regarding HIV/AIDS testing of peacekeepers is that such testing would be in violation of the U.N.'s policies prohibiting discrimination against individuals based on their HIV/AIDS status.[65] Some sending states do require that their troops be tested for HIV/AIDS infection prior to deployment as peacekeepers but this is entirely discretionary.[66] Even then, many of these states do not require that a deployed peacekeeper be re-tested for HIV/AIDS during or after deployment.[67]

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60. *Id.*

61. *See* J. Okumura & S. Wakai, *Concern Over Localized HIV/Sexually Transmitted Infection Epidemic During Conflict in Nepal,* 35 TROPICAL DOCTOR 125 (Apr. 2005).

62. *See* REHN & SIRLEAF, *supra* note 16.

63. *See* Radhika Sarin, *A New Security Threat: HIV/AIDS in the Military*, 16 WORLD WATCH (Mar. 2003), *available at* 2003 WLNR 12287368.

64. *See* UNITED STATES GENERAL ACCOUNTING OFFICE, REPORT TO THE CHAIRMAN, COMMITTEE ON INTERNATIONAL RELATIONS, HOUSE OF REPRESENTATIVES, UNITED NATIONS FACES CHALLENGES IN RESPONDING TO THE IMPACT OF HIV/AIDS ON PEACEKEEPING OPERATIONS 7 (2001).

65. *Id.*

66. *Id.*

67. *Id.*

Full information on military HIV/AIDS infection rates is largely unavailable, however information on the overall estimated HIV/AIDS infection rates for sending states can provide some insights into the importance of HIV/AIDS as an issue when mass allegations of sexual violence by deployed peacekeepers are made. In alphabetical order, the following is the most current information on HIV/AIDS infection rates in the sending states discussed below: Austria: 0.3% of the adult population as of 2003;[68] Bangladesh: less than 0.1% of the adult population as of 2001;[69] Belgium: 0.2% of the adult population as of 2003;[70] Benin: 1.9% of the adult population as of 2003;[71] Brazil: 0.7% of the adult population as of 2003;[72] Bulgaria: less than 0.1% of the adult population as of 2001;[73] Canada: 0.3% of the adult population as of 2003;[74] Ethiopia: 4.4% of the adult population as of 2003;[75] France: 0.4% of the adult population as of 2003;[76] Ghana: 3.1% of the adult population as of 2003;[77] Guinea: 3.2% of the adult population as of 2003;[78] India: 0.9% of the adult population as of 2001;[79] Indonesia: 0.1% of the adult population as of 2003;[80] Ireland: 0.1% of the adult population as of 2001;[81] Italy: 0.5% of the adult population as of 2001;[82] Jordan: less than 0.1% of the adult population as of 2001;[83]

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68. AUSTRIA, CIA WORLD FACTBOOK, *available at* https://www.cia.gov/library/publications/the-world-factbook/geos/au.html (last visited Mar. 11, 2008).

69. BANGLADESH, CIA WORLD FACTBOOK, *available at* https://www.cia.gov/library/publications/the-world-factbook/geos/bg.html (last visited Mar. 11, 2008).

70. BELGIUM, CIA WORLD FACTBOOK, *available at* https://www.cia.gov/library/publications/the-world-factbook/geos/be.html (last visited Mar. 11, 2008).

71. BENIN, CIA WORLD FACTBOOK, *available at* https://www.cia.gov/Library/publications/the-world-factbook/geos/bn.html (last visited Mar. 11, 2008).

72. BRAZIL, CIA WORLD FACTBOOK, *available at* https://www.cia.gov/library/publications/the-world-factbook/geos/br.html (last visited Mar. 11, 2008).

73. BULGARIA, CIA WORLD FACTBOOK, *available at* https://www.cia.gov/library/publications/the-world-factbook/geos/bu.html (last visited Mar. 11, 2008).

74. CANADA, CIA WORLD FACTBOOK, *available at* https://www.cia.gov/library/publications/the-world-factbook/geos/ca.html (last visited Mar. 11, 2008).

75. ETHIOPIA, CIA WORLD FACTBOOK, *available at* https://www.cia.gov/library/publications/the-world-factbook/geos/et.html (last visited Mar. 11, 2008).

76. FRANCE, CIA WORLD FACTBOOK, *available at* https://www.cia.gov/library/publications/the-world-factbook/geos/fr.html (last visited Mar. 11, 2008).

77. GHANA, CIA WORLD FACTBOOK, *available at* https://www.cia.gov/library/publications/the-world-factbook/geos/gh.html (last visited Mar. 11, 2008).

78. GUINEA, CIA WORLD FACTBOOK, *available at* https://www.cia.gov/library/publications/the-world-factbook/geos/gv.html (last visited Mar. 11, 2008).

79. INDIA, CIA WORLD FACTBOOK, *available at* https://www.cia.gov/library/publications/the-world-factbook/geos/in.html (last visited Mar. 11, 2008).

80. INDONESIA, CIA WORLD FACTBOOK, *available at* https://www.cia.gov/library/publications/the-world-factbook/geos/id.html (last visited Mar. 11, 2008).

81. IRELAND, CIA WORLD FACTBOOK, *available at* https://www.cia.gov/library/publications/the-world-factbook/geos/ei.html (last visited Mar. 11, 2008).

82. ITALY, CIA WORLD FACTBOOK, *available at* https://www.cia.gov/library/publications/the-world-factbook/geos/it.html (last visited Mar. 11, 2008).

83. JORDAN, CIA WORLD FACTBOOK, *available at* https://www.cia.gov/library/

Morocco: 0.1% of the adult population as of 2001;[84] Nepal: 0.5% of the adult population as of 2001;[85] The Netherlands: 0.2% of the adult population as of 2001;[86] Niger: 1.2% of the adult population as of 2003;[87] Nigeria: 5.4% of the adult population as of 2003;[88] Pakistan: 0.1% of the adult population as of 2001;[89] Russia: 1.1% of the adult population as of 2001;[90] Senegal: 0.8% of the adult population as of 2003;[91] Slovakia: less than 0.1% of the adult population as of 2001;[92] South Africa: 21.5% of the adult population as of 2003;[93] Sri Lanka: less than 0.1% of the adult population as of 2001;[94] Togo: 4.1% of the adult population as of 2003;[95] Tunisia: less than 0.1% of the adult population as of 2005;[96] Uganda: 4.1% of the adult population as of 2003;[97] Ukraine: 1.4% of the adult population as of 2003;[98] United Kingdom: 0.2% of the adult population as of 2001;[99] United States: 0.6% of the adult population as of 2003; and[100] Uruguay: 0.3% of the adult population as of 2001.[101]

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publications/the-world-factbook/geos/jo.html (last visited Mar. 11, 2008).

84. MOROCCO, CIA WORLD FACTBOOK, *available at* https://www.cia.gov/library /publications/the-world-factbook/geos/mo.html (last visited Mar. 11, 2008).

85. NEPAL, CIA WORLD FACTBOOK, *available at* https://www.cia.gov/library/ publications/the-world-factbook/geos/np.html (last visited Mar. 11, 2008).

86. NETHERLANDS, CIA WORLD FACTBOOK, *available at* https://www.cia.gov/library /publications/the-world-factbook/geos/nl.html (last visited Mar. 11, 2008).

87. NIGER, CIA WORLD FACTBOOK, *available at* https://www.cia.gov/library /publications/the-world-factbook/geos/ng.html (last visited Mar. 11, 2008).

88. NIGERIA, CIA WORLD FACTBOOK, *available at* https://www.cia.gov/library /publications/the-world-factbook/geos/ni.html (last visited Mar. 11, 2008).

89. PAKISTAN, CIA WORLD FACTBOOK, *available at* https://www.cia.gov/library/ publications/the-world-factbook/geos/pk.html (last visited Mar. 11, 2008).

90. RUSSIA, CIA WORLD FACTBOOK, *available at* https://www.cia.gov/library/ publications/the-world-factbook/geos/rs.html (last visited Mar. 11, 2008).

91. SENEGAL, CIA WORLD FACTBOOK, *available at* https://www.cia.gov/library/ publications/the-world-factbook/geos/sg.html (last visited Mar. 11, 2008).

92. SLOVAKIA, CIA WORLD FACTBOOK, *available at* https://www.cia.gov/library /publications/the-world-factbook/geos/lo.html (last visited Mar. 11, 2008).

93. SOUTH AFRICA, CIA WORLD FACTBOOK, *available at* https://www.cia.gov/library/ publications/the-world-factbook/geos/sf.html (last visited Mar. 11, 2008).

94. SRI LANKA, CIA WORLD FACTBOOK, *available at* https://www.cia.gov/library publications/the-world-factbook/geos/ce.html (last visited Mar. 11, 2008).

95. TOGO, CIA WORLD FACTBOOK, *available at* https://www.cia.gov/library/ publications/the-world-factbook/geos/to.html (last visited Mar. 11, 2008).

96. TUNISIA, CIA WORLD FACTBOOK, *available at* https://www.cia.gov/library/ publications/the-world-factbook/geos/ts.html (last visited Mar. 11, 2008).

97. UGANDA, CIA WORLD FACTBOOK, *available at* https://www.cia.gov/library/ publications/the-world-factbook/geos/ug.html (last visited Mar. 11, 2008).

98. UKRAINE, CIA WORLD FACTBOOK, *available at* https://www.cia.gov/library /publications/the-world-factbook/geos/up.html (last visited Mar. 11, 2008).

99. UNITED KINGDOM, CIA WORLD FACTBOOK, *available at* https://www.cia.gov/ library/publications/the-world-factbook/geos/uk.html (last visited Mar. 11, 2008).

100. UNITED STATES, CIA WORLD FACTBOOK, *available at* https://www.cia.gov/library/publications/the-world-factbook/geos/us.html (last visited Mar. 11, 2008).

101. URUGUAY, CIA WORLD FACTBOOK, *available at* https://www.cia.gov/library/ publications/the-world-factbook/geos/uy.html (last visited Mar. 11, 2008).

C. Sexual abuse not amounting to rape

Among the conduct falling into this section is the molestation of young boys, and the serious allegation that some members of MONUC's peacekeeping contingent were involved in attempts to further sex tourism and pedophilia activities.[102] Also within this category are allegations of inappropriate and nonconsensual contact between peacekeepers and the local populations, including threats of further sexual abuse.[103] An Irish peacekeeper was also found to have produced a pornographic film involving an adult Eritrean woman whom he paid for her performance.[104] A number of peacekeepers from Uruguay were repatriated for unspecified acts of sexual misconduct while deployed.[105]

D. Sexual and human trafficking

Direct connections between U.N. peacekeepers and human trafficking for sexual purposes into and out of Bosnia have also been made routinely since the deployment of peacekeepers to the area.[106] The United Nations Mission in Kosovo (UNMIK) has also been identified as a key source of human trafficking involvement with peacekeepers.[107] Overall, UN peacekeeping per se has been identified as a major supporter of human trafficking for sexual purposes.[108]

E. Theft and embezzlement

Between 2005 and 2006, Pakistani peacekeepers were allegedly involved in a scheme to sell guns and gold to rebel groups in the

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102. Kent, *supra* note 3, at 47.

103. *See British Journal Stands Behind Study Finding Human Rights Abuses in Haiti*, KITCHENER RECORD, Feb. 10, 2007, at A6; *Six Nepalese UN Peacekeepers Jailed for Sex Abuse in DR Congo*, AGENCE FRANCE PRESS ENGLISH WIRE, July 23, 2005, *available at* Westlaw, 7/23/05 AGFRP 10:58:00.

104. Alex Last, *Porn Scandal Rocks Eritrean Peace Force*, BBC NEWS, Dec. 20, 2002, *available at* http://news.bbc.co.uk/2/hi/africa/2595003.stm (last visited May 10, 2008).

105. *Sex Scandal, supra* note 19.

106. MUST BOYS BE BOYS?, *supra* note 38; REHN & SIRLEAF, *supra* note 16.

107. *Kosovo UN troops 'Fuel Sex Trade*,' BBC NEWS, May 6, 2004, *available at* http://news.bbc.co.uk/go/pr/fr/-/2/hi/europe/3686173.stm (last visited Mar. 11, 2008). UNMIK has also been identified as the site of unspecified acts of sexual misconduct and abuse by peacekeepers. *See UN Watchdog Cites Sexual Abuse, Corruption in UN-Run Kosovo*, AGENCE FRANCE PRESSE ENGLISH WIRE, Oct. 18, 2005, *available at* Westlaw, 10/18/05 AGFRP 22:49:00.

108. *See* Sarah DiLorenzo, *Former US Ambassador Criticizes UN for Promoting Sex Trafficking in Peacekeeping Missions*, AP ALERT – BUSINESS, Apr. 13, 2007, *available at* Westlaw, 4/13/07 APALERTBUS 00:57:41.

Congo.[109] The U.N. later dismissed the gun smuggling portions of these allegations but did substantiate the gold smuggling allegations.[110] Also in 2005, twelve French peacekeepers received minimal sentences in France for having robbed a bank in the Cote D'Ivoire while stationed there.[111] These sentences were protested by the French Justice Ministry for their leniency.[112]

Allegations of financial improprieties have also been levied against the Ukrainian peacekeeping delegation to the United Nations Force in Lebanon (UNFIL) with a less clear outcome.[113] According to the U.N.'s own investigation, Nigerian peacekeepers deployed to Sierra Leone were "heavily involved in diamonds, false passports, drug-smuggling and other illegal activities."[114] However, the UN ultimately determined that the Nigerian contingent to Sierra Leone could remain as part of the mission because it was successful in some of its military roles.[115] Allegations of a food for gold barter arrangement between Indian peacekeepers and certain rebel groups in Rwanda have also been made.[116]

F. Other crimes and issues

In a disturbing confirmation of the depth and breadth of peacekeeper transgressions with the populations they were deployed to protect and assist, children of mixed races – one parent from the host country and one from whatever the sending state was – are increasingly being born in host countries.[117] There is currently no UN requirement that peacekeepers care for or acknowledge the children they father. Since the host state's laws do not apply to peacekeepers and since, as noted in several sending state sections below, it is essentially impossible for any woman to

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109. *See Peacekeeper 'Smuggled Congo Gold*,' BBC NEWS, July 13, 2007, *available at* http://news.bbc.co.uk/go/pr/fr/-/2/hi/south_asia/6896881.stm (last visited May 10, 2008); U.S. DEPT. OF STATE, *supra* note 24.

110. *Id.*; Mike Pflanz, *UN Officer Smuggled Gold Out of Congo*, DAILY TELEGRAPH (London), July 14, 2007, at 20, *available at* 2007 WLNR 13442618.

111. *Appeal at French Troop Sentences*, BBC NEWS, June 22, 2005, *available at* http://news.bbc.co.uk/go/pr/fr/-/2/hi/africa/4118498.stm (last visited May 10, 2008).

112. *Id.*

113. *See Ukrainian Former Peacekeeper Chief in Lebanon Denies Corruption Charges*, BBC INT'L NEWS, Sept. 9, 2005, *available at* Westlaw, 9/9/05 BBCINTLRKIEV 00:00:00.

114. Kwesi Aning, *Unintended Consequences of Peacekeeping Operations for Troop-Contributing Countries from West Africa: The Case of Ghana, in* UNINTENDED CONSEQUENCES OF PEACEKEEPING OPERATIONS 144 (Chiyuki Aoi, Cedric de Coning & Ramesh Thakur eds., 2007).

115. *Id.*

116. *Human Rights Watch Flays UN Report Acquitting Pak Peacekeepers*, INDIAN NEWS, July 24, 2007, *available at* Westlaw, 7/24/07 INNWS 00:00:00.

117. *See* Koyama & Myrttinen, *supra* note 2, at 37.

meet the burden of establishing paternity and attempting to collect child support in the sending states of peacekeepers alleged to have committed crimes, a class of children and single mothers has been created amid already dismal social and economic conditions in most host states. Although the reaction to these children and their mothers varies throughout the host states and societies in question, these children and their mothers tend to suffer from economic, social, and often legal stigmatization as a result.[118] Many women who bear peacekeeper children are also in extremely precarious financial and societal positions already and their struggle to exist and reestablish themselves during the conflict in the host state is made more difficult because of these children.[119]

There is an additional issue surrounding sexual violence in conflict and post-conflict areas to which peacekeepers have been deployed: the occurrence of sexual violence against protected populations while peacekeepers watch. This issue has been highlighted recently by devastating tales of rapes of women of all ages – including babies – by combatants in the Congo, yet has existed for much longer.[120] Similar issues occurred in Sierra Leone during its conflict.[121]

Also falling under this category are several alleged crimes which are difficult to otherwise classify. Allegations of murder involving a Somali boy were made against two Canadian peacekeepers who were later convicted and jailed for their crimes.[122] In the wake of claims involving the torture of a Somali woman by several Italian peacekeepers, two generals involved in the oversight of these troops resigned.[123] Allegations of torture were made against two Belgian peacekeepers in Somalia; these peacekeepers were tried but acquitted.[124]

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118. *See, e.g., id.,* at 37-38 (discussing the negative and positive community reactions to peacekeeper-fathered children and their mothers).

119. *See id.*

120. *See DR Congo Child Rape Victim Dies*, BBC NEWS, Nov. 28, 2007, *available at* http://news.bbc.co.uk/2/hi/africa/7119567.stm (last visited May 10, 2008) (discussing the death of an eleven-month-old baby girl after she was raped by a combatant); Jeffrey Gettleman, *Rape Epidemic Raises Trauma of Congo War*, N.Y. TIMES, Oct. 7, 2007, at A1, *available at* 2007 WLNR 19666768; Eddy Isango, *UN Official Wants Congo Rapes Punished*, AP ONLINE REGIONAL – AFRICA, Sept. 8, 2006, *available at* 9/8/06 APONLINEAFR 17:44:18.

121. *See 'Systematic Rape' in Sierre Leone War*, BBC NEWS, Jan. 16, 2003, *available at* http://news.bbc.co.uk/2/hi/africa/2662807.stm (last visited May 10, 2008).

122. Eddie Barnes, *With Friends Like These . . .*, SCOTLAND ON SUNDAY, Dec. 22, 2002, at 16, *available at* 2005 WLNR 14336940.

123. *Id.*

124. *Id.*

G. Victim Reporting Issues

In many of the above situations, the victim is often reluctant to report the sexual abuse to the U.N. or even their own families. The societal beliefs of host countries are often very conservative and view women and their sexual purity as property to be maintained by the family.[125] Regardless of the circumstances and heinous nature of acts committed against them – including rape – it is well documented that victims of peacekeepers are reluctant to tell their families of their abuse for fear of physical punishment and/or ostracization from their families and communities.[126] Where familial and societal pressures do not militate against reporting sexual abuse, victims often remain reluctant to come forward because of the power disparity between the U.N. peacekeepers and the victims.[127] In a situation where a woman or her family is surviving because of U.N. rations and assistance, it is logical that she will not report the crime out of fear that she and her family will lose the aid upon which they depend for survival. This is especially important in situations where the conflict from which the victim has fled is ongoing and there is a threat – however real – that the victim and her family will be forced to return to the conflict and suffer its consequences if they are not under the protection of the U.N. in some way.

The women and girls who come forward – and the parents and other family members who insist that their daughters and relatives come forward – with allegations of sexual abuse face additional hurdles. Evidentiary issues abound as many victims will not immediately report the crime, and, in sexual crimes, time destroys evidence. As discussed below, the U.N. has limited jurisdiction over the prosecution of peacekeepers for their actions and the host state typically has no jurisdiction for crimes committed within its borders by peacekeepers.[128] The U.N. can take certain disciplinary actions against peacekeepers alleged to have committed sexual or other misconduct, the harshest being to repatriate a peacekeeper, yet its record for actually taking such

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125. *See* Francoise J. Hampson & Ai Kihara-Hunt, *The Accountability of Personnel Associated with Peacekeeping Operations, in* UNINTENDED CONSEQUENCES OF PEACEKEEPING OPERATIONS 195, 205 (Chiyuki Aoi, Cedric de Coning & Ramesh Thakur eds. 2007).

126. *See, e.g., UN Haiti Troops Accused of Rape*, BBC CARIBBEAN.COM, Nov. 30. 2006, *available at* http://www.bbc.co.uk/caribbean/news/story/2006/11/printable/061130_unrapehaiti.shtml (last visited May 10, 2008).

127. SAVE THE CHILDREN UN, *supra* note 6, at 14.

128. *See infra* Part III.

actions is abysmal.[129] Even with a drive to increase awareness and reporting of sexual and other crimes by peacekeepers and the resultant increase in reporting of such crimes, the U.N.'s record of findings against peacekeepers continues to be extremely poor.[130]

III. U.N. POLICIES AND RULES FOR PEACEKEEPERS AND PEACEKEEPING

A. Legal Constraints

One of the most striking features of the U.N. Charter is its muteness on the concept of U.N. peacekeeping.[131] The U.N. Charter does contemplate a standing U.N. military, comprised of commanders from the permanent members of the U.N. Security Council, to be used as a reaction force in the event of circumstances deemed to threaten international peace and security.[132] However, in the Cold War environment which arose in the wake of World War II, this force was never created.[133] The idea of peacekeeping came into being in the 1960s and was justified on a legal basis as an extension of the U.N. Charter's mandate that the U.N. function to promote international peace and security.[134] The same justification has been used from the 1960s to the present. This justification has always come under attack from U.N. Charter textualists and international law scholars in general and the issue has yet to be fully decided.[135]

U.N. peacekeeping missions are authorized by the U.N. Security Council.[136] The creation of a mission includes the designation of a maximum allowed numbers of peacekeepers, which can be subsequently changed by the U.N. Security Council, and specific action allowances for the mission.[137] Once created, the new mission is under the jurisdiction of the U.N. Department of

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129. *See infra* Part III.
130. *See infra* Part III.
131. *See generally* U.N. Charter.
132. *See* U.N. Charter ch. VII.
133. *See* Alexandra R. Harrington, *Victims of Peace: Current Abuse Allegations Against U.N. Peacekeepers and the Role of Law in Preventing Them in the Future*, 12 ILSA J. INT'L & COMP. L. 125, 131 (2005).
134. *See id.*
135. *See id.*
136. UN Peacekeeping – FAQ – Meeting New Challenges, *available at* http://www.un.org/Depts/dpko/dpko/faq/q1.htm (last visited Jan. 2, 2008) ("What is peacekeeping?"); ULF HAUSSLER, ENSURING AND ENFORCING HUMAN SECURITY: THE PRACTICE OF INTERNATIONAL PEACE MISSIONS § 4.1.2 (2007).
137. UN Peacekeeping – FAQ – Meeting New Challenges, *available at* http://www.un.org/Depts/dpko/dpko/faq/q8.htm (last visited May 10, 2008) ("Who decides to dispatch a UN peacekeeping operation and who is in charge on the ground?").

Peacekeeping Operations (DPKO) and the office of the Secretary General for staffing and other organizational needs.[138] Peacekeepers are volunteered by their sending state to the particular mission; the U.N. cannot force a state to contribute troops and it currently cannot bar any member states from contributing troops to a peacekeeping mission.[139] Although these internal U.N. actions can take place rather quickly, the host state must still acquiesce to the presence of U.N. peacekeepers before they can be deployed to any area or conflict.[140]

Sending states and host states have their own contracts with the U.N. for peacekeeping operations. Host states are required to sign these documents to preserve a semblance of sovereignty, although once the peacekeeping mission is present it is possible for the U.N. Security Council to change the mission in ways not contemplated by the contract.[141] After the 2005 allegations of massive sexual abuse by peacekeepers in the Congo, U.N. contracts with sending states have attempted to impose additional restrictions on the conduct of U.N. peacekeepers and their likelihood of being tried at home. However these clauses have had little to no effect.[142]

Outside of the contracts between the U.N. and the sending state, jurisdiction over all troops sent on a peacekeeping mission rests solely with the sending state.[143] The U.N. has the capacity to investigate allegations of sexual and other abuses and can, at most, repatriate the errant peacekeeper, but that is the extent of the U.N.'s jurisdiction.[144] The decision as to whether a peacekeeper will be tried is made by the sending state and it is often difficult to determine the course of trial for peacekeepers charged once they return home.[145] The host state cannot charge peacekeepers with any crimes, regardless of how heinous, because it lacks individual

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138. *See* United Nations Department of Peacekeeping Operations – Head of Department, *available at* http://www.un.org/Depts/dpko/dpko/info/page1.htm (last visited May 10, 2008); Kent, *supra* note 3, at 50.

139. UN Peacekeeping – FAQ – Meeting New Challenges, *available at* http://www.un.org/Depts/dpko/dpko/faq/q11.htm (last visited May 10, 2008) ("Who contributes personnel?"); Kent, *supra* note 3, at 52.

140. *See* Kent, *supra* note 3, at 49.

141. *See id.*

142. *See id.* at 49–50.

143. OLA ENGDAHL, PROTECTION OF PERSONNEL IN PEACE OPERATIONS: THE ROLE OF THE 'SAFETY CONVENTION' AGAINST THE BACKGROUND OF GENERAL INTERNATIONAL LAW 30, 52-55 (2007).

144. *See id.*; Hampson & Kihara-Hunt, *supra* note 125, at 206–07; United Nations Dept. of Peacekeeping Operations, Conduct and Discipline Unit, *available at* http://www.un.org/Depts/dpko/CDT/about.html (last visited May 10, 2008) ("About the Conduct and Discipline Units").

145. Hampson & Kihara-Hun, *supra* note 125, at 198–99, 203.

jurisdiction over the peacekeeper.[146] However, the host state is required to protect U.N. peacekeepers and other associated personnel from harm during their deployment; this requirement includes an obligation to prosecute those who are alleged to have attacked or otherwise targeted U.N. personnel.[147] Although it is possible for the mission to deny or waive immunity for an errant peacekeeper when the acts alleged are deemed to be without the scope of general immunity, this is very rare.[148] Even where this is possible, there are many reasons that a host state will not ask for jurisdiction over an errant peacekeeper and will instead rely on his sending state to evaluate the allegations and make further judicial decisions.[149]

B. Rule-based Constraints

As with any military mission, peacekeeping operations are governed by rules of engagement which are specific to the mission.[150] These rules involve tactical and operational guidelines and requirements, as well as certain conduct policies for peacekeepers and the mission generally.[151] Key to the discussion of peacekeepers and sexual abuse is the U.N.'s oft-touted policy of "zero tolerance" for any such conduct and for sexual contact between peacekeepers and those they are charged with protecting.[152] This policy has been criticized on many levels, including its interaction with the U.N.'s weekly distribution of condoms to deployed peacekeepers.[153] There has been a recent move toward incorporating gender awareness units within peacekeeping missions since the allegations of sexual misconduct have become more pervasive.[154] Some of these units are geared toward providing a same-gender environment to increase the comfort of women who are victims of sexual abuse by peacekeepers.[155] Other units are used as part of an overall plan to increase the participation and role of women in the shattered

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146. *See id.*

147. *See* ENGDAHL, *supra* note 143, at 179–80, 205-92 (discussing the Convention on the Safety of United Nations and Associated Personnel).

148. *See* Hampson & Kihara-Hunt, *supra* note 125, at 202.

149. *Id.* at 207–08.

150. HAUSSLER, *supra* note 136, § 6; ENGDAHL, *supra* note 143, at 168–74.

151. *See* HAUSSLER, *supra* note 136, § 6.

152. *See Countries to Mull Steps to Prevent UN Troop Misconduct*, AGENCE FRANCE PRESSE ENGLISH WIRE, July 25, 2007, *available at* Westlaw, 7/25/07 AGFRP 21:31:00.

153. *See id.*; Harrington, *supra* note 133.

154. Koyama & Myrttinen, *supra* note 2, at 39–40.

155. *Id.* at 27–29.

societies to which U.N. missions are deployed.[156] In the latter role, these gender-based units have received praise from peacekeeping mission leaders and local members of the host state for their attempts to include women in post-conflict reconstruction of society and to bring attention to certain pressing issues affecting women in the host state.[157] In the former role, these units have not reduced the incidents of sexual abuse allegations made against peacekeepers and have been unable to trump the evidentiary and other issues associated with the investigation of such allegations.[158] There is nothing to suggest that these gender-based units have made it easier for victims of sexual violence and misconduct by peacekeepers to come forward with their experiences.

C. Proposed Changes in the Wake of Recent Scandals

The first U.N. study to find fault with the structure of U.N. peacekeeping overall was the "Brahimi report," issued by the U.N. in 2000.[159] This report was commissioned to evaluate the structure of U.N. peacekeeping as a functional entity and derives its informal name from the report's chief author. The Brahimi report did not specifically address issues related to sexual abuse or other criminal conduct by peacekeepers and, nearly eight years after its issuance,[160] many of its proposals and targeted areas for reform have yet to be addressed in a meaningful manner.

In several missions, the U.N. has created an ombudsman for the purpose of collecting complaints regarding members of the mission.[161] The use of this office is not widespread throughout the mission system and has limited authority to investigate but not prosecute or otherwise punish an errant peacekeeper.[162] There is a longstanding Office of Internal Oversight Services within the U.N. peacekeeping structure which has recently been tasked with monitoring allegations of peacekeeper and other U.N. personnel misconduct.[163] This office, like the recently created U.N. Conduct and Discipline Unit, has no implementation, enforcement, or

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156. *Id.* at 39.
157. *Id.* at 27.
158. *See generally id.*
159. *See* REPORT OF THE PANEL ON UNITED NATIONS PEACE OPERATIONS, EXECUTIVE SUMMARY, *available at* http://www.un.org/peace/reports/peace_operations/docs /summary.htm (last visited May 10. 2008).
160. *See id.*
161. Hampson & Kihara-Hunt, *supra* note 125, at 212–13.
162. *Id.*
163. *Id.*

prosecutorial role and is intended to function only as an investigatory body.[164] These offices, especially the Conduct and Discipline Units, have done nothing to stem the flow of allegations of sexual and other misconduct and abuse by U.N. peacekeepers.[165]

After allegations of sexual abuse in U.N. missions flourished, the U.N. asked that Jordan's permanent representative to the U.N., Prince Zeid Ra'ad al-Hussein, investigate the allegations and make suggestions in response to them.[166] The Zeid report confirmed that sexual abuse among peacekeepers was a real and rampant problem and that the U.N.'s program of "zero tolerance" for sexual abuse by peacekeepers was not working in practice.[167] It made many suggestions, such as including additional language in agreements between the U.N. and the sending state requiring follow-up on allegations of peacekeeper misconduct.[168] Unfortunately, the majority of the Zeid report suggestions have not been implemented and, if they were to be implemented, would still be weakened by the overall dependence on the will of the sending state to recognize sexual abuse as a serious offense and prosecute errant peacekeepers accordingly.[169] Key to addressing the issue of assisting women who are victims of sexual abuse by peacekeepers – and, in the view of the author, identifying additional victims and perpetrators – was the Zeid report's suggestion of a victim assistance strategy.[170] This strategy is among the major components of the Zeid report which has not been acted upon by the U.N.[171]

As allegations of sexual abuse and the patronizing of prostitutes continued to surface, the U.N. issued new regulations that banned sexual relations between peacekeepers and anyone eighteen years old or younger in the affected area.[172] Interestingly, these bans involve only sexual intercourse with women while on a peacekeeping mission, not other sexual acts.[173] Additional measures attempted by the U.N. include promoting gender

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164. *Id*; United Nations Dept. of Peacekeeping Operations, Conduct and Discipline Unit, *supra* note 144.

165. *See supra* Part II.

166. *See* U.N. G.A. Doc. A/59/710, *supra* note 56 (containing the text of the Zeid report).

167. *Id.*; *see also* U.S. DEPT. OF STATE, *supra* note 24.

168. U.N. G.A. Doc. A/59/710, *supra* note 56.

169. *Id.*

170. *Id.*; *see also* U.S. DEPT. OF STATE, *supra* note 24.

171. U.N. G.A. Doc. A/59/710, *supra* note 56; *see also* U.S. DEPT. OF STATE, *supra* note 24,

172. *See* Harrington, *supra* note 133, at 136.

173. *Id.*

equality as part of the mission[174] and attempting to draw more female peacekeepers from sending states.[175] At the same time, the U.N. implemented a policy of providing its deployed peacekeepers with a pouch of condoms every week.[176] The U.N. Security Council has, at various times, stressed the need for HIV/AIDS education for peacekeepers in order to protect them and the people they protect from exposure and harm.[177] Some missions have also started to use gender-friendly units as part of their mission structure as a result of the Convention to Eliminate all Forms of Discrimination Against Women (CEDAW) and the sexual abuse allegations.[178]

Of particular interest in light of the U.N.'s claimed attempts to address the conduct of peacekeepers abroad are the statements and findings made in 2007 by the U.N. Special Rapporteur on Torture, who stated that the U.N. should more carefully screen troops selected for peacekeeping missions in order to keep troops who are involved in torture away from peacekeeping missions.[179]

IV. LEGAL AND SOCIO-LEGAL STRUCTURES OF AFFECTED SENDING STATES

Because errant peacekeepers are only subject to legal discipline by their sending states, if at all, it is important to study the legal and socio-legal structures of the sending state to determine how its law views the alleged acts of errant peacekeepers. This study seeks to understand the laws – as written and applied – of states that have sent errant peacekeepers in order to cull legal and socio-legal similarities between these systems. Such similarities are then the basis for the author's observations and suggestions in Parts V and VI of this article.

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174. Koyama & Myrttinen, *supra* note 2, at 27-30; Kent, *supra* note 3, at 55-56.

175. *Id.*

176. Harrington, *supra* note 133, at 136. The distribution of condoms to peacekeepers started in 2001, when peacekeepers were provided with a condom pouch and a multi-lingual card with information on the transmission of HIV/AIDS as well as "a code of conduct calling for pride, respect, and consideration for law, customs, and tradition." UNITED STATES GENERAL ACCOUNTING OFFICE, *supra* note 64, at 11.

177. *See UN Anti-AIDS Training for Peacekeepers*, BBC NEWS, July 17, 2000, http://news.bbc.co.uk/2/hi/americas/838421.stm (last visited May 10, 2008).

178. *See, e.g.,* Koyama & Myrttinen, *supra* note 2, at 27–29; Kent, *supra* note 3, at 55.

179. *See UN Requires 'Better' Peacekeepers*, BBC NEWS, July 28, 2007, http://news.bbc.co.uk/2/hi/europe/6920867.stm (last visited May 10, 2008).

To date, allegations of largely sexual misconduct have been made against thirty-four sending states. Since the primary focus of this article is on sexual crimes and misconduct alleged and proven to have been committed by peacekeepers, and since the majority of allegations made against peacekeepers have involved sex and sex-related offenses, the laws examined below are primarily those dealing with sex crimes and the legal status of women in the sending states at issue. Because law does not exist in a vacuum in any society or legal system, the studies below also examine the socio-legal trends extant in the sending states at issue. Although the sending states discussed below have been the subject of misconduct allegations, they have not been the subject of the same quantity of allegations. Some, such as the United States, United Kingdom, Austria, and Canada, have been the subject of few allegations. Others, such as Morocco, Pakistan and Nigeria, have been the subject of wide-ranging allegations across various missions. It is important to note that, generally, sending states tend to be developing and economically poor states. It should also be noted that many of the sending states which are regarded as the greatest and most consistent donors of peacekeepers – not peacekeeping funding, which is addressed in Part VI below – are among the sending states which have sustained the most repetitive and serious allegations of sexual abuse against the population of the host state.[180] The sending states discussed below are arranged alphabetically for ease of the reader and do not in any way reflect a scale of implication in alleged or established crimes.

When considering the socio-legal regimes used by sending states and their relationship to U.N. peacekeepers, it must be remembered that the top three most lucrative illicit industries in the world are considered to be drug trafficking, arms smuggling, and human trafficking – all industries to which peacekeepers have access when they are deployed.

A. Austria

Those wishing to volunteer for the Austrian military may do so at age sixteen.[181] There is a seven month conscription requirement

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180. *See* D.C.F. Daniel & Leigh C. Caraher, *Characteristics of Troop Contributors to Peace Operations and Implications for Global Capacity*, 13(3) INT'L PEACEKEEPING 297, 301 (2006) (stating that these nations were "Bangladesh, Canada, France, Germany, Ghana, India, Italy, the Netherlands, Nigeria, Pakistan, Russia, Spain, Turkey, the United States and the UK").

181. AUSTRIA, CIA WORLD FACTBOOK, *available at* https://www.cia.gov/library/

at age eighteen with an eight year reserve requirement to follow.[182] There is no specific code of military justice governing the Austrian military and, as a result, a member of the Austrian military is subject to the civil laws of Austria.[183]

The crime of rape in Austria is defined as: "whoever coerces a person by serious force directed against this person or by the threat of immediate danger for life and limb to perform or to endure sexual intercourse or a sexual act equated to sexual intercourse shall be punished by imprisonment from one to ten years."[184] There is a lesser crime of sexual coercion under the Austrian Penal Code which applies in cases that do not rise to the level of rape.[185] In regards to sexual abuse of children, there are several relevant statutes of the Austrian Penal Code, such as grievous sexual abuse of minors,[186] sexual abuse of minors,[187] and endangering the moral development of persons under sixteen years of age.[188] Child prostitution and the promotion thereof is criminal in Austria.[189]

Austria is in the first tier[190] of the U.S. human trafficking assessments in 2007.[191] Austria does not have refugee camps within its borders and, although it does grant refugee status to people in certain situations, it does not have a large refugee community presence.[192]

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publications/the-world-factbook/geos/au.html (last visited May 10, 2008).

182. *See id.*

183. LIBRARY OF CONGRESS, AUSTRIA, MILITARY JUSTICE (1993) *available at* http://lcweb2.loc.gov/cgi-bin/query2/r?frd/cstdy:@field(DOCID+at0163).

184. NATIONAL LAWS, LEGISLATION OF INTERPOL MEMBER STATES ON SEXUAL OFFENCES AGAINST CHILDREN, AUSTRIA 1 (2006) *available at* http://www.interpol.int/Public/Children/SexualAbuse/NationalLaws/csaAustria.pdf (last visited May 14, 2008) (summarizing Strafgesetzbuch [StGB] [Penal Code], § 201 (Austria)).

185. *Id.* (summarizing StGB, § 202).

186. *Id.* at 2 (summarizing StGB, § 206).

187. *Id.* (summarizing StGB, § 207).

188. *Id.* at 2-3 (summarizing StGB, § 208).

189. *Id.* at 3-4 (summarizing StGB, § 215a).

190. The U.S. State Department releases an annual assessment of human trafficking practice and patterns in states throughout the world. This assessment places states into tiers: Tier 1 indicates states with the best human trafficking practices and patterns; Tier 2 and Tier 2 Watch List indicates states which have objectionable human trafficking practices and patterns; and Tier 3 indicates the worst states in terms of human trafficking practices and patterns. *See* U.S. DEPT. OF STATE, *supra* note 24, at 42.

191. *Id.*

192. U.N. HIGH COMM'R OF REFUGEES, STATISTICAL YEARBOOK 2005 244 (2007), *available at* http://www.unhcr.org/statistics/STATISTICS/464478a72.html (last visited May 10, 2008) [hereinafter U.N. HIGH COMM'R].

B. Bangladesh

Bangladesh has an all-volunteer military which is open to eligible men at age eighteen.[193] Under the terms of the Bangladesh Army Act, there is no crime of rape.[194] A soldier who is civilly convicted of a crime may face additional sanctions under Bangladeshi military law.[195] Crimes which could potentially be applicable to errant peacekeepers under Bangladeshi military law include "un-becoming behaviour"[196] or "violation of good order and discipline."[197] However, neither of these crimes are well defined at law and both contain subjective criteria.[198] The evidentiary provisions of the Army Act would, in the reality of U.N. peacekeeping mission settings, serve as a bar to the successful prosecution of a peacekeeper for acts done overseas.[199]

Human rights advocates have demonstrated that parts of the Bangladeshi military, combined with the police force, have been involved in massive human rights violations, including rape and other sexual crimes, against the Bangladeshi public.[200] The same groups have requested that the U.N. bar certain portions of the military from participation in peacekeeping operations due to their conduct.[201] Bangladesh is in the second tier of the U.S. human trafficking assessments in 2007.[202] Despite this classification, Bangladesh has been identified as a major sending and receiving

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193. BANGLADESH, CIA WORLD FACTBOOK, *available at* https://www.cia.gov/library/publications/the-world-factbook/geos/bg.html#Military (last visited May 10, 2008).

194. *See generally* Bangladesh Army Act (1952) (as adapted and modified up to 1975), *in* A MANUAL OF DEFENCE LAWS IN BANGLADESH 1-49 (A.J.M. Kamrul Islam ed. 1976).

195. *Id.* at 28-29 (reprinting Bangladesh Army Act, ch. 5, § 59 (1952)).

196. *Id.* at 26 (reprinting Bangladesh Army Act, ch. 5, § 52 (1952). "Any officer, junior commissioned officer or warrant officer, who behaves in a manner un-becoming his position and the character expected of him shall, on conviction by court-martial, be liable to be dismissed from the service or to suffer such less punishment as is in this Act mentioned." *Id*.

197. *Id.* at 26 (reprinting Bangladesh Army Act, ch. 5, § 55 (1952)).

> Any person subject to this Act who is guilty of any act, conduct, disorder or neglect to the prejudice of good order and of military discipline shall, [upon] conviction by court-martial, be punished with rigorous imprisonment for a term which may extend to five years, or with such less punishment as is in this Act mentioned.

Id.

198. *See id.* at 26 (reprinting Bangladesh Army Act, ch. 5, §§ 52, 55 (1952)).

199. *Id.* at 46-48 (reprinting Bangladesh Army Act, ch. 7, §§ 109-10 (1952)).

200. *See generally Special report: lawless law-enforcement & the parody of judiciary in Bangladesh*, ARTICLE 2, Aug. 2006, *available at* http://www.article2.org/pdf/v05n04.pdf (last visited Dec. 14, 2007) [hereinafter *Special Report*] (detailing instances of rape and other crimes committed by Bangladeshi state officials); *see also* Roland Buerk, *Bangladesh's Feared Elite Police*, BBC NEWS, Dec. 13, 2005, *available at* http://news.bbc.co.uk/2/hi/south_asia/4522734.stm (last visited Jan. 2, 2008).

201. *Special report, supra* note 200, at 130.

202. U.S. DEPT. OF STATE, *supra* note 24, at 42.

state for the traffic in human beings.[203] The Bangladeshi military has occupied a solid place in the nation's political hierarchy almost since its founding.[204]

Under the provisions of the Penal Code of Bangladesh, a person who is subject to the laws of Bangladesh and commits a crime punishable under Bangladeshi law abroad may be found to be triable in Bangladesh.[205] One relevant crime under the Penal Code is "Assault or criminal force to [a] woman with intent to outrage her modesty," which is defined as "Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."[206] Trafficking a woman under age twenty-one into the country for criminal purposes is a crime under the Penal Code,[207] as is slavery generally.[208] The crime of rape is defined as:

> A man is said to commit 'rape' who except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the five following description[s]. Firstly: Against her will. Secondly. Without her consent. Thirdly: With her consent obtained by putting in fear of death or hurt. Fourthly: With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married. Fifthly: with or without her consent, when she is under fourteen years of age . . . Exception: sexual intercourse by a man with his own wife, the wife not being under thirteen years of age, is not rape.[209]

The punishment for rape ranges from ten years to life imprisonment and also can involve a fine.[210] The evidentiary

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203. Martii Lehti & Kauko Aromaa, *Trafficking for Sexual Exploitation*, 34 CRIME & JUST. 133, 208-09 (2006).

204. Hannah Pearce, *An Examination of the International Understanding of Political Rape and the Significance of Labeling it Torture*, 14 INT'L J. REFUGEE L. 534 (2002).

205. MD. ZAHURIUL ISLAM, THE PENAL CODE [ACT NO XLV OF 1860] §§ 3-4.

206. *Id.* § 354.

207. *Id.* § 366B.

208. *Id.* § 370.

209. *Id.* § 375.

210. *Id.* § 376.

standards for proving a rape case are such that it would be difficult to establish a rape case in the event of an errant peacekeeper.[211] Adultery is a crime in Bangladesh which can only be prosecuted against a man.[212] In 2005, the Law Commission of Bangladesh recognized that domestic violence is a prevalent and damaging issue in Bangladeshi society and proposed a domestic violence law.[213] The U.N. itself has recognized that the Bangladeshi criminal justice system – particularly its handling of crimes against women – is inadequate.[214]

Bangladesh has refugee camps within its borders for those displaced by conflict in neighboring states.[215] As of 2005, female refugees in Bangladesh outnumbered male refugees.[216]

C. Belgium

Belgium has an all-volunteer military which is open to men and women aged sixteen and over.[217] Belgium's military is governed more by its own regulations than by a specific military code.[218] Belgium has recently begun a trial of a former Rwandan general who is accused of ordering his soldiers to kill several Belgian peacekeepers who were protecting the Rwandan prime minister.[219]

Rape in Belgium is a crime which can be committed against a woman or man when the element of consent to intercourse is missing.[220] Lack of consent occurs with the use of violence, deception, restraint, or incapacitation of the victim.[221]

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211. *Id.* § 376, at nn.10–16.

212. *Id.* § 497.

213. THE LAW COMMISSION, GOVERNMENT OF THE PEOPLE'S REPUBLIC OF BANGLADESH, A FINAL REPORT ON THE PROPOSED LAW OF DOMESTIC VIOLANCE ALONG WITH A BILL, NAMELY THE DOMESTIC VIOLANCE ACT (Dec. 29, 2005), *available at* http://www.apwld.org /pdf/lawcommission_finalreport.pdf (last visited Dec. 14 2007).

214. *Bangladesh Law Enforcement Criticized*, BBC NEWS, Sept. 15, 2002, *available at* http://news.bbc.co.uk/2/hi/south_asia/2259489.stm (last visited Dec. 19 2007).

215. *See* U.N. HIGH COMM'R, *supra* note 192, at 252.

216. *Id.*

217. CIA, BELGIUM, *supra* note 70.

218. Georg Nolte & Heike Kreiger, *Comparison of European Military Law Systems, in* EUROPEAN MILITARY LAW SYSTEMS 90 (Georg Nolte ed., 2003).

219. *Belgian Peacekeeper Trial Starts*, BBC NEWS, Apr. 19, 2007, *available at* http://news.bbc.co.uk/2/hi/africa/6571129.stm (last visited May 14, 2008).

220. NATIONAL LAWS, LEGISLATION OF INTERPOL MEMBER STATES ON SEXUAL OFFENCES AGAINST CHILDREN, BELGIUM 1-2 (2006) *available at* http://www.interpol.int /Public/Children/SexualAbuse/NationalLaws/csaBelgium.pdf (last visited May 14, 2008) (reprinting portions of CODE PÉNAL [C.PÉN.] [Penal Code], art. 375 (1989) (Belg.)) (*translated by* author).

221. *Id.*

Punishments for rape under the Belgian Penal Code vary depending on the age of the victim.[222] Punishments also increase where there are certain exigent circumstances, such as the misuse of authority over the victim.[223] Lesser sexual offenses are also provided for in the Belgian Penal Code.[224] Child prostitution is illegal under the Belgian Penal Code.[225] Belgium has enacted extra-territorial jurisdiction legislation, which makes all Belgians subject to prosecution for sexual offenses committed abroad.[226] Belgium is in the first tier of the US human trafficking assessments in 2007.[227] Belgium does not have refugee camps within its borders and, although it does grant refugee status to people in certain situations, it does not have a large refugee community presence.[228]

D. Benin

Volunteers to the Beninese military may volunteer at age eighteen.[229] Conscription of men and women for a period of eighteen months occurs at age twenty-one.[230] The Beninese military is at once a frequent participant in the coups and political machinations which have characterized Benin and is also viewed as an important actor in the economic and social structure.[231] The constitutions of Benin have given the Beninese military primacy in many areas of statecraft, especially in regards to allowing the state to function domestically and internationally.[232] It is also charged with protecting the internal and external safety of Benin as a state.[233] Benin formally recognizes diplomatic issues with many of its neighbors in regard to land and natural resource control and

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222. *Id.*
223. *Id.* at 2-3 (reprinting portions of C.PÉN., art. 376 (1989)).
224. *Id.* at 4 (reprinting portions of C.PÉN., art. 373 (1989)).
225. *Id.* at 4-5 (reprinting portions of C.PÉN., art. 380 (1989)).
226. *Id.* at 7-8.
227. U.S. DEPT. OF STATE, *supra* note 24, at 42.
228. U.N. HIGH COMM'R, *supra* note 192, at 256.
229. CIA, BENIN, *supra* note 71.
230. *Id.*
231. PHILIPPE AKPO, LE ROLE ET LES IMPLICATIONS DES FORCES ARMIES BENINOISES DANS LA VIE POLITIQUE NATIONALE, 9 (2002) (*translated by* author); MATHURIN C. HOUNGNIKPO, DETERMINANTS OF DEMOCRATIZATION IN AFRICA: A COMPARATIVE STUDY OF BENIN AND TOGO 119–31 (2001).
232 REPUBLIQUE DU BENIN, PRESIDENCE DE LA REPUBLIQUE, MINISTERE DE LA DEFENSE NATIONALE, FORCES ARMEES BENINOISES, LA NATION BENINOISE ET SES FORCES ARMEES 12–13, 31 (1996) (*translated by* author).
233. *Id.* at 19.

cites these as reasons that the military is required to be a strong component of the state.[234]

The Penal Code of Benin is actually the French Penal Code of 1810. Although a definition of rape is not provided, it, along with other forms of sexual offenses, is punishable by time in prison.[235] Hard labor is prescribed for those who commit sexual acts upon children or who misuse their authority over their victim.[236] Prostitution and adultery are also illegal under this law.[237] Marital rape is not a crime in Benin.[238]

Births abroad may be registered with the appropriate diplomatic officers in the Beninese embassy, provided that the names of each parent are known and specified.[239] The use of a Beninese father's last name in situations where a child was born outside of Benin is allowed only in cases where the father has registered the child with the Beninese government.[240] Proving filiation requires the active agreement of and involvement by the putative father.[241] Dowries are still allowed in Benin.[242] The terms of the Beninese family code are made applicable to soldiers stationed overseas.[243] Although there are specific sections of the Personal and Family Code which address marriage, Benin still allows and recognizes traditional or customary marriages, including polygamous marriages.[244] Benin is in the second tier of the U.S. human trafficking assessments in 2007.[245] Currently, there are active refugee camps located within Benin, many filled with Togolese nationals.[246]

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234. *Id.* at 21.

235. C.PÉN., Book III, ch. I § IV (1810) (Fr.), *reprinted in* LES CINQ CODES 20-21 (1820).

236. *Id.*

237. *Id.*

238. CENTER FOR REPRODUCTIVE RIGHTS, REPRODUCTIVE RIGHTS OF YOUNG GIRLS AND ADOLESCENTS IN BENIN 13 (1999), *available at* http://www.reproductiverights.org/pdf/SRbenin99en.pdf (last visited May 14, 2008).

239. Portant Code des personnes et de la famille, Loi No. 2002–07, arts. 60–61 (Benin), *reprinted in* FIRMIN MÉDÉNOUVO, LOI NO 2002-07 PORTANT CODE DES PERSONNES ET DE LA FAMILLE EN RÉPUBLIQUE DU BÉNIN : LOI NO 2003-03 DU 03 MARS 2003 PORTANT RÉPRESSION DE LA PRATIQUE DES MUTILATIONS GÉNITALES FÉMININES EN RÉPUBLIQUE DU BÉNIN : LOI NO 2003-04 DU 03 MARS 2003 RELATIVE À LA SANTÉ SEXUELLE ET À LA REPRODUCTION (2004) (*translated by* author).

240. Portant Code des personnes et de la famille, *supra* note 239, at art. 10.

241. *Id.* at art. 287.

242. *Id.* at art. 949.

243. *Id.* at art. 83.

244. GUIDE JURIDIQUE DE LA FEMME BENINOISE 24 (1991) (*translated by* author).

245. U.S. DEPT. OF STATE, *supra* note 24, at 42.

246. *See* U.N. HIGH COMM'R, *supra* note 192, at 260.

E. Brazil

Brazilians may volunteer for military service between ages seventeen and forty-five.[247] There is a conscription period of between nine and twelve months for Brazilians aged twenty-one to forty-five.[248] Although now a democracy, Brazil was for decades under military dictatorship, in which the military was given primacy as a legal, political, and social tool.[249] In the wake of demilitarization attempts, the Brazilian military has seen its financial resources allotted in the state budget shrink significantly.[250] Overall, peacekeeping has been a limited endeavor for Brazil, especially in light of the state's internal military needs and reduced military funding.[251] Interestingly, the Brazilian constitution would allow a child of a peacekeeper born abroad at least some basic constitutional claim to Brazilian citizenship provided the child was born while the father was still stationed abroad in service to Brazil.[252]

Until recently, there was a decided trend in Brazilian jurisprudence to allow what were essentially honor killings in certain circumstances, such as infidelity.[253] There is domestic violence legislation in Brazil involving marital rape crimes.[254] Rape, sexual abuse, and the corruption of minors are all crimes in Brazil.[255]

Brazil is in the second tier of the U.S. human trafficking assessments in 2007.[256] Despite this ranking, Brazil is the largest exporter and importer of human beings in the Americas.[257] Brazil is also home to one of the worst child prostitution problems in the

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247. CIA, BRAZIL, *supra* note 72.

248. *Id.*

249. *See* CRAIG L. ARCENEAUX, BOUNDED MISSIONS: MILITARY REGIME AND DEMOCRATIZATION IN THE SOUTHERN CONE AND BRAZIL 150, 160–80 (2001)

250. *See* WENDY HUNTER, US INSTITUTE FOR PEACE, STATE AND SOLDIER IN LATIN AMERICA ch. 3 (1996), *available at* http://www.usip.org/pubs/peaceworks/state10/hunterhm.html (last visited May 14, 2008).

251. *Id.*

252. C.F. ch. III, art. 12, § II (Braz.) (Constituição Federal) (*translated by* author).

253. Catherine Warrick, *The Vanishing Victim: Criminal Law and Gender in Jordan*, 39 L. & SOC'Y REV. 315 (2005).

254. C.P. [PENAL CODE] art. 150 (Braz.), *available at* http://www.planalto.gov .br/CCIVIL/Decreto-Lei/Del2848compilado.htm (last visited May 15, 2008) (*translated by* author).

255. *See generally id.* (codifying various types of rape as an offense and aggravating offense throughout its provisions).

256. U.S. DEPT. OF STATE, *supra* note 24, at 42.

257. *See* Lehti & Aromaa, *supra* note 203, at 202.

world.[258] Brazil is home to refugees from other states but does not currently have organized refugee camps within its borders.[259]

F. Bulgaria

Conscription in Bulgaria ended on January 1, 2008.[260] Previously, one was eligible to volunteer or be conscripted into the military at age eighteen.[261] In the wake of years of communist control, the Bulgarian military generally has been the subject of wide-ranging reform attempts.[262]

Bulgarian law defines rape as "sexual intercourse with a woman (1) incapable of defending herself, where she did not consent; (2) who was compelled . . ."[263] The European Court of Human Rights has found that the application of this statute in a particular case was in violation of European conventions; this opinion also cast doubt on the validity of the method by which Bulgarian courts apply the rape statute.[264] Under Bulgarian law, cases involving domestic violence either require the victim to prosecute the offense without the assistance of the state or are subject to limits which essentially make the prosecution by the state worthless.[265] Marital rape may only be prosecuted in Bulgaria if "the wife has been killed or permanently injured."[266] An additional crime exists where a person uses the material dependency of a woman upon him to procure sexual relations.[267] Prostitution is illegal in Bulgaria.[268] Homosexual intercourse – forced or consensual – is also a crime under Bulgarian law.[269]

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258. *Id.*

259. *See* U.N. HIGH COMM'R, *supra* note 192, at 270.

260. CIA, BULGARIA, *supra* note 73.

261 *Id.*

262 *See generally* Galentin I Gueorguiev, Bulgarian Military in Transition – The Legal Framework of Democratic Civil-Military Relations (Dec. 1998) (unpublished M.A. thesis, Naval Postgraduate School) (on file with Naval Post Graduate School, Monterey, Calif.).

263 Beate Rudolf & Andrea Eriksson, *Women's Rights Under International Human Rights Treaties: Issues of Rape, Domestic Slavery, Abortion, and Domestic Violence*, 5 INT'L J. CONST. L. 507, 508 (2007); Penal Code, art. 152 (Bulg.), *available at* http://legislationline.org/upload/legislations/d7/8d/c1519b43d701a2f3976b312d2993.pdf (last visited May 14, 2008).

264 Rudolf & Eriksson, *supra* note 263.

265 Julie Mertus, *Human Rights of Women in Central and Eastern Europe*, 6 AM. U. J. GENDER & L. 369, 411-13 (1998).

266 *Id*. at 423 (quoting Swanee Hunt, *'Feminization of Poverty' in East Europe; Western-Style Safeguards are Foreign to Women in Post-Communist Nations,* BALTIMORE SUN, July 13, 1997, at F5).

267 Penal Code, art. 153 (Bulg.), *available at* http://legislationline.org/upload/legislations/d7/8d/c1519b43d701a2f3976b312d2993.pdf (last visited May 14, 2008).

268 *Id.* art. 155.

269 *Id.* art. 157.

Bulgaria is in the second tier of the U.S. human trafficking assessments in 2007.[270] Bulgarian citizens who commit crimes abroad can be tried in a Bulgarian court for their actions.[271]

Bulgaria is home to few refugees from other states and does not have an organized refugee camp structure.[272]

G. Canada

Canada has an all-volunteer military which is open to men and women aged sixteen to thirty-four.[273] The military Code of Service Discipline makes it clear that it applies to all persons in the service of the armed forces of Canada, regardless of whether the crimes were committed in Canada.[274] Under the Code of Service Discipline, it is an offense for a member of the Canadian military to "commit[] any offence against the property or person of any inhabitant or resident of a country in which he is serving."[275] This is problematic because many victims and potential victims on U.N. peacekeeping missions neither inhabit the area to which the soldier is deployed in the strict legal sense nor are they legally classified as residents. It is a crime for a member of the military to engage in either "[s]candalous conduct by officers"[276] or "[c]ruel or disgraceful conduct."[277] Canadian troops may be tried for civil offenses under the Criminal Code and will suffer military punishments if convicted.[278]

Although Canada uses a provincial system in which citizens are governed by both federal and provincial laws, there are uniform national laws prohibiting sexual abuse of minors,[279] homosexuality when involving at least one minor,[280] and luring a child.[281] Canada is in the first tier of the U.S. human trafficking

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270. U.S. DEPT. OF STATE, *supra* note 24, at 42.

271. Penal Code, art. 4 (Bulg.), *available at* http://legislationline.org/upload/legislations/d7/8d/c1519b43d701a2f3976b312d2993.pdf (last visited May 14, 2008).

272. *See* U.N. HIGH COMM'R, *supra* note 192, at 272.

273. CIA, CANADA, *supra* note 74.

274. National Defence Act, R.S.C., ch. N-5, § 67 (1985) (Can.).

275. *Id.* § 77.

276. *Id.* § 92 ("Every officer who behaves in a scandalous manner unbecoming an officer is guilty of an offence and on conviction shall suffer dismissal with disgrace from Her Majesty's service or dismissal from Her Majesty's service.").

277. *Id.* § 93 ("Every person who behaves in a cruel or disgraceful manner is guilty of an offence and on conviction is liable to imprisonment for a term not exceeding five years or to less punishment.").

278. *Id.* § 130.

279. Criminal Code, R.S.C., ch. C-46, §§ 151–52 (1985) (Can.).

280. *Id.* § 159.

281. *Id.*

assessments in 2007.[282] Currently, Canada admits refugees. However, it does not have refugee camps within its borders.[283]

H. Ethiopia

Ethiopia uses compulsory military service at age eighteen.[284] Those wishing to volunteer to serve in the Ethiopian military may also begin to serve at age eighteen.[285] Interestingly, throughout its recent history, there has been a dramatic fluctuation in the amount of reported government funds appropriated to the Ethiopian military.[286] During the conflict between Eritrea and Ethiopia, the Eritrea-Ethiopia Claims Commission determined that Ethiopia "failed to impose effective measures on its troops, as required by international humanitarian law, to prevent rape."[287] There are no provisions under the Military Code of Ethiopia which would directly punish an errant peacekeeper for sexual misconduct while deployed.[288]

When a rape occurs in Ethiopia, the rapist may avoid prosecution by agreeing to marry the victim.[289] Generally, the Ethiopian Penal Code would apply to allow an Ethiopian enjoying immunity from international prosecution for crimes committed abroad to be charged with these crimes in Ethiopia as long as the act at issue is a crime both in Ethiopia and the state where it was committed.[290] The crime of rape in Ethiopia is defined as follows: "[w]hoever compels a woman to submit to sexual intercourse outside wedlock, whether by the use of violence or grave intimidation, or after having rendered her unconscious or incapable of resistance, is punishable with rigorous imprisonment

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282. U.S. DEPT. OF STATE, *supra* note 24, at 42.

283. *See* U.N. HIGH COMM'R, *supra* note 192, at 282 .

284. CIA, ETHIOPIA, *supra* note 75.

285. *Id.*

286. WUYI OMITOOGUN, MILITARY EXPENDITURE DATA IN AFRICA: A SURVEY OF CAMEROON, ETHIOPIA, GHANA, KENYA, NIGERIA AND UGANDA 46-47 (2003).

287. Lee M. Caplan et al., *International Courts and Tribunals*, 41 INT'L L. 291, 305 (2007).

288. *See* Criminal Code of the Federal Democratic Republic of Ethiopia, Proclamation No. 414/2004 (2004) (Eth.), *available at* http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/70993/75092/F1429731028/ETH70993.pdf (last visited May 14, 2008).

289. Charles J. Ogletree, Jr. & Rangita de Silva-de Alwis, *The Recently Revised Marriage Law of China: The Promise and The Reality*, 13 TEX. J. WOMEN & L. 251, 278 n.118 (2004).

290. Criminal Code of the Federal Democratic Republic of Ethiopia, Proclamation No. 414/2004, arts. 14-15. (2004) (Eth.), *available at* http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/70993/75092/F1429731028/ETH70993.pdf (last visited May 14, 2008).

from five years to fifteen years."[291] Penalties vary depending on the age of the victim, her mental capacity and health, the violence of the crime, and whether the crime was a gang rape.[292] A slightly lesser crime is that of "[s]exual [o]utrages [a]ccompanied by [v]iolence."[293] Other relevant offenses include "[t]aking [a]dvantage of the [d]istress or [d]ependence of a [w]oman,"[294] sexual relations with underage members of the opposite sex,[295] "[h]omosexual and other [i]ndecent [a]cts,"[296] use of position or underage participants in homosexual acts,[297] and human trafficking.[298] Adultery is a gender neutral crime in which each party is equally culpable.[299] Ethiopia is in the second tier of the U.S. human trafficking assessments in 2007.[300] According to the United Nations High Commissioner for Refugees' latest information, more than one hundred thousand refugees live in refugee camps within Ethiopia's borders.[301]

I. France

Conscription into military service ended in the 1990s for French nationals.[302] Currently, one must be at least seventeen

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291. *Id.* at art. 620.
292. *Id.*
293. *Id*. at art. 622.

> Whoever, by the use of violence or grave intimidation, or after having in any other way rendered his victim incapable of offering resistance, compels a person of the opposite sex, to perform or submit to an act corresponding to the sexual act, or any other indecent act, is punishable with simple imprisonment for not less than one year, or rigorous imprisonment not exceeding ten years.

Id.
294. *Id.* at art. 625.

> Whoever . . . procures from a woman sexual intercourse or any other indecent act by taking advantage of her material or mental distress or the authority he exercises over her by virtue of his position, function or capacity as protector, teacher, master or employer, or by virtue of any other like relationship, is punishable, upon complaint, with simple imprisonment.

Id.
295. Criminal Code of the Federal Democratic Republic of Ethiopia, Proclamation No. 414/2004, arts. 626-27 (2004) (Eth.), *available at* http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/70993/75092/F1429731028/ETH70993.pdf (last visited May 14, 2008).
296. *Id.* at art. 629. "Whoever performs with another person of the same sex a homosexual act, or any other indecent act, is punishable with simple imprisonment." *Id*.
297. *Id.* at arts. 629-32.
298. *Id.* at art. 635-37.
299. *Id.* at art. 652.
300. U.S. DEPT. OF STATE, *supra* note 24, at 42.
301. *See* U.N. HIGH COMM'R, *supra* note 192, at 328.
302. *See* CIA, FRANCE *supra* note 76.

years of age to volunteer for the French military.[303] Women are allowed in non-combat roles and positions.[304] Members of the French military may be arrested and tried for crimes arising under civil law as well as the Code of Military Justice.[305]

Rape in France is defined as sexual intercourse to which the consent of the victim is vitiated by violence, constraint, threats, or surprise.[306] Marital rape is a crime in France.[307] Rape is primarily defined as a crime committed by a man against a woman.[308] The punishment for rape will increase in the event that there are aggravating circumstances, such as age, number of perpetrators, and injuries suffered by the victim.[309] Lesser sexual offenses, although not precisely defined in the French Penal Code, are punishable in France.[310] A separate system of crimes exists for sexual abuse of minors.[311] Child prostitution is a crime in France.[312] France is in the first tier of the U.S. human trafficking assessments in 2007.[313] Although France does admit refugees, there are no refugee camps within its borders.[314]

J. Ghana

Ghana has been an active participant in peacekeeping missions from the 1960s onwards.[315] Currently, Ghana is among the top ten overall troop contributors for U.N. peacekeeping operations.[316] However, the underlying motives for this contribution have been called into question, especially as the military has used participation in these missions to justify the acquisition of military

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303. *Id*.

304. *Id*.

305. Jorg Gerkrath, *Military Law in France, in* EUROPEAN MILITARY LAW SYSTEMS 319 (Georg Nolte ed., 2003).

306. NATIONAL LAWS, LEGISLATION OF INTERPOL MEMBER STATES ON SEXUAL OFFENCES AGAINST CHILDREN, FRANCE 2-4 (2006), *available at* http://www.interpol.int/Public/Children/SexualAbuse/NationalLaws/csaFrance.pdf (last visited May 14, 2008) (summarizing and reprinting portions of [Code Pénal] [C. PÉN.] [Penal Code], arts. 222-23, 222-24, 222-25 (Fr.)) (*translated by* author).

307. *Id.*

308. *Id.*

309. *Id.*

310. *Id.*

311. *Id.* at 5-7 (summarizing and reprinting portions of C. PÉN., arts 227-22, 227-25, 227-26, 227-27 (Fr.)).

312. *Id.* at 7-8 (summarizing and reprinting portions of C. PÉN., arts 225-5, 225-7 (Fr.); Loi No. 2002-305, art. 13 (Mar. 4, 2002) (Fr.)).

313. U.S. DEPT. OF STATE, *supra* note 24, at 42.

314. *See* U.N. HIGH COMM'R, *supra* note 192, at 334.

315. Aning, *supra* note 114, at 134; STEPHEN ADDAE, GENERAL HISTORY OF GHANA ARMED FORCES: A REFERENCE VOLUME 371 (2005).

316. Aning, *supra* note 114, at 133.

equipment in a time of economic tension between the interests of various state actors in Ghana.[317] It has also been established that there exists a system of corruption involving the placement of members of the Ghanaian military in peacekeeping deployments.[318]

Throughout its modern history as an independent state, Ghana has been plagued by political turmoil which is either exacerbated or quelled by its Armed Forces.[319] At the same time that the military was gaining prominence in the social and political culture of Ghana, it had to compete for resources during the nation's long economic downturn.[320] With conditions in armed forces housing and other essential services described by the Ministry of Defence itself as unpleasant,[321] it is perhaps not surprising that members of the Armed Forces were interested in participating in peacekeeping operations. Recent developments, however, have resulted in superior barracks and living facilities for Ghanaian soldiers and their families.[322] Service in the Ghanaian armed forces has now become a socially acceptable occupation regardless of class, with more entrance seekers than positions available.[323] Interestingly, one of the recruitment slogans used by the Ghanaian armed forces is to "serve with the U.N."[324] Statistical data gathered in 2000 suggests that Ghanaians hold their military in high esteem generally and have a particularly good view of the participation of the Ghanaian armed forces in peacekeeping operations.[325] Despite these views, when the armed forces are required to interact with the civilian population in a professional capacity, there is a tension between the actions and opinions of the civilian and military populations.[326] The Ghanaian armed forces have, in some instances, become responsible for committing illegal activities to further the interests of their families and friends.[327] Throughout its history, the Ghanaian military has become

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317. *See id.* at 133-51.

318. *Id.* at 146–47.

319. ADDAE, *supra* note 315, at 207; BAFFOUR AGYEMAN-DUAH, CIVIL MILITARY RELATIONS IN GHANA'S FOURTH REPUBLIC 1-2 (2002).

320. ADDAE, *supra* note 315, at 210.

321. *Id.* at 208-10, 275-81; Eboe Hutchful, *Military Policy and Reform in Ghana,* 35(2) J. MOD. AFR. STUD. 251, 258 (1997).

322. AGYEMAN-DUAH, *supra* note 319, at 29-30.

323. ADDAE, *supra* note 315, at 345.

324. *Id.*

325. AGYEMAN-DUAH, *supra* note 319, at 12 (stating that, of those surveyed, 65% "trust the military" and "nearly 90% approved of the military's role in international peacekeeping.").

326. *Id.* at 15-16.

327. *Id.* at 14.

intertwined with its political structure and has gained political, societal, and thus legal power as a result.[328]

The Criminal Code of Ghana defines the crime of rape as "the carnal knowledge of a female of sixteen years or above without her consent."[329] The punishment prescribed for those convicted of rape is between five and twenty-five years.[330] Other relevant provisions of the Criminal Code include "[d]efilement of a child under 16 years of age,"[331] and "Unnatural carnal knowledge."[332] Prostitution is illegal only when committed by the prostitute herself[333] and "[s]lave-dealing," including bringing human beings to Ghana for the purposes of slavery, is illegal.[334] Ghana is in the second tier of the U.S. human trafficking assessments in 2007.[335] Ghana maintains refugee camps for many of the refugees which have sought safety within its borders.[336]

K. Guinea

All Guineans are required to perform two years of compulsory military service after age eighteen.[337] Once this service is completed, a service member may volunteer to continue his or her service.[338] The Guinean Army, along with the security forces, was involved in a major crackdown on strikers in early 2007.[339] During

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328. *See* Michael Kweku Addison, Preventing Military Intervention in West Africa: A Case Study of Ghana, 3, 21 (Mar. 2002) (unpublished M.A. thesis, Naval Postgraduate School) (on file with Naval Postgraduate School, Monterey, Calif.).

329. HENRIETTA J.A.N. MENSA-BONSU, THE ANNOTATED CRIMINAL CODE OF GHANA 91 (4th ed. 2005) (citing Criminal Code, § 98 (Ghana)).

330. *Id.* (citing Criminal Code, § 97 (Ghana)).

331. *Id.* at 92 (citing Criminal Code, § 101(2) (Ghana)). "Whoever naturally or unnaturally carnally knows any child under sixteen years of age, whether with or without his or her consent commits an offence and shall be liable on summary conviction to imprisonment for a term of not less than seven years and not more than twenty-five years." *Id*.

332. *Id.* at 94 (citing Criminal Code, § 104 (Ghana)).

> Whoever has unnatural carnal knowledge (a) of any person of the age of sixteen years or over without his consent shall be guilty of a first degree felony and shall be liable on conviction to imprisonment for a term of not less than five years and not more than twenty-five years; or (b) of any person of sixteen years or over with his consent is guilty of a misdemeanour.

Id.

333. *Id*. at 174 (citing Criminal Code, § 398 (Ghana)).

334. *Id.* at 200–01 (citing Criminal Code, § 314 (Ghana)).

335. U.S. DEPT. OF STATE, *supra* note 24, at 42.

336. *See* U.N. HIGH COMM'R, *supra* note 192, at 344.

337. CIA, GUINEA, *supra* note 78.

338. *Id.*

339. *See* HUMAN RIGHTS WATCH, DYING FOR CHANGE: BRUTALITY AND REPRESSION BY GUINEAN SECURITY FORCES IN RESPONSE TO A NATIONWIDE STRIKE 3, 14-35 (2007), *available*

this time, the military was implicated in general human rights violations, including rape and sexual assault against the civilian population, and has not been called to account for these actions.[340] Also, residents of refugee camps inside Guinea have experienced harassment and ill-treatment at the hands of the Guinean military.[341]

Rape is a crime in Guinea and the punishment for this crime depends on the circumstances of the crime and the number of accused perpetrators.[342] Guinea is in the second tier of the U.S. human trafficking assessments in 2007.[343] Guinea has criminalized human trafficking, as well as rape and other forms of "indecent assault."[344] Many of the refugees located within Guinea's borders are housed in refugee camps.[345] Human rights agencies have condemned the treatment which refugees in these camps receive from Guinean military units and members of the Guinean public generally.[346]

L. India

Service in the Indian military is entirely voluntary from age sixteen onward.[347] Within the most recent Army budget, salaries of Army officers and personnel have accounted for the largest appropriation of funds – over 36 percent per year.[348] The Indian Military Code provides penalties for "Unbecoming Conduct"[349] and

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at http://hrw.org/reports/2007/guinea0407/guinea0407webwcover.pdf (last visited May 14, 2008).

340. *See id.*

341. *See* HUMAN RIGHTS WATCH, GUINEA: REFUGEES STILL AT RISK, CONTINUING REFUGEE PROTECTION CONCERNS IN GUINEA (2001) *available at* http://www.hrw.org/reports/2001/guinea/guinea0701.PDF (last visited May 14, 2008).

342. *See* NATIONAL LAWS, LEGISLATION OF INTERPOL MEMBER STATES ON SEXUAL OFFENCES AGAINST CHILDREN, GUINEA 1-2 (2006) *available at* http://www.interpol.int/Public/Children/SexualAbuse/NationalLaws/csaGuinea.pdf (last visited May 14, 2008) (reprinting and summarizing portions of Criminal Code, arts. 12-13 (Guinea)) (*translated by* author).

343. U.S. DEPT. OF STATE, *supra* note 24, at 42.

344. *See* HUMAN RIGHTS WATCH, BOTTOM OF THE LADDER: EXPLOITATION AND ABUSE OF GIRL DOMESTIC WORKERS IN GUINEA (2007) *available at* http://hrw.org/reports/2007/guinea0607/guinea0607webwcover.pdf (last visited May 14, 2008).

345. *See* U.N. HIGH COMM'R, *supra* note 192, at 350.

346. *See* HUMAN RIGHTS WATCH, GUINEA: REFUGEES SUBJECT TO SERIOUS ABUSE (2001), *available at* http://hrw.org/english/docs/2001/07/05/guinea83.htm (last visited May 14, 2008).

347. CIA, INDIA, *supra* note 79.

348. AMIYA KUMAR GHOSH, DEFENCE BUDGETING AND PLANNING IN INDIA: THE WAY FORWARD 35 (2006).

349. G.K. SHARMA, M.S., JASWAL, STUDY AND PRACTICE OF MILITARY LAW 101 (6th ed. 2006) (quoting The Army Act of 1950, § 45, INDIA CODE (as amended to 2006)).

> [A]ny officer, junior commissioned officer or warrant officer who behaves in a manner unbecoming his position and the character expected of him,

for "Disgraceful Conduct."[350] Officers and others who are subject to the Army Act may be tried under the Act for offenses which are criminal under Indian law unless he is already being tried by a civilian court.[351] The Army Act requires incidents of "Rape including assault or criminal force to a woman with intent to outrage her modesty/dishonour the person" be reported for investigation.[352] There is, however, no explicit crime of rape in the Army Act.[353]

Currently, the Indian Army Act has not been amended to reflect the introduction of women into certain parts of the military system.[354] Many military wives are unaware of the rights owed to them by their husbands and by the military apparatus while their husbands are deployed.[355] The "Commandments" for military deployment state that the first commandment is "No rape."[356] The Mandate of the COAS About Personal Behaviour & Conduct in Operations provides "Rape and molestation are the most heinous of crimes. God will not forgive you, and the Army will punish you very severely;" and "Rape, molestation, murder, taking of hostage and arbitrary executions are violations of humanitarian law."[357] It is widely accepted that the Indian Army, which is a frequent participant in peacekeeping missions, uses rape as a standard interrogation method.[358] In response to concerns of the spread of HIV/AIDS to troops deployed on peacekeeping missions, the Indian military promulgated a code of conduct for its peacekeepers before many of the complaints against Indian peacekeepers were made.[359]

At present, there is no crime of marital rape in India and marriage to the victim is an absolute defense.[360] A lower standard of proof is required for gang rapes under the Indian penal code, apparently with the legislative intent to curtail the incidences of an increasingly prevalent crime in Indian society.[361] The Penal

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> shall on conviction by court-martial, if he is an officer, be liable to be cashiered or to suffer such less punishment as is mentioned in the Army Act and if he is a JCO or WO, be liable to be dismissed or to suffer such less punishment as is mentioned in the Army Act.

Id.

350. *Id.* at 102 (discussing The Army Act of 1950, § 46, INDIA CODE (as amended to 2006) which makes "Conduct of cruel, indecent or unnatural kind" a crime).

351. *Id.* at 106 (citing §§ 69, 70 of the Army Act).

352. *Id.* at 401, app. I, 1(b)(iv).

353. *See generally id.*

354. NILENDRA KUMAR, COURT MARTIAL AND MILITARY MATTERS 84–85 (2000).

355. *See id.* at 108–09.

356. *Id.* at 191, table 6.

357. *Id.* at 192, table 7.

358. PEARCE, *supra* note 204, at n.536.

359. MURTHY, *supra* note 35, at 164–65.

360. Ogletree & Silva de-Alwis, *supra* note 289, at 275.

361. S.C. SARKAR, COMMENTARY ON THE INDIAN PENAL CODE, 1860, sec. 1 to 299, at 105 (2006).

code provides for the crime of "Assault or criminal force to [a] woman with intent to outrage her modesty," defined as "Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."[362] It also provides for the crime of "Procuration of [a] minor girl,"[363] "Buying or disposing of any person as a slave,"[364] and "Unnatural Offences."[365] Rape is defined as:

> [A] man is said to commit 'rape' who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions: Firstly – Against her will. Secondly – Without her consent. Thirdly – With her consent, when her consent, has been obtained by putting her or any person in whom she is interested in fear of death or hurt. Fourthly – With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married. Fifthly – With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or though [sic] another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she give [sic] consent. Sixthly – With or without her consent when she is under sixteen years of age. Exception – sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.[366]

The sentences for rape vary under the circumstances, but police officers and other public servants, rapists of girls under twelve, and participants in gang rapes are subject to sentences of at least

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362. *Id.* at 586 (citing INDIA PEN. CODE § 354).

363. *Id.* at 633 (citing INDIA PEN. CODE § 366-A).

364. *Id.* at 639 (citing INDIA PEN. CODE § 369).

365. S.C. SARKAR, COMMENTARY ON THE INDIAN PENAL CODE, 1860, sec. 303 to 408, at 833 (2006) (quoting INDIA PEN. CODE § 377). "Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine." *Id*.

366. *Id.* at 642 (citing INDIA PEN. CODE § 375).

ten years.[367] Although marital rape is not a crime in India, there is a separate provision of the Penal Code making it a crime for a man to rape his wife while they are legally or customarily separated.[368] Even when a rape case is brought to trial, the evidence rules in India shift the focus of the trial to the victim's conduct and past – an experience which is traumatic to the victim[369] and can, in the author's view, create a culture of impunity for the accused because of the cultural conservatism and stigma attached to such revelations and proceedings. When a complaint involving rape or sexual violence is filed, it is accepted practice that there will be shoddy follow-up investigations which can prejudice the outcome of the trial, if there is one.[370]

India is in the second tier watch list of the U.S. human trafficking assessments in 2007.[371] Despite this classification, India is widely regarded as a major sending and receiving state in the traffic of human beings.[372] There are no refugee camps in India although refugees are allowed into the country.[373]

Dowry deaths are a form of domestic violence which has plagued India in direct contradiction of its laws.[374] These deaths still occur on a routine basis and tend to receive light sentencing from judges, who often find sympathy with the husband and his family.[375] The societal and legal protections are not afforded solely to husbands and their immediate family, however.[376]

M. Indonesia

Indonesians may volunteer for military service at age eighteen; if they do not volunteer then they will be conscripted for two years

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367. *Id.* at 651-52 (citing INDIA PEN. CODE § 376).

368. *Id.* at 830 (citing INDIA PEN. CODE § 376-A).

369. Savitri Goonesekere, *Overview: Reflections on Violence Against Women and the Legal Systems of some South Asian Countries, in* VIOLENCE, LAW AND WOMEN'S RIGHTS IN SOUTH ASIA 69-70 (Savitri Goonesekere ed., 2004).

370. Kirti Singh, *Violence against Women and the Indian Law, in* VIOLENCE, LAW AND WOMEN'S RIGHTS IN SOUTH ASIA 96–101 (Savitri Goonesekere ed., 2004).

371. U.S. DEPT. OF STATE, *supra* note 24, at 42.

372. Lethi & Aromaa, *supra* note 203.

373. *See* U.N. HIGH COMM'R, *supra* note 192, at 366.

374. *See* SARKAR, *supra* note 365, at 229 (citing section 304-B of the Indian Penal Code, which defines and penalizes the specific crime of dowry death); Melissa Spatz, *A "Lesser" Crime: A Comparative Study of Legal Defenses for Men Who Kill Their Wives*, 24 COLUM. J. L. & SOC. PROBS. 597 (1991); *See also* The Protection of Women from Domestic Violence Act, 2005 *reprinted in* S.C. SARKAR, COMMENTARY ON THE INDIAN PENAL CODE, 1860, sec. 303 to 408, app. 20 (2006).

375. *See* Singh, *supra* note 370, at 119–21 (citing evidence that, despite the dowry death ban, incidents of dowry deaths are on the rise in India).

376. *See* Spatz, *supra* note 374.

after age eighteen.[377] Regardless of whether they remain in the military after the mandatory period of conscription, all Indonesians remain on reserve until age forty-five and have an obligation to serve their country if activated.[378] From the 1980s onward, the Indonesian Army, which was at one point a well-respected and sought after career choice for the upper echelons of Indonesian society, lost some of its status.[379] As a result, it has begun recruiting from the rural middle class, which is regarded as a lower class of society.[380] Due to historical and political events, the Indonesian Army prides itself on enjoying a unique and powerful position in society, law, and the political realm.[381] In addition to standard military functions, it is expected that the Indonesian military will be involved in civilian tasks such as infrastructure building and support.[382] Additionally, the Indonesian military is frequently involved in national policing issues due to the perceived weakness of the national police organization.[383] Despite its stature, members of the Indonesian military, especially in its lower ranks, are poorly compensated.[384]

Although there were many sides which contributed to the massive human rights violations and conflict which occurred in East Timor, it is established that the Indonesian military both participated in and encouraged many egregious acts during the conflict.[385] While many of these acts can arguably be justified as part of war, there is an established pattern of using rape as a tool to either silence or exact retribution from the local population.[386] The Indonesian government itself admits that members of the military and those associated with it have committed human

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377. CIA, INDONESIA, *supra* note 80.

378. *Id.*

379. ANGEL RABASA AND JOHN HASEMAN, THE MILITARY AND DEMOCRACY IN INDONESIA 54 (2002).

380. *Id.*

381. *Id.* at 9–10; RINAKIT SUKARDI, THE INDONESIA MILITARY AFTER THE NEW ORDER 6–7 (2005).

382. RABASA AND HASEMAN, *supra* note 379, at 22–23.

383. *Id.* at 26–27; SUKARDI, *supra* note 381, at 142.

384. SUKARDI, *supra* note 381, at 139–40.

385. *See generally* MASTERS OF TERROR: INDONESIA'S MILITARY AND VIOLENCE IN EAST TIMOR (Richard Tanter, Gerry van Klinken, & Desmond Ball, eds., 2006) [hereinafter MASTERS OF TERROR]; RABASA AND HASEMAN, *supra* note 380, at 38–41.

386. *List of Major Incidents: East Timor, 1999, in* MASTERS OF TERROR: INDONESIA'S MILITARY AND VIOLENCE IN EAST TIMOR xxxv-xxxvi (Richard Tanter, Gerry van Klinken, & Desmond Ball, eds., 2006); INVESTIGATIVE COMMISSION ON ABUSES OF HUMAN RIGHTS IN EAST TIMOR, *FULL REPORT OF THE INVESTIGATIVE COMMISSION INTO HUMAN RIGHTS VIOLATIONS IN EAST TIMOR, in* MASTERS OF TERROR: INDONESIA'S MILITARY AND VIOLENCE IN EAST TIMOR 37, 52-53, 58 (Richard Tanter, Gerry van Klinken, & Desmond Ball, eds., 2006).

rights violations, including sexual crimes, across the nation.[387] The government has established several courts to hear allegations of human rights violations against Indonesian military and civilians, yet the application of laws by these courts has been uneven.[388]

Prostitution is not illegal in Indonesia.[389] There also is no crime of marital rape in Indonesia.[390] The crime of rape is defined by the Indonesian Penal Code as: "Anybody who is having sexual intercourse by force or threat or enforcing a woman to commit adultery with out marriage will be punished with imprisonment up to 12 years."[391] Child prostitution is not a recognized crime in Indonesia.[392] Indonesia is in the second tier of the U.S. human trafficking assessments in 2007.[393] There are no refugee camps located within Indonesia's borders.[394]

N. Ireland

Ireland has an all volunteer military service starting at age seventeen.[395] Ireland has retained the crime of buggery on the national level.[396] Prostitution is illegal in Ireland.[397] Rape is a crime in Ireland[398] as is marital rape as of 1990.[399] Sexual assault and aggravated sexual assault also exist as crimes under the Irish Criminal Law (Rape) Act.[400] The definition of rape under Irish civilian law and the trial procedure for a rape complaint are

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387. Suzannah Linton, *Accounting for Atrocities in Indonesia*, 10 SING. Y.B. INT'L L. 199 (2006).

388. *Id.* at 204-05

389. Koyama & Myrttinen, *supra* note 2, at 33.

390. *See* Leah Riggins, *Criminalizing Marital Rape in Indonesia*, 24 B.C. THIRD WORLD L.J. 421, 422 (2004) (reviewing VIOLENCE AGAINST WOMEN IN ASIAN SOCIETIES (Lenore Manderson & Linda Rae Bennett eds., 2003)).

391. NATIONAL LAWS, LEGISLATION OF INTERPOL MEMBER STATES ON SEXUAL OFFENCES AGAINST CHILDREN, INDONESIA 1 (2006) *available at* http://www.interpol.int/Public/Children/SexualAbuse/NationalLaws/csaIndonesia.pdf (last visited May 14, 2008) (summarizing Indonesian Penal Code, art. 285).

392. *See id.* at 2 (explaining that while "no special legal provisions exist" to punish child prostitution, other laws "can be applied").

393. U.S. DEPT. OF STATE, *supra* note 24, at 42.

394. *See* U.N. HIGH COMM'R, *supra* note 192, at 368.

395. CIA, IRELAND, *supra* note 81.

396. CRIMINAL LAW (SEXUAL OFFENCES) ACT, 1993, § 3 (Ir.).

397. *Id.* §§ 9-11.

398. CRIMINAL LAW (RAPE) ACT, 1981 § 2 (Ir.).

> A man commits rape if – (a) he has unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it and (b)at that time he knows that she does not consent to the intercourse or he is reckless as to whether she does or does not consent to it.

Id.

399. CRIMINAL LAW (RAPE) (AMENDMENT) ACT, 1990 §§ 5 (Ir.).

400. *Id.* §§ 2-3.

essentially the same under the Defence Act as well.[401] No information on Ireland's placement in the tier system used by the U.S. State Department is available.[402] Ireland does not have refugee camps located within its borders.[403]

O. Italy

Compulsory military service in Italy ceased in 2005.[404] Now, the Italian military is entirely voluntary, with men and women ages eighteen to twenty-seven eligible to enter service.[405]

Rape in Italy is defined as forced sexual intercourse compelled through violence, threats, misrepresentation, or abuse of the perpetrator's authority.[406] Age of the victim, the relationship of the perpetrator to the victim, and whether the perpetrator is a public servant are aggravating factors for punishment.[407] Gang rape is a separate crime involving more stringent punishment.[408] Sexual relations with a minor are also illegal in Italy.[409] Child prostitution and sex-tourism involving minors are both illegal under the Italian Penal Code.[410] The Penal Code specifies that sex crimes committed by Italian citizens abroad are subject to trial in Italy through an expansive extra-territorial jurisdiction statute.[411] Italian military personnel can be subject to military or criminal jurisdiction for crimes which would fall under one or both.[412] Italy is in the first tier of the U.S. human trafficking assessments in 2007.[413] There are no refugee camps located within Italy.[414]

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401. *Id.* § 19.
402. *See* U.S. DEPT. OF STATE, *supra* note 24, at 42.
403. *See* U.N. HIGH COMM'R, *supra* note 192, at 372.
404. CIA, ITALY, *supra* note 82.
405. *Id.*
406. NATIONAL LAWS, LEGISLATION OF INTERPOL MEMBER STATES ON SEXUAL OFFENCES AGAINST CHILDREN, ITALY 1 (2006) *available at* http://www.interpol.int/Public/Children/SexualAbuse/NationalLaws/csaItaly.pdf (last visited May 14, 2008) (summarizing and reprinting portions of [Code Pénal Italien] C.P. [Penal Code], art. 609 (Italy)) (*translated by* author).
407. *Id.* at 2 (summarizing and reprinting portions of C.P., art. 609-3).
408. *Id.* at 2 (summarizing and reprinting portions of C.P., art. 609-8).
409. *Id.* at 2-3 (summarizing and reprinting portions of C.P., art. 609).
410. *Id.* at 3-4 (summarizing and reprinting portions of C.P., art. 600 bis).
411. *Id.* at 6 (summarizing and reprinting portions of C.P., art. 604).
412. Jorg Luther, *Military Law in Italy, in* EUROPEAN MILITARY LAW SYSTEMS 494-95 (Georg Nolte ed. 2003).
413. U.S. DEPT. OF STATE, *supra* note 24, at 42.
414. *See* U.N. HIGH COMM'R, *supra* note 192, at 378.

P. Jordan

Conscription in Jordan ended in 1999 and its military forces are now all-volunteer after age seventeen, although all men are required to register their eligibility until age thirty-seven.[415] Women are allowed to volunteer to serve in non-combat positions.[416]

Allegations of rape dogged the Jordanian mission to UNTAET – including an allegation of rape during the contingent's layover before arriving in East Timor.[417] Unsubstantiated claims that these peacekeepers were identified, repatriated, and then executed have been advanced but there is not evidence to support these claims.[418]

The Jordanian penal code uses an element of intent for rape which, as some have posited, can be an exculpatory element for the rapist if a court determines that the victim "enticed" the rapist in some capacity.[419] The crime of rape itself is defined under Jordanian law as: "Whoever has sexual intercourse with a woman (other than his wife) without her consent whether by force, intimidation, trickery or deception shall be sentenced to a term of imprisonment of not less than 10 years. Whoever rapes a woman under 15 shall be sentenced to death."[420] Other relevant provisions of Jordanian law include indecent assault.[421] Child prostitution is illegal under Jordanian law.[422] Rape, or the allegation thereof, is one of the many grounds which have been used to justify honor killings of the victim in Jordan.[423] The guilt of a rapist may be absolved if he marries the victim.[424] Some of these and other legal

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415. CIA, JORDAN, *supra* note 83.

416. *Id*.

417. Koyama & Myrttinen, *supra* note 2, at 36-37.

418. *See id*.

419. *See* AMIRA EL-AZHARY SONBOL, WOMEN OF JORDAN: ISLAM, LABOR AND THE LAW 27-28 (2003).

420. NATIONAL LAWS, LEGISLATION OF INTERPOL MEMBER STATES ON SEXUAL OFFENCES AGAINST CHILDREN, JORDAN 1 (2006) *available at* http://www.interpol.int/Public/Children/SexualAbuse/NationalLaws/csaJordan.pdf (last visited May 14, 2008) (summarizing and reprinting portions of Jordanian Penal Code, art. 292).

421. *Id*. at 1-2 (summarizing and reprinting portions of Jordanian Penal Code, arts. 296, 298). "Whoever by use of violence or intimidation commits an indecent act on an individual shall be sentenced to a term of imprisonment of not less than 4 years." *Id.* at 1 (summarizing and reprinting portions of Jordanian Penal Code, art. 296). "Whoever without violence or intimidation commits an indecent act on a child under 15 years old or persuades him/her to commit an indecent act shall be sentenced to a term of imprisonment with hard labour." *Id.* at 2 (summarizing and reprinting portions of Jordanian Penal Code, art. 298).

422. *Id*. at 3 (summarizing and reprinting portions of Jordanian Penal Code, art. 310).

423. SONBOL, *supra* note 419, at 28.

424. *Id*. at 187.

restrictions on the rights and freedoms of women in Jordan are tracked to the traditions of the various tribal groups existing in Jordan.[425] There is no crime of marital rape in Jordan.[426] Under the terms of Jordanian law, it would be very difficult – if not impossible – for the mother of a child born to her as the result of a relationship with a deployed Jordanian peacekeeper to establish Jordanian citizenship for the child without the father's acknowledgement.[427]

Under the terms of the Jordanian penal code, children may only bring allegations of criminality of any kind – sexual or otherwise – when supported by their parents or legal guardians.[428] Honor crimes, especially killings, have plagued Jordanian law and society.[429] Despite recent attempts to reform the legal system – which garnered the support of the royal family and particularly Queen Noor – the Jordanian parliament has not enacted the thorough legislation which has been advocated to completely eradicate these practices.[430] In this context, it is especially important to note that the blame for rape in many sectors of Jordanian society will – legally and socially – fall on the victim, while the rapist will often suffer no consequences as the result of his actions.[431] Additionally, it is important to note that, while women can be accused of and punished for adultery under the Jordanian penal code on the accusation of their male relatives or husband, a female relative or wife cannot successfully accuse their male relative or husband of the crime of adultery unless he appears with his mistress in public.[432] Divorce is easily available to Jordanian males but extremely difficult for Jordanian females.[433] Jordan is in the second tier of the U.S. human trafficking

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425. *Id*. at 37-38, 41, 43.

426. *Id*. at 203.

427. JOSEPH A. MASSAD, COLONIAL EFFECTS: THE MAKING OF NATIONAL IDENTITY IN JORDAN 36-39 (2001).

428. *See* WORLD CONGRESS AGAINST COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN, YOKOHAMA REPORT, REGIONAL ANALYSES, SUMMARY OF SITUATION IN THE MIDDLE EAST AND NORTH AFRICA (2001) [hereinafter YOKOHAMA REPORT], *available at* http://www.csecworldcongress.org/PDF/en/Yokohama/Background_reading/Regional_analyses/Summary%20situation%20in%20MEast%20&%20NAfrica_EN.pdf (last visited May 14, 2008).

429. Kathryn Christine Arnold, *Are the Perpetrators of Honor Killings Getting Away With Murder? Article 340 of the Jordan Penal Code Analyzed Under the Convention on the Elimination of all Forms of Discrimination Against Women,* 16 AM. U. INT'L L. REV. 1343 (2001).

430. SONBOL, *supra* note 419, at 190-91.

431. Arnold, *supra* note 429, at 1347, n.16.

432. SONBOL, *supra* note 419, at 198.

433 *Id*. at 137, 152.

assessments in 2007.[434] There are no active refugee camps in Jordan.[435]

Q. Morocco

Moroccans are under a conscription requirement for eighteen months once they turn eighteen years old.[436] Outside of the conscription requirement, Moroccans may also volunteer for military service starting at age eighteen.[437] In 2005, the Moroccan government arrested six of its peacekeepers for alleged sexual assault on the local population in the Democratic Republic of the Congo pending a court-martial inquiry.[438]

Once the subject of a formal charge under the military code, a Moroccan soldier is provided protections, key among them evidentiary requirements for any charge.[439] Interestingly, there are several articles of the Moroccan military code of justice devoted to penalties in the event of pillaging by Moroccan soldiers.[440] Rape and other sexual crimes are not addressed specifically in the Moroccan code of military justice.[441] Rather, the it provides that acts which are not enumerated under the military code but which would still be classified as criminal under the Moroccan penal code are likely punishable under the military code.[442] Similarly, the penal code explicitly states that a prosecution under the penal code does not bar a prosecution under the military code.[443]

The penal code creates several lesser classes of sexual offense, such as the kidnapping of a child under age fifteen for a criminal offense.[444] The crime of rape is defined as the act of a man having sexual relations with a woman against her will and is punishable by between five and ten years in prison.[445] The same act involving a girl under fifteen is punishable by ten to twenty years in prison.[446] Any unlawful sex act which would otherwise be

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434. U.S. DEPT. OF STATE, *supra* note 24 at 42.
435. *See* U.N. HIGH COMM'R, *supra* note 192, at 384.
436. CIA, MOROCCO, *supra* note 84.
437. *Id*.
438. *UN welcomes Morocco's arrest of 6 of its peacekeepers for sexual assault in the DR of Congo*, UN NEWS SERVICE, Feb. 14, 2005, *available at* www.un.org/apps/news/printnewsAr.asp?nid=13342 (last visited May 14, 2008).
439. CODE DE JUSTICE MILITAIRE, ch. III, V (Morocco) (*translated by* author).
440. *Id*. art. 169.
441. *See generally id.*
442. *Id*. ch. XII.
443. *Id*. art. 200.
444. *Id*. arts. 484, 485.
445. *Id*. art. 486.
446. *Id*.

punishable under the penal code and involves a virgin girl is intended to result in an increased punishment.[447] Lesser sexual offenses are punishable by several months to several years in prison.[448] Sexual relations outside of marriage and adultery are each punishable offenses as well.[449] Prostitution, facilitation of prostitution, and patronizing prostitutes are all punishable offenses under the Moroccan penal code.[450] There is no crime of spousal rape in Morocco[451] and spousal abuse tends to be treated leniently at law.[452] Paternity runs solely through the father under Moroccan law and the failure of a father to register a child makes it exceedingly difficult for the child to ever obtain citizenship or enjoy rights of registered children.[453] Morocco does not have specific anti-trafficking laws, instead prosecuting those involved in trafficking with prostitution and related offenses.[454] Rape may be a capital offense under Moroccan law where the victim is a child and ultimately dies as a result of the attack.[455]

Despite these penalties, it appears that reports of rape and other sexual offenses in Morocco are extremely low compared to the estimated incidences of these crimes.[456] The social stigma attached to a rape victim and her family is very high and, to counter some of the stigma, the victim's family has the right to offer the victim to the rapist in marriage to erase the stain.[457] Child sexual abuse has been identified as increasing in Morocco.[458] Under King Mohammed IV, there has been a push to recast the rights and role of women in Moroccan society to provide for greater equality; however, these attempts have been largely fruitless over

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447. *Id*. art. 488.
448. *Id*. art. 489.
449 . *Id*. arts. 490-92.
450. *Id*. arts. 497-504.
451. CRIME & SOCIETY, A COMPARATIVE CRIMINOLOGY TOUR OF THE WORLD, AFRICA – MOROCCO, http://www-rohan.sdsu.edu/faculty/rwinslow/africa/morocco.html (last visited Mar. 18, 2008).
452. *Id*.
453. *Id*.
454. *Id*.
455. *See* Warrick, *supra* note 253.
456. *See* YOKOHAMA REPORT, *supra* note 428.
457. CRIME & SOCIETY, *supra* note 451.
458. *See* Imane Belhaj, *New Report Discusses Child Abuse in Morocco,* MAGHAREBIA, July 5, 2007, *available at* http://www.magharebia.com/cocoon/awi/xhtml1/en_GB/features/awi/features/2007/07/05/feature-02 (last visited May 14, 2008)

time.[459] Morocco is in the first tier of the U.S. human trafficking assessments in 2007.[460] There are no refugee camps in Morocco.[461]

R. Nepal

The Nepalese military is comprised solely of volunteers, who are eligible for service at eighteen years old.[462] The Nepalese Army has been and continues to be linked to human rights abuses in conjunction with its long fight against Maoist insurgents.[463] In 2006, legislative attempts to reform the extant Army Act were made in Nepal, however many were concerned that these proposed reforms would allow the military to act with greater impunity when dealing with civilians there.[464]

The standard punishment for rape in Nepal is a prison sentence of three to five years, although prosecution of rape as a crime is very rare.[465] A 2004 court decision in Nepal recognized marital rape as a crime, however there has not to date been legislation to codify this finding.[466] In general, Nepali women are legally, societally, economically and politically discriminated against even under the most recent legal reforms.[467] Child prostitution is a crime in Nepal.[468] Bigamy is legal in Nepal.[469]

Nepal is in the second tier of the U.S. human trafficking assessments in 2007.[470] Despite this classification, Nepal is widely regarded as a major sending and receiving state in the traffic of human beings.[471] Other sources indicate that Nepal is rife with

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459. *See* Anita McNaught, *The King and the Sheik's Daughter*, BBC NEWS, Mar. 28, 2002, *available at* http://news.bbc.co.uk/2/hi/programmes/correspondent/1899478.stm (last visited May 14, 2008).

460. U.S. DEPT. OF STATE, *supra* note 24, at 42.

461. *See* U.N. HIGH COMM'R, *supra* note 192, at 426.

462. CIA, NEPAL, *supra* note 85.

463. MAHENDRA LAWOTI, TOWARDS A DEMOCRATIC NEPAL: INCLUSIVE POLITICAL INSTITUTIONS FOR A MULTICULTURAL SOCIETY 60 (2005).

464. *See* INT'L COMM'N OF JURISTS, NEPAL: RECOMMENDATIONS FOR AMENDMENTS TO THE DRAFT ARMY ACT (2006), *available at* http://www.icj.org/IMG/ICJ_report.pdf (last visited May 14, 2008).

465. Suzanne Sidun, *An End to the Violence: Justifying Gender as a "Particular Social Group"*, 28 PEPP. L. REV. 103, 108 (2000).

466. *See* Ogletree & de-Alwis, *supra* note 289, at 279.

467. LAWOTI, *supra* note 463, at 100–01; FORUM FOR WOMEN LAW AND DEV., AN UPDATE OF DISCRIMINATORY LAWS IN NEPAL AND THEIR IMPACT ON WOMEN, *available at* http://www.fwld.org/pdf_files/discriminatory%20Laws.pdf (last visited May 14, 2008).

468. *See* NATIONAL LAWS, LEGISLATION OF INTERPOL MEMBER STATES ON SEXUAL OFFENCES AGAINST CHILDREN, NEPAL 1 (2006), *available at* http://www.interpol.int/Public/Children/SexualAbuse/NationalLaws/csaNepal.pdf (last visited May 14, 2008) (summarizing Nepalese laws concerning rape and child sex offenses).

469. *See* FORUM FOR WOMEN, *supra* note 467, at 8.

470. U.S. DEP'T. OF STATE, *supra* note 26, at 42.

471. Lethi & Aromaa, *supra* note 203.

trafficking – as a point of origin especially – and that much of this trafficking involves women and young girls who will ultimately become prostitutes and be exposed to other forms of sexual slavery.[472] In cases where trafficked women and girls have been returned to their homes, they have faced massive social stigmas because of their experiences.[473] Additionally, it is established that girls in what are viewed as lower classes in Nepal are more frequently made into prostitutes as a result of their status.[474] Overall, the Nepalese domestic legal system and the societal constructs it reflects places little to no value on women as part of a family unit or society generally.[475] In the author's view, this creates a society of men and women which has a one-sided perception of the human trafficking and its associated issues – rape, prostitution, etc. – in that the trafficker, rapist, and other perpetrators are not called to account in Nepal and the only understanding of culpability in society is placed with the returned victims. Thus, troops who have and would commit sexual abuses against the populations of the host states do not see the stigma of being the perpetrator because, although the law might create such a stigma, it is not frequently enforced and is not understood as a reflection of societal beliefs.

Additionally, it should be noted that Nepal currently houses approximately one hundred thousand refugees in refugee camps located within its borders.[476] These camps have not been well-guarded by the Nepali government and, as a result, have been the site of violence.[477] These camps have been particularly threatening and damaging to Bhutanese women who have sought refuge in them.[478]

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472. *See* Beverly Balos, *The Wrong Way to Equality: Privileging Consent in the Trafficking of Women for Sexual Exploitation*, 27 HARV. WOMEN'S L.J. 137 (2004); John Frederick, *The Status of Care, Support and Social Reintegration of Trafficked Persons in Nepal, as of December 2005*, 14 TUL. J. INT'L & COMP. L. 317 (2006); Philip M. Nichols, *Trade Without Values*, 90 NW. U. L. REV. 658, n.305 (1996).

473. *See* Frederick, *supra* note 472, at 320.

474. Savitri Goonesekere, *Overview: Reflections on Violence against Women and the Legal Systems of some South Asian Countries, in* VIOLENCE, LAW AND WOMEN'S RIGHTS IN SOUTH ASIA, 19-20 (Savitri Goonesekere ed., 2004); YUBARAJ SANGROULA, NEPALESE LEGAL SYSTEM: HUMAN RIGHTS PERSPECTIVE 172-77 (2005).

475. SANGROULA, *supra* note 474, at 176.

476. *See* U.N. HIGH COMM'R, *supra* note 192, at 434.

477. *See* HUMAN RIGHTS WATCH, NEPAL: BHUTANESE REFUGEE TENSIONS ERUPT INTO VIOLENCE, May 31, 2007, *available at* http://hrw.org/english/docs/2007/05/31/bhutan16034.htm (last visited May 17, 2008).

478. *See* HUMAN RIGHTS WATCH , TRAPPED BY INEQUALITY: BHUTANESE REFUGEE WOMEN IN NEPAL 8-11 (2003), *available at* http://www.hrw.org/reports/2003/nepal0903/nepal0903full.pdf (last visited May 17, 2008).

S. Netherlands

The Netherlands has an entirely volunteer military force.[479] There are currently no military courts in the Netherlands and military personnel are tried in civilian courts regardless of the charge.[480] In 1995, Dutch peacekeepers were helpless to defend the Muslim population in and around Srebrenica and a large massacre occurred as a result; these peacekeepers maintain that since they were under threat of harm at the time they could offer no assistance.[481] The Dutch military maintains its ability to try its members for crimes under the Military Criminal Code.[482]

The Netherlands is in the first tier of the U.S. human trafficking assessments in 2007.[483] Prostitution was legalized in the Netherlands in 2000.[484] Rape in the Netherlands is defined as:

> [a] person who by an act of violence or another act or by threat of violence or threat of another act compels a person to submit to acts comprising or including sexual penetration of the body is guilty of rape and liable to a term o[f] imprisonment of not more than twelve years or a fine[…][485]

Sexual acts with those under age sixteen are criminal in the Netherlands,[486] as is indecent assault,[487] committing a sexual offense which results in serious bodily harm or death to the

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479. CIA, NETHERLANDS, *supra* note 86.

480. *See* INT'L COMM'N OF JURISTS, MILITARY COURTS AND GROSS HUMAN RIGHTS VIOLATIONS 294 (2004), *available at* http://www.icj.org/IMG/pdf/Trib._mil._ENG-_part_II.pdf (last visited May 17, 2008).

481. *See* Radul Radovanovic, *Former Dutch Peacekeepers Return to Site of Srebrenica Massacre*, INT'L HERALD TRIBUNE, Oct. 17, 2007, *available at* http://www.iht.com/articles/2007/10/17/europe/17serbs.php (last visited May 17, 2008).

482. Leonard F.M. Besselink, *Military Law in the Netherlands, in* EUROPEAN MILITARY LAW SYSTEMS 629-31 (Georg Nolte ed. 2003).

483. U.S. DEPT. OF STATE, *surpa*, note 24, at 42.

484. Janet Halley et al., *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J.L. & GENDER 335, 362 (2006).

485. NATIONAL LAWS, LEGISLATION OF INTERPOL MEMBER STATES ON SEXUAL OFFENCES AGAINST CHILDREN, NETHERLANDS 1 (2006) *available at* http://www.interpol.int/Public/Children/SexualAbuse/NationalLaws/csaNetherlands.pdf (last visited May 14, 2008) (reprinting portions of Wetboek van Strafrecht [SR] [Criminal Code], art. 242 (Neth.)).

486. *Id*. at 1-2 (reprinting portions of SR, arts. 244 -45).

487. *Id*. at 2 (reprinting portions of SR, art. 246).

> A] person who by an act of violence or another act or by threat of violence or threat of another act compels another person to perform or submit to indecent acts is guilty of indecent assault and is liable to a term of imprisonment of not more than eight years or a fine[…]

Id.

victim,[488] and abusing a position of authority to procure sexual favors from a minor.[489] Child prostitution and trafficking is illegal in the Netherlands.[490] There are no refugee camps located within the Netherlands.[491]

T. Niger

Citizens of Niger are subject to a compulsory military service requirement of two years when they reach eighteen years of age.[492] Throughout the nation's history, Niger's military has played an important part in shaping the government and political structure through coups and general influence.[493] This role transmuted into the various legal ordinances and structures which have developed during the country's history.[494] Niger is and has been the site of internal conflict between the state and the Tuareg rebels.[495] Niger is in the second tier of the U.S. human trafficking assessments in 2007.[496] There are no refugee camps currently active in Niger.[497]

U. Nigeria

Nigeria's military is a volunteer force which one may enter at age eighteen after having had an HIV/AIDS test.[498] However, Nigeria does not require repeat AIDS tests and it has been established that an increasing number of Nigerian peacekeepers are returning home with HIV/AIDS.[499] The Nigerian military has been implicated in long-term actions against its own people depending on the political will of the current regime.[500]

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488. *Id*. at 2 (reprinting portions of SR, art. 248).
489. *Id*. at 2 (reprinting portions of SR, art.248 ter).
490. *Id*. at. 3-4 (reprinting portions of SR, art.250 ter).
491. *See* U.N. HIGH COMM'R, *supra* note 192, at 436.
492. CIA, NIGER, *supra* note 87.
493. *See generally* SANOUSSI TAMBARI JACKOU, AFFAIRES CONSTITUTIONNELLES ET ORGANIZATION DES POUVOIRS AU NIGER (2000) (*translated by* author).
494. *Id*.
495. *See MSF forced out of northern Niger*, BBC NEWS, Oct. 24, 2007, *available at* http://news.bbc.co.uk/2/hi/africa/7060621.stm (last visited May 14, 2007); *Tuareg rebels seize Niger troops*, BBC NEWS, Sept. 7, 2007, *available at* http://news.bbc.co.uk/2/hi/africa/6983929.stm (last visited May 14, 2007).
496. U.S. DEP'T OF STATE, *supra* note 24, at 42.
497. *See* U.N. HIGH COMM'R , *supra* note 192, at 442.
498. CIA, NIGERIA, *supra* note 88.
499. *See* Sarin, *supra* note 63.
500. *See* 'EMEKA NWAGWU, TAMING THE TIGER: CIVIL-MILITARY RELATIONS REFORM AND THE SEARCH FOR POLITICAL STABILITY IN NIGERIA 76-78 (2002).

There is no specific crime of rape or other sexual misconduct in the Nigerian Army Act.[501] The Act does, however, provide that a civil violation will also be classified as a violation of the Act when a conviction arises.[502] Potential violations of the Act for conduct such as that proven and alleged against Nigerian peacekeepers would be limited to "scandalous conduct of an officer" ("every officer subject to military law under this Act who behaves in a scandalous manner, unbecoming the character of an officer and a gentleman, shall, on conviction by court-martial, be cashiered.")[503] or "disgraceful conduct" ("any person subject to military law under this Act who is guilty of disgraceful conduct of cruel, indecent or unnatural kind shall, on conviction by court-martial, be liable to imprisonment for a term not exceeding two years or less punishment provided by this Act.").[504] The evidentiary laws to be applied by courts martial are the same as those applied in civil courts in the Nigerian capital city of Abuja.[505] Generally, the intent of the Nigerian Military Code that offenses involving people and property outside of the confines of the military will be tried by a civilian court.[506] An exception is typically made for, among other things, rape.[507]

Internal U.N. documents have suggested that, while stationed at the U.N. Mission in Sierra Leone, officers from the Nigerian contingent were involved in diamond and drug smuggling activities.[508] The U.N. dismissed these activities because of the Nigerian contingent's ability to work effectively in Sierra Leone.[509]

Nigeria is in the second tier of the U.S. human trafficking assessments in 2007.[510] Nigeria and its armed forces have been implicated in extensive forms of human and other trafficking, calling into question the propriety of stationing these forces in areas where they have access to vulnerable – and often lonely – populations.[511] Indeed, Nigeria joins Morocco as being the two

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501. *See* Nigerian Army Act (1990).

502. *Id*. § 72. Some jurists believe that the vagueness of language used in this provision makes it a difficult provision to enforce at law. *See* DAVID M. JEMIBEWON, AN INTRODUCTION TO THE THEORY AND PRACTICE OF MILITARY LAW IN NIGERIA 34-35 (1989).

503. Nigerian Army Act, § 66 (1990).

504. *Id*. § 68.

505. *Id*. § 96.

506. JEMIBEWON, *supra* note 503, at 39.

507. *Id*.

508. Aning, *supra* note 114, at 144.

509. *Id*.

510. U.S. DEPT. OF STATE, *supra* note 24, at 42.

511. Melanie R. Wallace, *Voiceless Victims: Sex Slavery and Trafficking of African Women in Western Europe*, 30 GA. J. INT'L & COMP. L. 569 (2002).

largest export states of girls from Africa to Europe.[512] There are refugee camps located within Nigeria's borders.[513]

The Nigerian Criminal Code defines the crime of rape as:

> Any person who has unlawful carnal knowledge of a woman or girl without her consent or with her consent, if the consent is obtained by force or by means of threats or intimidation of any kind, or by fear of harm or by means of false and fraudulent representations as to the nature of the act, or, in the case of a married woman by personating her husband, is guilty of a crime which is called rape.[514]

Other relevant crimes include "unnatural offenses,"[515] "indecent treatment of boys under fourteen,"[516] "indecent practices between males,"[517] "defilement of girls under sixteen and above thirteen and of idiots,"[518] and "persons trading in prostitution."[519] There is no crime of marital rape under the Nigerian Criminal Code.[520] The use of Shari' a courts in portions of Nigeria, and the codes and mores which these courts apply, create a situation of unequal justice for victims of sexual violence because these crimes

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512. Lethi & Aromaa, *supra* note 203.

513. *See* U.N. HIGH COMM'R, *supra* note 192, at 444.

514. J. ADEMOLA YAKUBU & A. TORIOLA OYEWO, CRIMINAL LAW AND PROCEDURE IN NIGERIA 172 (2000) (citing Nigerian Criminal Code, § 157).

515. *Id*. at 182 (citing Nigerian Criminal Code, § 214).

> [A]ny person who 1) has carnal knowledge of any person against the order of nature; or 2) has carnal knowledge of an animal; or 3) permits a male person to have carnal knowledge of him or her against the order of nature: is guilty of a felony, and is liable to imprisonment for 14 years.

Id.

516. *Id*. at 184 (citing Nigerian Criminal Code, § 216). "[A]ny person who unlawfully and indecently deals with a boy under the age of 14 years is guilty of a felony and is liable to imprisonment for 7 years." *Id.*

517. *Id*. at 184-85 (citing Nigerian Criminal Code, § 217).

> [A]ny male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him or attempts to procure the commission of any such act by any male person with himself or with another male person whether in public or private, is guilty of a felony, and is liable to imprisonment for three years.

Id.

518. *Id*. at 186 (citing Nigerian Criminal Code, § 221).

> [A]ny person who 1) has or attempts to have unlawful carnal knowledge of a girl being of or above eleven years and under thirteen years of age; or 2) knowing a woman or girl to be an idiot or imbecile, has or attempts to have unlawful knowledge of her; is guilty of a misdemeanor, and is liable to imprisonment for two years, with or without whipping.

Id.

519. *Id*. at 187 (citing Nigerian Criminal Code, § 225(A)).

520. *Id*. at 173.

are treated differently under Shari' a law.[521] Additionally, the use of customary law in the area or among the peoples involved can be considered in addition to the statutory requirements and factors for the establishment of a crime.[522] Commentators have noted that much of the rule of law process in Nigeria has been undermined by an overall culture of political and economic corruption.[523]

V. Pakistan

Pakistan has an all-volunteer military.[524] Citizens are eligible to volunteer beginning at age sixteen but are not allowed into combat until age eighteen.[525] Limited participation of women is also allowed.[526]

The technical application of the terms of the Pakistan Army Act to Pakistani soldiers deployed on peacekeeping missions is questionable in that they are not actively used to fight an enemy, which is the key definitional element to the term "active service."[527] There is no specific crime of rape or sexual misconduct under the Pakistan Army Act.[528] Theoretically, there are several other infractions under the Act which could be made applicable to errant Pakistani peacekeepers. One such infraction could be "offences against property or persons of inhabitant of country where serving," which states: "any person subject to this Act who, on active service, commits an offense against the property or person of any inhabitant of, or resident in, the country in which he is serving shall, on conviction by court martial, be punished with

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521. *See generally* Elizabeth Peiffer, Note, *The Death Penalty in Traditional Islamic Law and as Interpreted in Saudi Arabia and Nigeria*, 11 WM. & MARY J. WOMEN & L. 507 (2005); Kia N. Roberts, Note, *Constitutionality of Shari' a Law in Nigeria and the Higher Conviction Rate of Muslim Women Under Shari' a Fornication and Adultery Laws*, 14 S. CAL. REV. L. & WOMEN'S STUD. 315 (2005); *Nigerian Sharia court bans play*, BBC NEWS, Oct. 8, 2007, *available at* http://news.bbc.co.uk/2/hi/africa/7033502.stm (last visited May 14, 2008).

522. CHARLES MWALIMU, THE NIGERIAN LEGAL SYSTEM VOL. 1, PUBLIC LAW 139, 144-45 (2005).

523. *See* 'EMEKA O.C. NWAGWU, A PROPOSAL FOR THE RE-FOUNDING OF NIGERIA: WHAT TO DO AFTER THE TOTAL COLLAPSE OF AN AFRICAN STATE 242-45 (2006).

524. CIA, PAKISTAN, *supra* note 89.

525. *Id*.

526. *Id*.

527. M.A. LATIF, THE MARTIAL LAW: REGULATIONS AND ORDERS WITH PAKISTAN ARMY ACT AND RULES, COMMENTARY 5 (1969) (reprinting Pakistan Army Act, § 8(1)).

> T]he time during which such person is attached to or, forms part of a force which is engaged in operations against an enemy, or is engaged in military operations in, or is on the line of march to, a country or place wholly or partly occupied by an enemy, or is attached to or forms part of a force which is in military occupation of a foreign country.

Id.

528. *See id*.

rigorous imprisonment for a term . . . [of] fourteen years, or with less punishment."[529] There are two issues with this infraction as applied to peacekeepers. First, it requires that the soldier in question be classed as serving on "active service." Second, since many peacekeepers are deployed to refugee camps located in countries in which potential victims do not inhabit and can advance no claim to residency, jurisdiction would be doubtful. Another option would be prosecution for "certain forms of disgraceful conduct," which entails, in relevant part, being "guilty of any disgraceful conduct of a cruel, indecent or unnatural kind."[530] The essential elements of this crime however, are undefined. An additional option would be "unbecoming behaviour," defined as "any officer, junior commissioned officer or warrant officer, who behaves in a manner unbecoming his position and the character expected of him shall, on conviction by court-martial be . . . dismissed from the service or suffer such less punishment as is in this Act mentioned."[531] Even if such charges were advanced, the standard paucity of U,N.-generated evidence would likely result in exclusion of key evidence under the evidentiary rules used for Pakistani military trials.[532]

Throughout the history of the Pakistani state, the military has been heavily involved in the political, societal, and legal affairs of the nation.[533] Indeed, it was during a military regime that the current Islam-centric laws which are seen by many as discriminatory to women – especially in the area of sex crimes – were instituted.[534]

Pakistan is in the second tier of the U.S. human trafficking assessments report in 2007.[535] Despite this classification, Pakistan is widely regarded as a major sending and receiving state in the traffic of human beings.[536] As of 2005, Pakistan housed an estimated one million refugees in refugee camps within its borders.[537]

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529. *Id*. at 10 (reprinting Pakistan Army Act, § 27).

530. *Id*. at 23 (reprinting Pakistan Army Act, § 41).

531. *Id*. at 28 (reprinting Pakistan Army Act, § 52).

532. *Id.* at 103-47 (reprinting Pakistan Army Act Rules, §§ 19-133).

533. *See generally* HASAN-ASKARI RIZVI, MILITARY, STATE, AND SOCIETY IN PAKISTAN (2000).

534. *Id*. at 170-71; VEENA KUKREJA, CIVIL-MILITARY RELATIONS IN SOUTH ASIA: PAKISTAN, BANGLADESH AND INDIA 88-89 (1991); HUSAIN HAQQANI, PAKISTAN: BETWEEN MOSQUE AND MILITARY 144-47 (2005).

535. U.S. DEPT. OF STATE, *supra* note 24, at 42.

536. Lehti and Aromaa, *supra* note 203, at 208-09.

537. *See* U.N. HIGH COMM'R, *supra* note 192, at 452.

Domestic abuse of all types is rampant in Pakistan and yet the authorities are reluctant to do anything to stop it.[538] Although there are laws geared toward protecting victims of domestic violence and rape, the rape victim – be she married to the rapist or not – faces the knowledge that she can be convicted of adultery if the accused is not convicted.[539] Additionally, there are well established patterns of police abusing women so that they will not file complaints about rape and domestic violence, further creating a culture of intimidation which defies the terms of Pakistan's penal code.[540] Pakistan has only recently begun to prosecute rape cases in civil courts rather than Shari' a courts.[541] Regardless of the court, there are severe evidentiary requirements for crimes such as rape – including that there be four male witnesses – which drastically undercut the likelihood of success on any claim of rape or sexual misconduct.[542] Because Pakistan is a religious state, there have been increased problems in reconciling its criminal codes, which are secular in theory, with the application of Shari' a as is done by many courts when criminal cases are tried.[543] The use of rape as a tribal method to settle disputes between different tribes continues today despite the above sexual violence laws.[544] In one of the most famous cases of the use of gang rape to settle a dispute between families, the rapists were convicted of participating in the planned attack – on the order of a tribal council – and were later freed because of evidentiary issues and investigatory flaws.[545] Attempts at reforming the Pakistani legal system to be less discriminatory to women have met with much opposition from political leaders and society.[546]

Attacks on women for honor crimes and other perceived wrongs, for example by burning a woman with acid, have gained

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538. *See generally* Asifa Quraishi, *Her Honor: An Islamic Critique of the Rape Laws of Pakistan From a Woman-Sensitive Perspective*, 18 MICH. J. INT'L L. 287 (1997); Manar Waheed, Note, *Domestic Violence in Pakistan: The Tension Between Intervention & Sovereign Autonomy in Human Rights Law*, 29 BROOK. J. INT'L L. 937 (2004).

539. Quraishi, *supra* note 538.

540. *Id*.

541. Edward Babayan, *Legislative Watch*, 14 HUM. RTS. BR. 64 (2006).

542. Jessica Neuwirth, *Sex Discriminatory Laws: A Challenge to the Integrity of International Law*, 29 SUM HUMAN RIGHTS 3 (2002).

543. Goonesekere, *supra* note 474, at 56.

544. *See* Barbara Plett, *Trauma of Pakistan's rape victims*, BBC NEWS, Mar. 9, 2007, *available at* http://news.bbc.co.uk/2/hi/south_asia/6433357.stm (last visited May 14, 2008); Aamer Ahmed Khan, *Pakistan's justice system in spotlight*, BBC NEWS, Mar. 3, 2005, *available at* http://news.bbc.co.uk/2/hi/south_asia/4315491.stm (last visited May 14, 2008).

545. *See Pakistan rape case accused freed*, BBC NEWS, Mar. 15, 2005, *available at* http://news.bbc.co.uk/2/hi/south_asia/4351507.stm (last visited May 14, 2008).

546. *See Pakistan law change 'un-Islamic'*, BBC NEWS, Aug. 22, 2006, *available at* http://news.bbc.co.uk/2/hi/south_asia/5275998.stm (last visited May 14, 2008).

societal acceptance and are not heavily prosecuted.[547] Honor killings are a prevalent and persistent problem in Pakistan despite being illegal.[548] These crimes are exacerbated by a lack of enforcement by police and a sense of societal acceptance.[549] Domestic violence and associated crimes are rarely reported in Pakistan due largely to social factors; when they are reported, the police are typically inattentive to these types of complaints.[550]

W. Russian Federation

Russia has a mandatory conscription period of one year after age seventeen, although the concept of mandatory conscription is currently up for debate.[551] Russians have a reserve obligation to their military until they reach age fifty.[552] In Croatia, a Russian peacekeeper left his post after it was discovered that he was involved in operating a brothel there.[553] During its long-term presence in Chechnya, the Russian military has routinely been accused of individual and systematic atrocities against the local population, without active prosecution.[554]

The Russian Federation has enacted a code which governs the conduct of its military personnel when deployed on any type of international peacekeeping mission.[555] However, this code does not discuss any criminal sanctions or standards of conduct for Russian soldiers deployed on those peacekeeping missions.[556] Russian soldiers generally can be subject to civilian jurisdiction and army rules in the event of criminal conduct.[557]

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547. Kerri L. Ritz, Note, *Soft Enforcement: Inadequacies of Optional Protocol as a Remedy for the Convention on the Elimination of All Forms of Discrimination Against Women*, 25 SUFFOLK TRANSNAT'L L. REV. 191, 200-03 (2001).

548. Hina Jilani & Eman M. Ahmed, *Violence against Women: The Legal System and Institutional Responses in Pakistan, in* VIOLENCE, LAW AND WOMEN'S RIGHTS IN SOUTH ASIA, 152-60 (Savitri Goonesekere ed. 2004); Paul Anderson, *Pakistan 'honor killings' arrests*, BBC NEWS, Feb. 11, 2004, *available at* http://news.bbc.co.uk/2/hi/south_asia/3480321.stm (last visited May 14, 2008).

549. Jilani & Ahmed, *supra* note 548, at 155.

550. *Id*. at 180-81, 187 (detailing incidents of sexual and other abuse of women by police officers when they report crimes).

551. CIA, RUSSIA, *supra* note 90.

552. *Id*.

553. Bone, *supra* note 55.

554. *See generally* Stacie Powderly, Note, *Case Study Illustrating the Shortcomings of International Criminal Law: Chechnya*, 82 WASH. U.L.Q. 1553 (2004).

555. *See* FOUNDATION FOR POLITICAL CENTRISM, *On Procedure of Providing Civil and Military Personnel for Participation in the Activity of Maintenance or Restoration of the International Peace and Security by the Russian Federation*, *in* RUSSIAN FEDERATION LEGAL ACTS ON CIVIL-MILITARY RELATIONS 280 (2003).

556. *Id*.

557. *Id*.; FOUNDATION FOR POLITICAL CENTRISM, *On the Status of Military Persons*, *in* RUSSIAN FEDERATION LEGAL ACTS ON CIVIL-MILITARY RELATIONS 452 (2003).

The pre-trial and trial procedures required for any criminal action commenced in the Russian Federation are onerous and would likely be difficult to meet in the event of peacekeeper abuse allegations.[558] Russian definitions of crimes do not focus on definitional or elemental requirements and instead look to the gravity of the crime on society generally.[559] Domestic violence is a persistent and growing problem in Russia, as is sexual abuse of young children, yet the law is not structured to offer wide-ranging support or protections to victims.[560] Rape under Russian law is defined as: "sexual relations with application of force or with threat of its application to the victim or to other persons, or by making use of the helpless state of the victim,"[561] and is punishable by between three and six years in prison.[562] Marital rape per se does not exist under Russian law.[563] Prostitution is not a crime in Russia.[564] Forced acts of homosexuality,[565] sexual relations with children,[566] and "lewd conduct"[567] are crimes under Russian law. Child prostitution is illegal under Russian law.[568] Russia is in the second tier watch list of the U.S. human trafficking assessments in 2007.[569] There are no active refugee camps located in Russia's borders.[570]

X. Senegal

The age for both conscription and voluntary entry into the Senegalese military is age eighteen.[571] The conscription period is two years.[572]

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558. WILLIAM BURNHAM, PETER B. MAGGS & GENNADY M. DANILENKO, LAW AND LEGAL SYSTEM OF THE RUSSIAN FEDERATION ch. XI (2004).

559. *Id*. at 550-51.

560. Mertus, *supra* note 266.

561. NATIONAL LAWS, LEGISLATION OF INTERPOL MEMBER STATES ON SEXUAL OFFENCES AGAINST CHILDREN, RUSSIA 2 (2006) *available at* http://www.interpol.int/Public/Children/SexualAbuse/NationalLaws/csaRussia.pdf (last visited May 14, 2008) [hereinafter NATIONAL LAWS, RUSSIA] (summarizing and reprinting portions of Ugolovnyi Kodeks [UK] [Criminal Code] ch.18, art. 131 (Russ.)).

562. *Id*.

563. Mertus, *supra* note 265**.**

564. Scott Burris & Daniel Villena, *Adapting to the Reality of HIV: Difficult Policy Choices in Russia, China, and India*, 31 HUM. RTS. 10 (2004).

565. NATIONAL LAWS, RUSSIA, *supra* note 561, at 2 (summarizing and reprinting portions of UK, ch.18, art. 132 (Russ.)).

566. *Id*. at 2 (reprinting portions of UK, ch.18, art. 134 (Russ.)).

567. *Id*. at 3 (reprinting portions of UK, ch.18, art. 135 (Russ.)).

568. *Id*. at 3 (reprinting portions of UK, ch.18, art. 133 (Russ.)).

569. U.S. DEPT. OF STATE, *supra* note 24, at 42.

570. *See* U.N. HIGH COMM'R, *supra* note 192, at 474.

571. CIA, SENEGAL, supra note 91.

572. *Id*.

The Senegalese Penal Code defines rape as sexual intercourse of any nature committed against a person by violence, constraint, threats, or surprise, and makes the crime punishable by five to ten years in prison.[573] In the event that the victim suffers permanent injury or is subjected to a gang rape, the rapists' punishment can be doubled.[574] The Penal Code provides additional penalties for sexual crimes committed against children.[575] Child pornography[576] and corruption of a minor through sexual acts are also crimes.[577] Prostitution and enticement into prostitution are illegal.[578] Interestingly, prostitution and enticement to prostitution committed by persons with authority or power over the victim – including those who have control over state support mechanisms– is an additional crime.[579] Except in the instance of membership in a tribe which allows polygamy, adultery is a crime in Senegal and both parties are deemed culpable.[580] Senegal is in the second tier of the U.S. human trafficking assessments in 2007.[581] There are no refugee camps located within Senegal's borders.[582]

Y. Slovakia

Slovakia abolished conscription in 2006.[583] Currently, the minimum age for voluntary entry into the military is seventeen.[584] Women were first allowed into the military in 2006.[585]

The Slovakian Penal Code defines the crime of rape as: "any person, who by using violence or threat of imminent violence, forces a woman to have intercourse with him, shall be liable to a term of imprisonment of five to ten years."[586] The term of

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573. NATIONAL LAWS, LEGISLATION OF INTERPOL MEMBER STATES ON SEXUAL OFFENCES AGAINST CHILDREN, SENEGAL 1 (2006) *available at* http://www.interpol.int/Public/Children/SexualAbuse/NationalLaws/csasenegal.pdf (last visited May 14, 2008) (summarizing Code Pénal [C. PÉN.] [Penal Code], art. 320 (Sen.)) (*translated by* author).

574. *Id*.

575. *Id*. at 1, 3-4 (summarizing C. PÉN. arts. 319, 320 (Sen.)).

576. *Id*. at 2 (summarizing C. PÉN. art. 320 bis (Sen.)).

577. *Id*. at 1 (summarizing C. PÉN. art. 320 ter. (Sen.)).

578. *Id*. at 3 (summarizing C. PÉN. art. 323 (Sen.)).

579. C. PÉN. art. 324. (Sen.).

580. C. PÉN. arts. 330-31 (Sen.).

581. U.S. DEPT. OF STATE, *supra* note 24, at 42.

582. *See* U.N. HIGH COMM'R, *supra* note 192, at 482

583. CIA, SLOVAKIA, *supra* note 92.

584. *Id*.

585. *Id*.

586. NATIONAL LAWS, LEGISLATION OF INTERPOL MEMBER STATES ON SEXUAL OFFENCES AGAINST CHILDREN, SLOVAKIA 2-3 (2006) *available at* http://www.interpol.int/Public/Children/SexualAbuse/NationalLaws/csaSlovakia.pdf (last visited May 14, 2008) (reprinting portions of Criminal Code, § 199 (Slovk.)).

imprisonment for rape is subject to increase under certain circumstances, including if a victim is a "person under protection according to international law."[587] Other relevant crimes include sexual abuse generally,[588] sexual abuse of a minor,[589] and procuring a child for prostitution.[590] Slovakia is in the second tier of the U.S. human trafficking assessments in 2007.[591] There are no refugee camps located within Slovakia's borders.[592]

Z. South Africa

The South African military is entirely volunteer and open to men and women who are eighteen or older and who take an HIV/AIDS test.[593] The Code of Conduct for the South African military states that "I will not tolerate or engage in rape or looting."[594]

South Africa is in the second tier watch list of the US human trafficking assessments in 2007.[595] There are no refugee camps located within the borders of South Africa.[596]

The acceptance of marriage as an absolute defense to a rape charge was only recently abolished in South Africa.[597] Rape is defined as "the unlawful, intentional sexual intercourse with a woman without her consent."[598] The South African Penal Code also makes provisions for the lesser offense of "indecent assault."[599] Although domestic violence is estimated to be prevalent in South Africa, the legislature has enacted domestic violence legislation which aims to protect both the victim and children of the family.[600]

The prevalence of rape in South Africa – despite laws which criminalize it and a desegregated legal system which provides

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587. *Id*. (reprinting portions of Criminal Code, §§ 139, 199 (Slovk.)).
588. *Id*. at 3 (reprinting portions of Criminal Code, § 200 (Slovk.)).
589. *Id*. at 3-4 (reprinting portions of Criminal Code, § 201 (Slovk.)).
590. *Id*. at 4-5 (reprinting portions of Criminal Code, § 367 (Slovk.)).
591. U.S. DEPT. OF STATE, *supra* note 24, at 42.
592. *See* U.N. HIGH COMM'R, *supra* note 192, at 490
593. CIA, SOUTH AFRICA, *supra* note 93.
594. REPUBLIC OF SOUTH AFRICA, DEPARTMENT OF DEFENCE, CODE OF CONDUCT, *available at* http://www.dcc.mil.za/Code_of_Conduct/Files/English.htm (last visited May 14, 2008).
595. U.S. DEPT. OF STATE, *supra* note 24, at 42.
596. *See* U.N. HIGH COMM'R, *supra* note 192, at 496
597. Rebecca S. Katz, *Genocide: The Ultimate Racial Profiling*, 5 J. L. & SOC. CHALLENGES 65 (2003).
598. Jonathan Burchell, *Criminal Law, in* INTRODUCTION TO THE LAW OF SOUTH AFRICA 474 (C.G. der Merwe and Jacques E. du Plessis eds. 2004).
599. *Id*. at 477.
600. Brigitte Clark, *Family Law, in* INTRODUCTION TO THE LAW OF SOUTH AFRICA 164 – 66 (C.G. der Merwe and Jacques E. du Plessis eds. 2004).

more equal access to justice – cuts across all strata of society.[601] It is estimated that up to five hundred thousand rapes occur in South Africa each year.[602] At the same time, the rate of HIV/AIDS in South Africa has skyrocketed, making rape an even more dangerous and deadly crime for the victim.[603] Rape and other violent crimes committed by police also are regarded as prevalent.[604] South Africa has experienced issues in the uniform application of rape laws and sentencing over the past ten years.[605]

AA. Sri Lanka

The Sri Lankan military is entirely volunteer starting at age eighteen.[606] Due to the decades of domestic conflict in Sri Lanka between the Tamil insurgency and government forces, the Sri Lankan military – and its less than savory elements – are viewed by the population to be on a higher plane than in other times.[607] The rules of evidence used by the Sri Lankan Army Act would make it difficult to prosecute errant peacekeepers in most cases.[608] There is no crime of rape under the Army Act.[609] However, it is possible that sexual abuse of the local population by a peacekeeper could result in a charge under the "disgraceful conduct" law,[610] although this law is limited in its scope of application to military forces.[611] Sri Lanka in general, and its military in particular, have been fighting an often brutal internal war with Tamil Tiger rebels for decades.[612] In late 2007, more than one hundred Sri Lankan

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601. DIANA R. GORDON, TRANSFORMATION AND TROUBLE: CRIME, JUSTICE, AND PARTICIPATION IN DEMOCRATIC SOUTH AFRICA 97 – 99 (2006) (discussing the extraordinarily high incidents of rape committed against women and children in South Africa since the end of apartheid); Katz, *supra* note 597.

602. *See Tackling South Africa's rape culture*, BBC NEWS, Nov. 1, 2007, *available at* http://news.bbc.co.uk/2/hi/africa/7072818.stm (last visited May 14, 2008).

603. Ashley J. Moore, Notes*, Endangered Species: Examining South Africa's Rape Crisis and Its Legislative Attempt to Protect Its Most Vulnerable Citizens*, 38 VAND. J. TRANSNAT'L L. 1469 (2005); *see* CIA, SOUTH AFRICA, *supra* note 93 (explaining that 21.5% of adult population is estimated to be infected).

604. GORDON, *supra* note 601 at 100-01.

605. *Id.* at 157-58.

606. CIA, SRI LANKA, *supra* note 94.

607. NIRA WICKRAMASINGHE, CIVIL SOCIETY IN SRI LANKA: NEW CIRCLES OF POWER 28-31 (2001).

608. *See* Sri Lanka Army Act, part XI, *available at* http://www.defence.lk/main _pub.asp?fname=armyact (last visited May 14, 2007).

609. *See generally id*.

610. *See id*. § 107. "[E]very officer who, being subject to military law, behaves in a scandalous manner, unbecoming the character of an officer and a gentleman, shall be guilty of a military offense and shall, on conviction by court martial, be cashiered." *Id.*

611. *Id*.

612. *See Sri Lanka ends truce with rebels*, BBC NEWS, Jan. 2, 2008, *available at* http://news.bbc.co.uk/2/hi/south_asia/7168528.stm (last visited May 14, 2008).

peacekeepers were repatriated to Sri Lanka by the UN after allegations that they engaged in prostitution – including child prostitution – while stationed in Haiti.[613]

Sri Lanka is in the second tier watch list of the U.S. human trafficking assessments in 2007.[614] Sri Lanka has active refugee camps located within its borders.[615] Despite its enactment of legislation which furthered the principles of CEDAW, Sri Lanka is still a society in which sexual abuse of children is prevalent.[616] Societally, prostitution – even among parents of young male prostitutes – is accepted and often encouraged as a way for a young member of the household to produce income.[617] Rape and sexual abuse is also used as a key tool by members of the Sri Lankan military and police forces without prosecution or apparent repercussions.[618] Male rape is also an accepted form of interrogation in Sri Lanka, especially during times of conflict.[619] Interestingly, the terms of the Sri Lankan constitution specifically prohibit torture by public servants – and, by association, rape.[620] Marital rape is only a crime in Sri Lanka in the event that it occurs during a time of marital separation.[621] Recent revisions to the Sri Lankan penal code have abolished the requirement that a rape be committed against the victim's will and leave only the lack of consent requirement.[622] Rape is still a crime committed by a man against a woman, however, although now rape in a detention setting is the equivalent of a strict liability offense.[623] Even when a

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613. *Sri Lanka to probe UN sex claims*, BBC NEWS, Nov. 3, 2007, *available at* http://news.bbc.co.uk/2/hi/south_asia/7076284.stm (last visited May 14, 2008).

614. U.S. DEPT. OF STATE, *supra* note 24, at 42.

615. *See* U.N. HIGH COMM'R, *supra* note 192, at 500.

616. Isabella D. Kaliszczak Bunn, *The United Nations Convention on the Rights of the Child*, 91 AM. SOC'Y INT'L L. PROC. 74, n.3 (1997).

617. *See id.*; Karene Jullien, *The Recent International Efforts to End Commercial Sexual Exploitation of Children*, 31 DENV. J. INT'L L. & POL'Y 579 (2003).

618. Goonesekere, *supra* note 474, at 21; Dean Adams, *The Prohibition of Widespread Rape as a Jus Cogens*, 6 SAN DIEGO INT'L L. J. 357, n.113-29 (2005); Pearce, *supra* note 204.

619. Sandesh Sivakumaran, *Sexual Violence Against Men in Armed Conflict*, 18 EUROPEAN J. INT'L L. 253 (2007).

620. Goonesekere, *supra* note 474, at 29-30.

621. *Id*. at 60.

622. *Id.* at 64-65

623. *Id.* at 65; Penal Code, § 363 (Sri Lanka).

> [A]a man is said to commit 'rape' who enactment has sexual intercourse with, a woman under any of the following descriptions: (a) without her consent even where such woman is his wife and she is judicially separated from the man (b) with her consent when her consent has been obtained, by use of force or threats or intimidation or by putting her in fear of death or hurt (c) with her consent when her consent has been obtained at a time when she was of unsound mind or was in a state of intoxication induced by alcohol or drugs, administered to her by the man or by some other person (d) with her consent when the man knows that

rape case is brought to trial, the evidence rules in Sri Lanka shift the focus of the trial to the victim, her conduct and her past, an experience which is traumatic to the victim[624] and can, in the author's view, create a culture of impunity for the accused because of the cultural conservatism and stigma attached to such revelations and proceedings. There is no such thing as a domestic violence law per se in Sri Lanka; rather, the victim would be required to report the specific act associated with the domestic violence (assault, burning, rape, etc) in order to file a complaint.[625] Other crimes of relevance include defilement of young girls[626] and unnatural offenses.[627]

BB. Togo

Togolese citizens may volunteer or be conscripted for military service at age eighteen.[628] The term of conscription is two years, and all new entrants to the military must take an HIV/AIDS test.[629]

Since Togo's independence, the military has played a constant role in the political life of the nation and has been a consistent factor in the repression of dissent and attempts to bring transparency to the Togolese government.[630] International aid to Togo was suspended following particularly repressive and bloody campaigns by the military against the Togolese people.[631]

Togo is in the second tier of the U.S. human trafficking assessments in 2007.[632] Togo is both a starting and destination

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> he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believed herself to be lawfully married. (e) with or without her consent when she is under sixteen years of age Unless the woman is his wife who is over twelve years of age and is not judicially separated from the man.

Id.; Shyamala Gomez & Mario Gomez, *Sri Lanka: The Law's Response to Women Victims of Violence, in* VIOLENCE LAW AND WOMEN'S RIGHTS IN SOUTH ASIA 211-13 (Savitri Goonesekere ed., 2004).

624. Goonesekere, *supra* note 474, at 69-70.

625. Gomez & Gomez, *supra* note 623, at 216-17.

626. NATIONAL LAWS, LEGISLATION OF INTERPOL MEMBER STATES ON SEXUAL OFFENCES AGAINST CHILDREN, SRI LANKA 3 (2006) *available at* http://www.interpol.int/Public/Children/SexualAbuse/NationalLaws/csaSriLanka.asp (last visited May 14, 2008) (reprinting portions of Penal Code, § 364 (Sri Lanka)).

627. *Id*. at 1-3 (reprinting portions of Penal Code, §§ 365A, 365B (Sri Lanka)).

628. CIA, TOGO, *supra* note 95.

629. *Id*.

630. *Id*.; HOUNGNIKPO, *supra* note 231, at 74-77.

631. *See Togo counts landmark poll votes*, BBC NEWS, Oct. 15, 2007, *available at* http://news.bbc.co.uk/2/hi/africa/7044855.stm (last visited May 14, 2008).

632. U.S. DEPT. OF STATE, *supra* note 24, at 42.

point for human trafficking, especially in children.[633] There are refugee camps located within Togo's borders.[634]

CC. Tunisia

Volunteer eligibility for the Tunisian military starts at age eighteen.[635] Conscription for a period of twelve months is required of Tunisians aged twenty.[636]

Tunisian law provides that rape may be a capital offense provided that the crime is committed against a woman with established violence or the victim is under ten years of age.[637] Additionally, rape only is an offense when the victim is a woman.[638] There are other forms of lesser sexual offense crimes in Tunisia, which primarily center on the age of the victim and the pre-existing relationship between the victim and the perpetrator.[639] Included in this lesser sexual offenses category are homosexual acts.[640] Child prostitution is illegal in Tunisia.[641]

No information on Tunisia's placement in the tier system used by the US State Department is available.[642] However, practically there is strong evidence to support the proposition that illegal slavery of many forms (sexual, domestic, etc.) is currently thriving in Tunisia.[643] Outside evaluations of the Tunisian judiciary and its independence have been extremely critical.[644] There are no refugee camps in Tunisia.[645]

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633. *See* HUMAN RIGHTS WATCH , TOGO: BORDERLINE SLAVERY: CHILD TRAFFICKING IN TOGO (2003), *available at* http://hrw.org/reports/2003/togo0403/ (last visited May 14, 2008).

634. *See* U.N. HIGH COMM'R, *supra* note 192, at 520.

635. CIA, TUNISIA, *supra* note 96.

636. *Id*.

637. NATIONAL LAWS, LEGISLATION OF INTERPOL MEMBER STATES ON SEXUAL OFFENCES AGAINST CHILDREN, TUNISIA 1-2 (2006) *available at* http://www.interpol.int/Public/Children/SexualAbuse/NationalLaws/csaTunisia.pdf (last visited May 14, 2008) [hereinafter NATIONAL LAWS, TUNISIA] (summarizing Penal Code, art. 227 (Tunis.)) (*translated by* author); Warrick, *supra* note 253, at 319-20, n.6;

638. NATIONAL LAWS, TUNISIA *supra* note 637, at 1-2 (summarizing Penal Code, art. 227 (Tunis.)).

639. *Id*. at 2 (summarizing Penal Code, art. 228 (Tunis.)).

640. *Id*.

641. *Id*.

642. U.S. DEPT. OF STATE, *supra* note 24, at 42.

643. Nichols, *supra* note 472, at 305.

644. *See* COMM'N INT'L DE JURISTES RAPPORT SUR LA TUNISIE,, Mar. 14, 2003, *available at* http://www.icj.org/news.php3?id_article=2761&lang=fr (last visited May 14, 2008) (*translated by* author).

645. *See* U.N. HIGH COMM'R, *supra* note 192, at 522

DD. Uganda

Ugandans have a nine year military service obligation.[646] Those wishing to enter the military voluntarily may do so between the ages of eighteen and twenty-six years.[647] Those wishing to enter the military as professionals may do so between the ages of eighteen and thirty.[648]

Historically and currently, the Ugandan Army has been associated with the Ugandan police force, which was and is known for depriving citizens of their basic human rights and engaging in torture and other associated practices on a frequent basis.[649] The role of the military in the judicial and juridical process in Uganda was vividly demonstrated in 2005, when a Ugandan judge became publicly enraged that members of a military commando unit attended a court hearing for a man who was accused by them and the regime of treason.[650]

Under the terms of the Ugandan Penal Code, an errant peacekeeper would not be under Ugandan criminal jurisdiction.[651] The Ugandan penal code provides:

> any person who has unlawful carnal knowledge of a woman or girl, without her consent, or with her consent, if the consent is obtained by force or by means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false representation as to the nature of the act, or in the case of a married woman, by personating her husband, is guilty of the felony termed rape.[652]

A man convicted of rape is eligible for capital punishment.[653] Marital rape is not illegal in Uganda.[654] Associated sexual offenses under the Ugandan Penal Code include indecent assault ("when an

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646. CIA, UGANDA, *supra* note 97

647. *Id*.

648. *Id*.

649. *See generally* HUMAN RIGHTS INITIATIVE, THE POLICE, THE PEOPLE, THE POLITICS: POLICE ACCOUNTABILITY IN UGANDA, COMMONWEALTH (2006).

650. *See Ugandan judge's fury at military*, BBC NEWS, Nov. 18, 2005, *available at* http://news.bbc.co.uk/2/hi/africa/4451004.stm (last visited May 14, 2008).

651. KALR'S CRIMINAL PRACTICE LEGISLATION OF UGANDA 4-16 [hereinafter KALR] (citing Ugandan Penal Code, § 5).

652. LILLIAN TIBATEMWA-EKIRIKUBINZA, CRIMINAL LAW IN UGANDA: SEXUAL ASSAULTS AND OFFENCES AGAINST MORALITY 3 (2005) (citing Ugandan Penal Code, § 123).

653. *Id*. (citing Ugandan Penal Code, § 124).

654. *Id*. at 11.

assault is accompanied by messages with sexual connotations" and the victim is female);[655] indecent assault of a boy under the age of 18;[656] defilement of girls under the age of 18 ("any person who unlawfully has sexual intercourse with a girl under the age of 18 years is guilty of an offence and is liable to suffer death.");[657] and unnatural offenses ("any person who: a) has carnal knowledge of any person against the order of nature; b) has carnal knowledge of an animal; c) permits a male person to have carnal knowledge of him or her against the order of nature, commits an offense and is liable to imprisonment for life").[658] The evidentiary requirements for establishing rape under the Ugandan Penal Code are such that it would be difficult to establish a case involving peacekeepers.[659] Both men and women are subject to criminal punishment if they are found to have committed adultery.[660] The problem is that the definition of adultery makes rape victims subject to persecution for rape.[661] Prostitution was made illegal in Uganda in 1990.[662] Procuring or enticing women, inside or outside of Uganda, into prostitution is a punishable offense.[663] Prostitution within Uganda is illegal.[664] HIV/AIDS, particularly in women, is a huge and yet unaddressed problem in Ugandan society overall.[665] Uganda is in the second tier of the U.S. human trafficking assessments in 2007.[666] A quarter of a million refugees who are being housed in refugee camps located within Uganda.[667]

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655. *Id*. at 15 (citing Ugandan Penal Code, § 128).
656. *Id*. at 16 (citing Ugandan Penal Code, § 147).
657. *Id*. at 43 (citing Ugandan Penal Code, § 129).
658. *Id*. at 97 (citing Ugandan Penal Code, § 145).
659. *Id*. at 17.
660. *Id*. at 68 (citing Ugandan Penal Code, § 154).

> 1. any man who has sexual intercourse with any married woman not being his wife commits adultery and is liable to imprisonment for a term not exceeding twelve months or a fine . . . ; and, in addition, the court shall order any such man on first conviction to pay the aggrieved party compensation . . . , and, on subsequent conviction compensation . . .; 2. any married woman who has sexual intercourse with any man not being her husband commits adultery and is liable on first conviction to a caution by the courts and on a subsequent conviction to imprisonment for a term not exceeding six months.

Id.

661. *Id*.
662. *Id*. at 92.
663. KALR, *supra* note 651, at 4-48 (citing Ugandan Penal Code, § 125).
664. *Id*. at 4-50 (citing Ugandan Penal Code, § 134B).
665. *See generally* HUMAN RIGHTS WATCH , JUST DIE QUIETLY: DOMESTIC VIOLENCE AND WOMEN'S VULNERABILITY TO HIV IN UGANDA (2003), *available at* http://www.hrw.org/reports/2003/uganda0803/uganda0803.pdf (last visited May 14, 2008).
666. U.S. DEPT. OF STATE, *supra* note 24, at 42.
667. *See* U.N. HIGH COMM'R, *supra* note 192, at 528.

Uganda is still emerging from a multi-year civil war, which has torn apart the country, its society, and its legal systems.[668] Some of the atrocities committed by and against the warring factions in the Ugandan conflicts were sex crimes on a massive and well-organized scale.[669] As of this writing, there has yet to be a legal vehicle allowing for the prosecution of government or rebel actors known to have committed sexual crimes.[670] Many of the remaining rebel forces are associated with forces in the Sudan, making it politically and practically dangerous to deploy Ugandan state troops in any situation in the Sudan. Further, the impunity with which sex crimes during the conflict have been treated – despite the terms of Ugandan criminal law – suggests that sex crimes are not taken as seriously as the law intended them to be.[671] This knowledge in turn informs society in general – and members of the military in particular – that such crimes are not likely to be punished. This can be seen in the civilian population in the form of the massive problem with rape and sexual harassment experienced by Ugandan students at the hands of their teachers. Additionally, male rape is and had been used as a means of interrogation in Uganda.[672]

EE. Ukraine

There is a compulsory service requirement of between eighteen and twenty-four months for those between eighteen and twenty-five years old.[673] Ukrainians are eligible to volunteer for service in the military during the same time period.[674]

The Criminal Code of Ukraine does recognize the crime of "smuggling, fictitious business activity, frauds with financial

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668. Members of the Ugandan government have threatened to recommence the war between the government and the Lord's Resistance Army (LRA) in the event that a peace agreement is not signed by the LRA by January 31, 2007. *See Otti 'Executed by Uganda Rebels'*, BBC NEWS, Dec. 21, 2007, *available at* http://news.bbc.co.uk/2/hi/africa/7156284.stm (last visited May 14, 2008).

669. *See generally* SUSAN MCKAY & DYAN MAZURANA, WHERE ARE THE GIRLS?: GIRLS IN FIGHTING FORCES IN NORTHERN UGANDA, SIERRA LEONE AND MOZAMBIQUE: THEIR LIVES DURING AND AFTER WAR (2004) (finding, among other things, that the Ugandan military is inappropriately equipped to handle the many girls who were abducted and sexually abused by the Lord's Resistance Army before being able to turn themselves in to the Ugandan military for shelter and support).

670. *See Uganda Considers War Crimes Court*, BBC NEWS, Aug. 20, 2007, *available at* http://news.bbc.co.uk/2/hi/africa/6954860.stm (last visited May 14, 2008).

671. *See, e.g., Ugandan Justice 'Fails on Rape'*, BBC NEWS, Nov. 30, 2007, *available at* http://news.bbc.co.uk/2/hi/africa/7120484.stm (last visited May 14, 2008).

672. Sivakumaran, *supra* note 619.

673. CIA, UKRAINE, *supra* note 98

674. *Id*.

resources."[675] There is no crime of marital rape in Ukraine.[676] The crime of rape is defined as "sexual intercourse combined with violence, threats of violence, or by taking advantage of the victim's helpless condition."[677] Punishment for rape depends on the age of the victim, number of assailants, and other statutory factors.[678] Many rape victims in Ukraine do not report their rapes because of fear of law enforcement.[679] A Ukrainian citizen who commits acts which are violations of the Ukrainian Penal Code is subject to trial in Ukraine under applicable law.[680] There are acts which punish sexual relations with children.[681] Child prostitution is a crime in Ukraine.[682] Ukraine is in the second tier watch list of the U.S. human trafficking assessments in 2007.[683] There are no refugee camps located within Ukrainian borders.[684]

FF. United Kingdom

The United Kingdom maintains an all-volunteer military structure, with entrance eligibility for those aged sixteen to thirty-three.[685] In the event that a soldier is charged with rape overseas, he is subject to court-martial.[686] Under the provisions of the Armed Forces Act, it is illegal for a member of the British Armed Forces to act with "conduct prejudicial to good order and discipline."[687] It is also illegal for a member of the Armed Forces to engage in "disgraceful conduct of a cruel or indecent kind."[688] All members of the British Armed Forces are liable to punishment under the civilian criminal law and the Armed Forces Act for crimes which

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675. ALEXANDER BIRYUKOV & INNA SHYROKOVA, THE LAW AND LEGAL SYSTEM OF THE UKRAINE 173-74 (2005).

676. Mertus, *supra* note 265.

677. Criminal Code, art. 152 (Ukr.), *available at* http://www.legislationline.org/upload /legislations/2e/4b/e7cc32551f671cc10183dac480fe.htm (last visited May 14, 2008).

678. *Id*.

679. *See generally* BIRYUKOV & SHYROKOVA, *supra* note 675.

680. Criminal Code, ch II (Ukr.), *available at* http://www.legislationline.org/upload /legislations/2e/4b/e7cc32551f671cc10183dac480fe.htm (last visited May 14, 2008).

681. *Id*.

682. *Id*. arts. 302-03.

683. U.S. DEPT. OF STATE, *supra* note 24, at 42.

684. *See* U.N. HIGH COMM'R, *supra* note 192, at 530.

685. CIA, UNITED KINGDOM, *supra* note 99.

686. *See* THE LIBRARY RESEARCH PAPER 05/86: THE ARMED FORCES BILL 15, *available at* http://www.parliament.uk/commons/lib/research/rp2005/rp05-086.pdf (last visited May 14, 2008).

687. Armed Forces Act, 2006, c. 52, § 19 (Eng.). "[A] person subject to service law commits an offense if he does an act that is prejudicial to good order and service discipline . . . A person guilty of an offence under this section is liable to any punishment . . . must not exceed two years." *Id*.

688. *Id*. § 23. "A person subject to the service law commits an offence if – a) he does an act which is cruel or indecent; and b) his doing do is disgraceful." *Id.*

are illegal under the criminal laws of England and Wales.[689] Members of the military who commit sexual offenses that are or would be crimes under the laws of England and Wales are subject to mandatory military sentences as well and civilian penalties.[690]

The crime of rape under English law is defined as the intentional and non-consensual penetration of the orifice of a man or woman by a man where the perpetrator does not believe that the victim has consented.[691] A rapist may be sentenced to a term of up to life in prison if convicted of rape under this law.[692] Other relevant crimes include sexual assault,[693] "causing a person to engage in sexual activity without consent,"[694] sexual crimes

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689. *Id*. § 42.

690. *Id*. §§ 220, 222-23.

691. Sexual Offences Act, 2003, c. 42, § 1 (Eng.).

> A person (A) commits an offence if— (a) he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis, (b) B does not consent to the penetration, and (c) A does not reasonably believe that B consents. (2) Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents. (3) Sections 75 and 76 apply to an offence under this section. (4) A person guilty of an offence under this section is liable, on conviction on indictment, to imprisonment for life.

Id. Prior to 2003, the English rape law provided:

> A man commits rape if – a) he has sexual intercourse with a person who at the time of the intercourse does not consent to it; and b) at the time he knows that the person does not consent to the intercourse or is reckless as to whether that person consents to it.

Id.; See Criminal Justice Order 2003/1247, pt. IV, art. 18.

692. Sexual Offences Act, 2003, c. 42, § 1 (Eng.).

693. *Id*. § 3.

> A person (A) commits an offence if— (a) he intentionally touches another person (B), (b) the touching is sexual, (c) B does not consent to the touching, and (d) A does not reasonably believe that B consents. (2) Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents. (3) Sections 75 and 76 apply to an offence under this section. (4) A person guilty of an offence under this section is liable— (a) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both; (b) on conviction on indictment, to imprisonment for a term not exceeding 10 years.

Id.

694. *Id*. § 4.

> A person (A) commits an offence if— (a) he intentionally causes another person (B) to engage in an activity, (b) the activity is sexual, (c) B does not consent to engaging in the activity, and (d) A does not reasonably believe that B consents. (2) Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents. (3) Sections 75 and 76 apply to an offence under this section. (4) A person guilty of an offence under this section, if the activity caused involved— (a) penetration of B's anus or vagina, (b) penetration of B's mouth with a person's penis, (c) penetration of a person's anus or vagina with a part of B's body or by B with anything else, or (d) penetration of a person's mouth with B's penis, is liable, on conviction on indictment, to imprisonment for life. (5) Unless

against children—for which there is a separate chapter of the Sexual Offences Act defining crimes and penalties[695]—offenses related to child prostitution,[696] and trafficking humans into, out of, and within the United Kingdom "for sexual exploitation."[697] The Sexual Offences Act makes its provisions applicable to British citizens abroad provided that the activities which are alleged to be criminal were crimes both in the jurisdiction in which they were committed and in the United Kingdom.[698]

The United Kingdom is in the first tier of the U.S. human trafficking assessments in 2007.[699] There are no refugee camps located within the borders of the United Kingdom.[700]

GG. United States

The U.S. military is entirely volunteer except that all males must register eligibility at age eighteen.[701] The most prominent incident involving a U.S. soldier committing abuses while on peacekeeping missions was a staff sergeant who was sentenced to life in prison by a military court for raping and murdering a young girl in Kosovo.[702] Under the provisions of the United States Uniform Code of Military Justice, which would be applicable to U.S. peacekeepers when deployed,[703] there are specific crimes of

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> subsection (4) applies, a person guilty of an offence under this section is liable— (a) on summary conviction, to imprisonment for a term not exceeding 6 months or to a fine not exceeding the statutory maximum or both; (b) on conviction on indictment, to imprisonment for a term not exceeding 10 years.

Id.

695. *Id*. §§ 5-24.
696. *Id*. §§ 47-56.
697. *Id*. §§ 57-60.
698. *Id*. § 72.
699. U.S. DEPT. OF STATE, *supra* note 24, at 42
700. *See* U.N. HIGH COMM'R, *supra* note 192, at 534.
701. CIA, U.S., *supra* note 100.
702. *See* Carol Rosenberg, *Soldier Probed on Sex Abuse in Haiti*, Miami (Fla.) Herald, Nov. 6, 2000.
703. 10 U.S.C. § 101 (2006).

"child abuse,"[704] rape,[705] "carnal knowledge,"[706] and "conduct unbecoming an officer and a gentleman."[707]

The United States is in the second tier of the U.S. human trafficking assessments in 2007.[708] There are no refugee camps located within the borders of the United States.[709]

HH. Uruguay

Entrance into the Uruguayan military is voluntary starting at age eighteen except that conscription may occur in times of emergency.[710] Uruguay's military was heavily involved in the running of the country for years.[711] The Uruguayan military is regarded as a protector of the laws and society of Uruguay overall.[712] Although the Uruguayan military guards its ability to try its own members, there are situations where a member of the military can be tried civilly for crimes which fall under civilian criminal jurisdiction.[713] There are no terms of the Uruguayan Military Penal Code which would directly implicate the actions of an errant peacekeeper.[714]

A rapist in Uruguay may avoid punishment by agreeing to marry his victim.[715] Rape in Uruguay can be committed against persons of either sex or the same sex as the rapist.[716] The crime is

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704. *Id*. § 843.

705. *Id*. § 920(a). "Any person subject to this chapter who commits an act of sexual intercourse, by force and without consent, is guilty of rape and shall be punished by death or such other punishment as a court-martial may direct." *Id.*

706. *Id*. § 920(b).

> Any person subject to this chapter who, under circumstances not amounting to rape, commits an act of sexual intercourse with a person - (1) who is not that person's spouse; and (2) who has not attained the age of sixteen years; is guilty of carnal knowledge and shall be punished as a court-martial may direct.

Id.

707. *Id*. § 933. "[A]ny commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial shall direct." *Id.*

708. U.S. DEPT. OF STATE, *supra* note 24, at 42.

709. *See* U.N. HIGH COMM'R, *supra* note 192, at 538-39.

710. CIA, URUGUAY, supra note 101.

711. *See* ARCENEAUX, *supra* note 249, at 184-221.

712. JUAN RIAL, ESTRUCTURA DE LAS FUERZAS ARMADAS DEL URUGUAY: UN ANALISIS POLITICO 46 (1992) (*translated by* author).

713. *Id*. at 177.

714. *See* Codigo Penal Militar (Uru.), *available at* http://www.parlamento.gub.uy /codigos/codigopenalmilitar/1943/cod_penalmilitar.htm (last visited May 14, 2008) (*translated by* author).

715. Ogletree & Silva de-Alwis, *supra* note 289, at n.118.

716. Codigo Penal, art. 272 (Uru.) *available at* http://www.parlamento.gub.uy/codigos /codigopenalmilitar/1943/cod_penalmilitar.htm (last visited May 14, 2008) (*translated by* author).

defined as causing the victim through the use of violence or threats to engage in a sexual act which the victim would not otherwise have consented to.[717] Child prostitution is a crime in Uruguay.[718] Uruguay is in the second tier of the U.S. human trafficking assessments in 2007.[719] There are no refugee camps located within Uruguay's borders.[720]

V. GENERAL TRENDS IN LEGAL AND SOCIO-LEGAL STRUCTURES OF AFFECTED SENDING STATES

> *From the above country studies, it is possible to create three categories to define the legal and socio-legal structures of sending states which have contributed errant peacekeepers. These categories are typified by similar trends in law, justice, society and politics. Although it is axiomatic that it is nearly impossible for two states to replicate each other, the information provided above serves as an excellent backdrop for creating these categories. The purpose of these categories is twofold. First, by creating these categories and understanding the components of them, it is possible to separate states which do and do not pose a threat to the populations they are sent to protect on peacekeeping missions. This is instructive overall and is important to the suggestions made in Part VI below. Second, it is hoped that these categories can be used as predictors for states which wish to contribute troops to future peacekeeping missions. Certainly, the idea of evaluating a state against the faults of other states might be perceived as harsh or unfair, given that the stated goal of U.N. peacekeeping is the protection of the local populations ravaged by war and deprivation; however, it seems that, on balance, the harms to potential sending states under this rationale are far outweighed by the potential for*

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717. *Id*.

718. NATIONAL LAWS, LEGISLATION OF INTERPOL MEMBER STATES ON SEXUAL OFFENCES AGAINST CHILDREN, URUGUAY 2 (2006), *available at* http://www.interpol.int /Public/Children/SexualAbuse/NationalLaws/csaUruguay.pdf (last visited May 14, 2008) (summarizing Ley No. 17.815, arts. 5-6 (Uru.)) (*translated by* author).

719. U.S. DEPT. OF STATE, *supra* note 24, at 42.

720. *See* U.N. HIGH COMM'R, *supra* note 192, at 540.

harms to the local population and to the concept of U.N. peacekeeping generally.

The first category will be referred to as "infrequent offenders." For these states, sexual or other misconduct by peacekeepers is an abhorrent event on a legal, social, and military level. Based on their history in peacekeeping operations and legal/socio-legal structures, these states are likely not to have a high recidivism rate and thus should not be barred from any future U.N. peacekeeping activity. The second category will be referred to as "frequent/chronic offenders with a legal gap." The states in this category have a greater propensity to contribute troops which commit sexual or other abuses. They also exhibit a marked disparity between law and the socio-legal views on law and its application. It is in these states that simply examining the established laws cannot be used as a predictor of future behavior or of whether the state should be allowed to contribute peacekeeping forces to U.N. missions because there is a disparity between law and its application. Such states would require a more stringent evaluation in order to be allowed to contribute to U.N. missions. The third category will be referred to as "frequent/chronic offenders with little law." These states have similar propensities to the second category, however they are different in that there is little gap between law and application in that the laws they currently use do not provide extensive protections for victims of sexual violence and, more often then not, allow the perpetrators of sexual violence to act with impunity.

Several points should be raised here. The category classifications and discussions do not generally refer to a state as democratic or non-democratic. The democracy factor does not generally have a correlation to the category propensities used here, with the exception of members of category one. In the author's view, however, the propensity of category one states to be entrenched democracies is more a product of the states' overall political, legal, and historical status rather than being democratic per se. As illustrated above, a state's military conscription policy – or lack thereof – does not have a correlation

> *to the activities and status of the military or the legal and socio-legal systems in use overall. Therefore, state conscription policies are not discussed as category factors. Additionally, a state's status as a signatory of international treaties such as CEDAW is not mentioned as a factor because the above information demonstrates that the gap between signing these treaties and implementing their terms is so vast that these treaties barely enter into the legal and socio-legal framework of the states.*

As a final note, these categories have been constructed based on information regarding the sending states themselves and not the host states to which peacekeepers have been deployed. There is some scholarship which imputes a great deal of peacekeeper misconduct to the conditions of the host state because the sense of lawlessness and compromised laws and mores during and after conflict are viewed as empowering of bad behavior.[721] In the author's view, the atmosphere of the host state is important in that it creates a sense of desperation in which women and young girls are more willing to offer themselves as prostitutes in order to survive. However, it is the author's belief that the atmosphere of the host state is irrelevant to the propensity of peacekeepers from a particular sending state to commit bad acts because these peacekeepers' understandings of their ability to do these acts are informed by the legal and socio-legal structures of their home state. This is supported by the broad swath of U.N. missions through which sexual and other misconduct by peacekeepers from the same sending states have committed sexual and other abuses.

A. Infrequent Offenders

This category features predominantly developed states which are members of NATO and have a long history of providing support to U.N. peacekeeping missions.[722] In all of these systems military law places a premium on obedience and order and, in some cases, defines crimes relating to sexual violence as specific crimes punishable under military law.[723] Other states have military laws that allow members of the military to be tried in

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721. KENT, *supra* note 3, at 51-55; *See* MUST BOYS BE BOYS?, *supra* note 38.

722. The states in this category are: Austria, Belgium, Canada, France, Ireland, Italy, the Netherlands, the United Kingdom and the United States.

723. *See supra* Part IV.

civilian courts for such crimes.[724] The provisions of the military laws in these states are actively enforced and those who have been accused of sexual misconduct while on peacekeeping missions have principally been disciplined with a variety of punishments, depending on the severity of the allegations.[725] Situations where there are allegations made and yet no convictions typically occur because of a lack of evidence, which is certainly possible given the dismal state of U.N. investigatory procedures and the reluctance of victims to come forward in time to preserve evidence necessary to sustain sexual convictions.[726] In these states, the military serves an important function but is not involved in politics or enforcing the rule of law.[727] The military is largely viewed as a separate function, subject to governmental oversight, and does not act against its own people in all but very rare instances.[728] These states also share a sense of internal military security in that, although many of these states are actively involved in fighting terrorist threats, they are not involved in fighting an active insurgency or other intranational conflict.[729]

The penal laws of the states in this category are strictly written to reflect the criminal nature of sexual violence and exploitation.[730] These laws reflect more accurately the societal norms of the state and, in turn, frame the concepts of society vis-à-vis crimes of sexual violence and the need to protect the victims.[731] The legal systems of these states are marked by transparency in the legislative process.[732] Indeed, human rights groups and media outlets within the U.K. and the U.S. were among the first to bring revelations of peacekeeper sexual abuse to the forefront of public attention; when these stories were made public, society generally reacted with horror. This is in keeping with a legal structure which makes these acts punishable generally and reflects a true socio-legal understanding that sexual violence – especially against the young and the vulnerable – is inexcusable.

Interestingly, although all of the states in this category do accept refugees into their borders through their immigration laws,

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724. *See supra* Part IV.
725. *See supra* Part IV.
726. *See supra* Part IV.
727. *See supra* Part IV.
728. *See supra* Part IV.
729. *See supra* Part IV.
730. *See supra* Part IV.
731. *See supra* Part IV.
732. *See supra* Part IV.

none of the countries in this category have organized refugee camps within their borders.[733]

In general, these states tend to be more secular in legal and socio-legal interaction between individuals and the legal system.[734] Law is applied evenly across religions and identities. Overall, these states are at least estimated to be less involved in human trafficking than the states in other categories and have taken action to enact laws that penalize human trafficking, especially in regards to children.[735] These states also tend to be heavily invested in the financial backing of U.N. peacekeeping, while at the same time their militaries do not realize a financial benefit from participation in peacekeeping missions.[736]

B. Frequent/Chronic Offenders with a Legal/Socio-Legal Gap

These states – often some of the largest contributors to a particular peacekeeping mission or to the U.N. peacekeeping system overall – have been the subject of a greater number of sexual misconduct and other allegations throughout the recent history of U.N. peacekeeping missions.[737] The term "recent history" is used here because this issue was not raised as a substantive and discussed problem until the early 1990s. Generally, these states share several political and historical realities, which, in the view of the author, tend to inform the way in which law works when applied to the military. These states tend to be newer states in the international system, and many of them were created as the result of internal conflict of some type.[738] In almost all of these states, internal security is viewed as a critical concern to the continuation of the nation because of threats from rebel groups, insurgents, and other groups that challenge the government and its structure in a variety of ways.[739] With the exception of the recent protesters in Pakistan, the groups which pose a threat to the governments of these states – and often these states themselves – are also armed and the states have been involved in prolonged states of war (official or unofficial) with them for years.[740] In the course of

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733. *See supra* Part IV.
734. *See supra* Part IV.
735. *See supra* Part IV.
736. *See supra* Part IV.
737. The states in this category are: Bangladesh, Brazil, Bulgaria, Ethiopia, India, Jordan, Morocco, Nigeria, Pakistan, Senegal, Slovakia, South Africa, Sri Lanka, Tunisia, Uganda, the Ukraine, and Uruguay.
738. *See supra* Part IV.
739. *See supra* Part IV.
740. *See supra* Part IV.

fighting these intrastate conflicts, the governments of states in these categories have relied heavily on the use of their militaries against the people of the state, with the frequent result of human rights violations against civilians that often involve sexual violence and dehumanize those who are not regarded as "loyal."[741] Sadly, the governments of states in this category have used rape as a tool against those suspected of conspiring against the state within and without the military context.[742] Many of these states have also sponsored or been the victims of child soldiers.[743] It should also be noted that some of these states have been or are home to U.N. peacekeeping missions themselves.[744]

The military laws of these states are either strict sounding, vague, or difficult to obtain.[745] Where military laws regarding troop – and therefore peacekeeper – conduct are available, they are silent on crimes of sexual violence and the most serious charge applicable to an errant peacekeeper under them would be a version of conduct unbecoming an officer or a similar crime.[746] Many would allow a member of the military to be tried civilly for crimes of sexual violence, particularly rape, although, as will be discussed below, this is not necessarily an improvement or method of assisting the victim. Generally, through either their military or penal laws, these states do make troops subject to domestic law for crimes committed abroad.[747] However, at both the military and civilian level, the burden of proof and witness requirements used in these states would make it extremely difficult to successfully prosecute an errant peacekeeper if the state wanted to do so.[748]

The penal laws of these states tend to be deceptive, which is why they are placed in this category. On the face of these laws, it would be easy to discount the role of penal law in creating a legal/socio-legal structure which makes troops from these states more likely to commit sexual and other misconduct as peacekeepers. Although some of the rape laws might not be as progressive in terms of who can be a rape victim and the elements required to prove the crime, on their face the rape statutes enacted by these states seem to be at least protective of women.[749] One glaring exception to this rule would, of course, be that many of

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741. *See supra* Part IV.
742. *See supra* Part IV.
743. *See supra* Part IV.
744. *See supra* Part IV.
745. *See supra* Part IV.
746. *See supra* Part IV.
747. *See supra* Part IV.
748. *See supra* Part IV.
749. *See supra* Part IV.

these states do not criminalize martial rape and recognize it as an absolute defense.[750] The plethora of laws criminalizing various forms of sexual interaction between adults and minors of the same and different sexes would again appear to offer protection to the children of these states and to reflect an overall societal belief structure which finds such contact abhorrent.[751] The frequency with which these states have enacted anti-child prostitution legislation again seems to indicate that the protection of children, especially girls, in society is a top priority of law and society.[752] However, as demonstrated above, to fully understand the impact of these laws on society, and vice-versa, it is necessary to look beyond their face.

In practice, these laws are more often than not meaningless to the victims of sexual violence. Many of these states are religiously based or conservative states and societies, in which the victim of a sexual crime is regarded as damaged or otherwise outcast from society.[753] Indeed, several of these states have an endemic problem with honor killings of rape victims as well as women who are merely suspected of having a conversation with a man.[754] Although such killings are theoretically illegal, efforts to stop them have been sharply rebuffed.[755] These states have a nearly uniform quality of devaluing women as members of society and, in many states, a rapist is rarely viewed as a criminal for his or her crimes.[756] In the event that a protest is made, the rapist may escape criminal punishment by paying a fine to the victim's family or, in some states, agreeing to marry the victim.[757] Despite the legal structures extant in these states, it is still accepted in parts of them to allow the rape of a female member of a family for a perceived slight done to another family.[758] These states also use rape as a form of punishment and retribution against suspected anti-government groups and forces although their laws make such acts a crime.[759] In practice, trafficking rates for women and girls in these states are high, and many are involved in more than one stage of the trafficking cycle.[760]

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750. *See supra* Part IV.
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757. *See supra* Part IV.
758. *See supra* Part IV.
759. *See supra* Part IV.
760. *See supra* Part IV.

Several of these states also have parallel court systems in that certain matters are heard by a governmental court and others are heard by a Shari' a court.[761] This creates an unequal sense of justice because secular and religious courts are often allowed to apply different standards, some of which might reflect the custom of a particular area but do not reflect the tenets of the national law.[762]

Six of these states, Bangladesh, Ethiopia, Nigeria, Pakistan, Sri Lanka and Uganda – one-third of the states in the category, have organized refugee camps located within their borders.[763] This does not suggest anything significant for the legal or socio-legal structures of states in this category per se although, as will be seen in category three, refugees do pose an additional way to evaluate a sending state's propensities.

C. Frequent/Chronic Offenders with Little Law

The states in this category are states which share the majority of the political, historical, and societal traits as the states in category two but differ in that their legal regimes are either non-transparent and were not available for this study or evince a fundamental lack of primacy for issues involving sexual violence.[764]

The states for which little legal information was available share traits in that they are dependent on their militaries to fight rebel groups.[765] As such, the international community and human rights groups have assessed the actions of these militaries in relation to the civilian populations of these states and have found that human rights violations are the norm.[766]

Five of the eight states in this category – Benin, Ghana, Guinea, Nepal and Togo – have organized refugee camps within their borders.[767] Interestingly, many of the refugees currently housed in Benin are from Togo.[768] Unlike in the other two categories, where there was little to no presence of domestic refugee camps, it is the author's belief that the presence of refugee camps in sixty-three percent of the states in category three is a significant predictor for the behavior of peacekeepers deployed by

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761. *See supra* Part IV.
762. *See supra* Part IV.
763. *See supra* Part IV.
764. The states in this category are: Benin, Ghana, Guinea, Indonesia, Nepal, Niger, Togo and the Russian Federation.
765. *See supra* Part IV.
766. *See supra* Part IV.
767. *See supra* Part IV.
768. *See supra* Part IV(B).

these countries. This belief stems from the fact that refugees tend to be among the most marginalized members of society, particularly when they are kept in camps, which creates a separate understanding as to their role in the host state and, frequently, the humanity of the refugees themselves. These camps are also under separate governance and are often viewed as sources of trouble, especially in resource starved states such as those in category three which host refugee populations in camps. As such, the author would argue that the presence of refugee camps within a state can dehumanize the population of the camp and, in so doing, create in the minds of society the idea that residents of refugee camps per se are not human. This is an important consideration in conjunction with the other legal and socio-legal issues attributed to states in category three.

States which are described as having little law are states in which the definition of rape and other sexual crimes, even facially, is outdated or reflects a legal understanding that these crimes are not of primary importance to society.[769] Available information on the societal beliefs and priorities in these states supports the idea that, rather than having a gap between law and application as in category two, the laws of these states do reflect the socio-legal systems which are most prevalent.[770]

VI. SUGGESTIONS

Throughout the years, and especially since the Zeid report, there have been many suggestions of ways to reform U.N. peacekeeping. The steps implemented by the U.N. to address sexual and other misconduct by peacekeepers sound lofty but, in reality, have not been effective. The more concrete and legally important suggestions in the Zeid report have not been adopted into any type of legally meaningful resolution by the U.N. At the same time, the U.N. Security Council has become re-polarized over a variety of issues from Iraq to Kosovo and shows no sign of becoming any less political in the future. Therefore, the below suggestions for taking the information presented in this article and using it to the benefit of host states, sending states, and the U.N. peacekeeping operation in general, removes the

769. *See supra* Part IV.
770. *See supra* Part IV.

> *U.N. Security Council from the immediate equation and re-centers the focus on the states with the most financial investment in the U.N. peacekeeping apparatus.*
>
> *Perhaps the easiest criticism of the below suggestions is that they would, facially, reduce the number of states eligible to contribute peacekeepers to U.N. missions at a time when the U.N. is continually expanding the number of authorized peacekeeping missions. If the emphasis of peacekeeping is solely on sending a mass of people to conflict-prone areas, then this criticism is valid, although undermined by the U.N.'s inability to fulfill its own mandate to create the African Union/United Nations Hybrid Operation in Darfur (UNAMID). Considering that peacekeepers are universally denied the right to use force except in the most dire situation of self-protection, the argument of quantity over quality is rather ineffective, however, in that more peacekeeping troops cannot, under the current rules of engagement, guarantee a safer population. If, however, the goal of U.N. peacekeeping is to send a force to alleviate the suffering of civilians and to enforce ceasefires or other terms as an honest broker, then the quality of troops being sent should be far more important than sheer quantity.*

A. Create a Screening Body for Sending States

Although the substantive power of the U.N. lies in the U.N. Security Council and its five permanent members, the U.N. would not exist as such without the funding of its member states. This is particularly true in the area of peacekeeping operations, which have only risen in cost each year.[771] Within donor states, there is a clearly pronounced group of states which have and currently do provide the bulk of the funding necessary for peacekeeping operations to continue, namely the United States (26.7%), Japan (19.5%), Germany (8.7%), the United Kingdom (7.4%) and France (7.3%).[772] Together, these five states contribute just under 70% of

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771. *See* CTR. ON INT'L COOPERATION, ANNUAL REVIEW OF GLOBAL PEACE OPERATIONS 172. (2007).
772. *Id*. at 171.

the annual budget for U.N. peacekeeping operations.[773] As such, they are given the most responsibility for maintaining the peacekeeping structure and for the accountability of U.N. peacekeeping.

The author's suggestion is that the U.N. create a screening body for sending states prior to the deployment of their troops on peacekeeping missions. This body would be comprised of a designated military and legal representative from each of the top five financing states. It would be tasked with evaluating the military and legal structures of each potential sending state to ensure that 1) adequate military law provisions exist to punish errant peacekeepers; 2) that the military in question has not been involved in gross violations of human rights, particularly in regard to sexual violence; 3) that the sending state's internal system is such that it can spare troops to serve as peacekeepers; 4) that the military is instructed on the legal consequences of sexual violence while deployed on a peacekeeping mission; and 5) that the domestic legal and socio-legal system recognizes sexual violence as a legitimate crime and does not create a situation where a peacekeeper could commit an act of sexual violence with impunity in the eyes of the civil state. Learning from the issues associated with the veto powers granted to the U.N. Security Council, it would only be necessary for a potential sending state to receive three of five votes to be authorized to send peacekeepers. However, states that send peacekeepers who behave badly would have their ability to send further peacekeepers suspended for at least three years and would have to undergo a stringent review before being authorized to send peacekeepers in the future. Subsequent violations by peacekeepers would render a state permanently unable to send troops on peacekeeping missions. All states, including those currently contributing peacekeepers, would be required to undergo a review by this body. Further, states would be reevaluated every five years and in the event that domestic situations warranted.[774] Should the top five sources of funding change, seats on the screening body would change accordingly but the rules and function of the body would stay the same.

Further, this body would be authorized to have an office at each U.N. mission established or

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773. *See id*.

774. For example, it is recommended that such a panel investigate and take appropriate action regarding plans for a Rwandan general who has been implicated by several groups in genocidal acts during the Rwandan conflict to be a deputy commander of the UNAMID military mission.

subsequently authorized in order to monitor the conduct of the peacekeeping operation itself and allegations of abuse. This body would also have a component charged with implementing the victim's assistance service recommended by the Zeid report at each mission. The body would have the right to seek compensation from the sending state in the event that it spirited away the peacekeeper before he could be called to account or refuses to cooperate with the investigation.

B. Require AIDS testing

The U.N. has consistently refused to require sending states to test their troops for HIV/AIDS prior to their deployment on peacekeeping missions, citing its opposition to any type of discrimination based on a person's HIV/AIDS status.[775] Opposition to such discrimination is laudable but, in the context of a peacekeeping mission, is irresponsible for operational and humanitarian reasons. When it is accepted, as it is by the U.N., that troops patronizing prostitutes is a given in any quasi-military environment, it is irresponsible to subject the local population to sexual contact with troops who are unaware of their HIV/AIDS status. This is especially true given the high HIV/AIDS infection rates among particularly recidivist sexual offender states such as South Africa and Nigeria.[776] As history has proven, the higher incidents of HIV/AIDS rates in areas where peacekeepers have been stationed demonstrate that the U.N.'s stance is deadly to the local population and must be revised.

In addition to creating the body discussed in Part V.1., the author strongly suggests that the U.N. institute a policy of mandatory HIV/AIDS testing before deployment and every six months thereafter. This is necessary because, in the event of isolated incidences of sexual contact between U.N. peacekeepers and the local population, it is incumbent on the U.N. to protect the local population and this protection starts with testing peacekeepers in the hopes that the results will inspire responsibility in them.

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775. *See supra* Part III.
776. *See supra* Part II.

VII. CONCLUSION

There is no easy way to discuss rape, prostitution, or any of the other sexual crimes discussed in this article, just as there is no way to comprehend the idea that these and other acts have been and are perpetrated by U.N. peacekeepers against vulnerable victims of conflict and tragedy. Discomfort and taboos will not, however, make the issues raised in this article disappear and indeed can be seen as having perpetuated them in the first place. Just as the discomfort over the idea of discussing sexual violence must be subsumed to the larger good, so must the idea that the U.N. cannot criticize its member states or deny the requests of any member state to participate in a peacekeeping operation.

This article has suggested that with peacekeeping reform, as with charity, it is necessary to begin at home. By demonstrating categories of sending states with errant peacekeepers and the reasons for these categories, this article has proven that the U.N. must do more than simply repatriate errant peacekeepers or request that member states agree to prosecute errant peacekeepers. It must look deeper into the laws and societies of its members to determine which members are in the position to offer victims of conflict peace and not further suffering. It must accept the idea that refusing a state's request to send peacekeeping troops can actually benefit the state – which would then have an impetus to correct the behavior which earned it the declination – as well as the local population and the U.N. peacekeeping apparatus itself. It must also accept the need to move past the Security Council on this issue and to allow those states who provide the bulk of peacekeeping funds to decide which states can represent them and the institution. And it must accept that, on balance, the rights of those whom peacekeepers are sent to protect trump the rights of those who may or may not be carriers of HIV/AIDS.

As the incidents of devastating conflicts around the world rise, the U.N. must also rise to police itself and its members in a meaningful manner which

allows its peacekeepers to be as welcomed and revered when they leave a mission as they were when they arrived. Otherwise, the U.N. peacekeeping apparatus will lose its legitimacy and, with it, the opportunity to preserve the peace which the U.N. was created to maintain. It is only when the issues addressed in this article are addressed and settled in reality that the U.N. peacekeeping forces can rightfully assume the role of preserving peace rather than prostituting it.

IMPLIED POWERS BEYOND FUNCTIONAL INTEGRATION? THE FLEXIBILITY CLAUSE IN THE REVISED EU TREATIES

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I. Introduction

One of the least discussed, but at least in principle, most important issues regarding the revision of European Union (EU) treaties has been the proposed revision of implied powers under the Treaty on the Functioning of the European Union (TFEU).[1] The purpose of this article is to give an account and present an analysis of the changes to the implied powers proposed in the latest round of the Intergovernmental Conference (IGC) of 2007.[2] Im-

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1. Consolidated version of the Treaty on the Functioning of the European Union, 2008 O.J. (C 115) 47 *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0047 :0199:EN:PDF [hereinafter TFEU]. Declarations annexed to the TFEU are available at Declaration Annexed to the Final Act of the Intergovernmental Conference which Adopted the Treaty of Lisbon, 2008 O.J. (C 115) 335, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C :2008:115:0335:0359:EN:PDF. *See generally* Council of the European Union, Brussels, Belgium, June 21-22, 2007, *Presidency Conclusions* CIG 11177/1/07 REV 1 (July 20, 2007), [hereinafter *Presidency Conclusions*] *available at* http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec /94932.pdf.

2. Substantive revisions concerning the implied powers have not taken place since the negotiations in October 2007, however, readers should note that the TFEU was formally

plied powers are of central importance to the constitutional structure of the EU since they provide flexibility of legislative (and in principle also of other) powers and also extend legislative powers of the European Community (EC) beyond what is explicitly mandated in the text of the treaties. Implied powers set the outer limits of legislative competencies of the EC which makes understanding them central to understanding the system of conferred powers within the EC. The revision in the roles of implied powers is also central to the understanding of the EU's constitutional architecture inter alia because it will extend the applicability of them to the EU as a whole (and abolish the difference between the EC and EU). The changes in the implied powers in the Treaty Establishing a Constitution for Europe (EU Constitutional Treaty),[3] proposed by the IGC in 2004, were radical compared to Article 308 of the Treaty Establishing the European Community (EC Treaty),[4] and

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adopted in December 2007 in the Lisbon Treaty. Conference of the Representatives of the Governments of the Member States, Brussels, Belgium, Dec. 3, 2007, *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community*, (Dec. 13, 2007), [hereinafter *Lisbon Treaty*] *available at* http://consilium.europa.eu/uedocs/cmsUpload/cg00014.en07.pdf. The TFEU *together* with the revisions in EU Treaty is also known as the "Reform Treaty" or the *Lisbon Treaty*. Here the EU Treaty and the TFEU are used exclusively.

3. Treaty Establishing a Constitution for Europe, 2004 O.J. (C 310) [hereinafter EU Constitutional Treaty].

4. Treaty Establishing the European Community (Amsterdam consolidated version) 1997 O.J. (C 340) [hereinafter EC Treaty]. For a discussion of these developments, see Carl Lebeck, *Art. 308 EC-Treaty, From a Democratic to a Constitutional Deficit? Implied Powers, Accountability and the Structure of the European Community,* Europarättslig Tidskrift 365-09 (2007); FLORIAN SANDER, REPRÄSENTATION UND KOMPETENZVERTEILUNG (Dunker & Humblot, 2005); Rudolf Streinz, *Art.308, in* EUV/EWG KOMMENTAR 2539-53 (Rudolf Streinz ed., 3d ed. 2003); Robert Schütze, *Organised Change Towards an "Ever Closer Union": Article 308 and the Limits to the Community's Legislative Competence,* 22 YB. EURO. L. 79 (2003); Robert Schütze, *Dynamic Integration – Article 308 EC and Legislation "in the Course of Operation of the Common Market": a Review Essay*, 23 OX. J.L. ST. 333 (2003a); VALERIE MICHAEL, RECHERCHES SUR LES COMPÉTENCES DE LA COMMUNAUTÉ 500-05 (L'Harmattan 2003); Matthias Rossi, *Art. 308 (ex-Art. 235), in* KOMMENTAR ZU EU-VERTRAG UND EG-VERTRAG 2537-60 (Christian Calliess & Matthias Ruffert eds., Bücher Luchterhand 2002); Peter Orebech, *The EU Competency Confusion: Limits, "Extension Mechanisms," Split Power, Subsidiarity, and "Institutional Clashes,"* 13 J. TRANSNAT'L L. & POL'Y 99 (2003); Marc Bungenberg, *Dynamische Integration, Art. 308 und die Forderung nach dem Kompetenzkatalog,* Europarecht 879 (2000); MARC BUNGENBERG, ART. 235 EGV NACH MAASTRICHT (Baden-Baden 1999); Sigmar Stadelmaier, *Die"Implied Powers" der Europäischen Gemeinschaften*, 55 AUSTRIAN J. PUB AND INT'l L. 353, 354-55 (1997); ANITA WOLF-NIEDERMAIER, DER EUROPÄISCHE GERICHTSHOF ZWISCHEN RECHT UND POLITIK 200-05 (Baden-Baden 1997); Ferdinand Tschofen, *Article 235 of the Treaty Establishing the European Economic Community: Potential Conflicts Between the Dynamics of Lawmaking in the Community and National Constitutional Principles,* 12 MICH. J. INT'L. L.471 (1991); J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2443-53 (1991). There has been considerable doctrinal discussion when it comes to the extent of the role of Article 308 EC Treaty, for some authors proposing a more traditional restrained approach see P. Lachmann, *Some Danish Reflections on the Use of Article 235 of the Rome Treaty,* 18 CML. REV. 447 (1981); Ivo E. Schwartz, *Article 235 and Law-Making Powers in the European Community,* 27 INT'L & COMP. L.Q. 614 (1978); G. Marenco, *Les Conditions d'Application de l'Article 235 du Traité C.E.E.*, 13 Revue Du Marché Commun. 147, 147-57 (1970); Gert

the revisions proposed to the IGC 2007 have proposed further (but less radical) revisions on some issues. Implied powers generally allow public authorities flexibility to act on concerns that are related to their fields of activity, but which are not covered by the competencies allocated to them. The main reason implied powers are of such interest is because they confer powers to the European Community (EC) and the EU that are not clearly defined. In that respect, Article 308 EC Treaty is an exception to the prevalence of the defined (and hence delimited) powers of the EC/EU. Article 308 EC Treaty is a central part of the constitutional framework, since the EC/EU lacks inherent competencies, and the member states are the "masters of the treaties." The structural issue of implied power is central to understanding some of the legitimacy problems facing the EC/EU. This Article discusses some of the aspects of the changes in the flexibility clause in relation to current Article 308 EC Treaty. The comparison concerns both the proposed changes adopted by the IGC 2004 in the EU Constitutional Treaty, and the changes proposed during the IGC 2007 incorporated into the TFEU.

Although there is considerable disagreement about the character of the EU, and to some extent, disagreement on the constitutional principles on which it should rely, there seems to be some agreement on the institutional principles of the EU that can be used to describe the constitutional practices of the EC/EU. These include conferred (as opposed to inherent) powers, fundamental rights, institutional balance, subsidiarity, and proportionality.[5] In such a system, implied powers are problematic since they weaken the constraining effects of conferred powers, and possibly the constraining effects of subsidiarity. The use of implied powers is often in contradiction with the protection of subsidiarity, as the use of implied powers leads to a greater degree of legal harmonization at the EU level. The protection of subsidiarity through procedural means in relation to the exercise of implied powers is a central part of the maintenance of some limits on the competencies of the EU.

A. Conferred Powers and Functional Integration

Nicolaysen, *Zur Theorie von den Implied Powers in den Europäischen Gemeinschaften*, Europarecht 129 (1966).

5. Armin von Bogdandy, *Europäischen Prinzipienlehre*, *in* EUROPÄISCHES VERFASSUNGSRECHT: THEORETISCHE UND DOGMATISCHE GRUNDZÜGE 149, 179-81, 191-94 (Armin von Bogdandy ed., 2003).

The EC/EU does not have any inherent powers; it only has powers delegated to it by the EC/EU member states.[6] The EC/EU cannot grant itself further powers. It lacks what has been called "*Kompetenz-Kompetenz*," meaning that it lacks the power to change its own legal competency.[7] This view of the EC/EU has been consistent over time, and leads to the conclusion that those wielding the ultimate power over the EU are the member states in their capacities as "masters of the treaties."[8] While that is a theoretical and largely uncontested position, upheld in the TFEU, the

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6. Under the EC/EU Treaties, the distinction between inherent and conferred powers has been explored by Alan Dashwood, *The Limits of European Community Powers*, 21 EUR. L. REV. 113, 115 (1996); Ingolf Pernice, *Kompetenzabgrenzung im Europäischen Verfassungsverbund*, 55 JURISTEN ZEITUNG 866 (2000); Franz C. Mayer, *Die drei Dimensionen der Europäischen Kompetenzdebatte*, 61 HEIDELBERG J. INT'L L. 577 (2001), *available at* http://www.zaoerv.de/61_2001/vol61.cfm; Armin von Bogdandy & Jürgen Bast, *Die vertikale Kompetenzordnung der Europäischen Union: Rechtsdogmatischer Bestand und verfassungspolitische Reformperspektiven*, 28 EUROPÄISCHE GRUNDRECHT ZEITSCHRIFT 441 (2001); Gráinne de Búrca & Bruno de Witte, *The Delimitation of Powers Between the EU and its Member States*, EUI RCAS Policy Paper CR 2001/03, *available at* http://www.iue.it/RSCAS/e-texts/CR200103.pdf.

7. However, when recognizing that the EC/EU cannot extend its own competencies, the ECJ has consistently held that the meaning of the competencies given to the EC/EU is to be determined by the ECJ itself. In that sense, one may argue that there is a judicial *Kompetenz-Kompetenz* in the EC/EU constitutional order. If that is true, the possibility of judicial *Kompetenz-Kompetenz* is distinctive from the possibility of inherent public powers. The reason for this is that in a constitutional system, where the primary mode of creating legal norms is through secondary legislation under a framework of treaties which cannot be legally changed by the lawmaking institutions in that constitutional system, it relegates the possibility of expansion of competencies to judicial practice. There are two possibilities for the ECJ to exercise judicial *Kompetenz-Kompetenz* in an expansive way. First, the ECJ can approve *ex post facto* expansive interpretations of legislative and executive powers of the political branches of the EU. The other possibility is for the ECJ to interpret fundamental freedoms (and in certain contexts fundamental rights) under the treaties in an expansive fashion. It seems clear that judicial *Kompetenz-Kompetenz* lacks the capacity of coordinated constitutional change, which is the core of inherent powers. The extent and effectiveness of judicial *Kompetenz-Kompetenz* is dependent upon the practices of the political branches. Thus, the role of the ECJ becomes a matter of stabilizing the legal framework already given by the member states. *See* Koen Lenaerts & Kathleen Gutman, *"Federal Common Law" in the European Union: A Comparative Perspective from the United States*, 54 AM. J. COMP. L. 1 (2006); FRANZ C. MAYER, *The European Constitution and the Courts, in* PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW (Armin von Bogdandy & Jürgen Bast eds., 2006); Gareth Davies, *The Division of Powers Between the European Court of Justice and National Courts*, Constitutionalism Web-Papers, ConWEB No. 3, Apr. 2004, *available at* http://www.qub.ac.uk/schools/SchoolofPoliticsInternationalStudiesandPhilosophy/FileStore/ConWEBFiles/Filetoupload,38338,en.pdf. S*ee generally* J.H.H.WEILER, THE CONSTITUTION OF EUROPE: "DO THE NEW CLOTHES HAVE AN EMPEROR?" (Cambridge Univ. Press 1999); Koen Lenaerts, *Some Thoughts About the Interaction Between Judges and Politicians,* 1992 U. CHI. LEGAL F. 93 (1992); Hjalte Rasmussen, *Towards a Normative Theory of Interpretation of Community Law*, 1992 U. CHI. LEGAL F. 135 (1992); Trevor C. Hartley, *Federalism, Courts and Legal Systems: The Emerging Constitution of the European Community*, 34 AM. J. COMP. L. 229 (1986); Ami Barav*, The Judicial Power of the European Economic Community*, 53 S. CAL. L. REV. 461 (1980); Note, *The Court of Justice of the European Community: An Institutional Analysis*, 51 IOWA L. REV. 129 (1965-1966).

8. Christian Calliess, *art. 5 (ex-art 3b)*, *in* KOMMENTAR ZU EU-VERTRAG UND EG-VERTRAG 381 (Christian Calliess & Matthias Ruffert eds., Luchterhand 2002).

central issue is to what extent can the EU be seen as constrained by the principle of conferred powers?[9] For conferred powers to be a meaningful basis for as well as limitation on public powers, it is presupposed that they are limited in scope and that those limits are possible to determine. In the case of powers delegated to the EC the limits have been defined through the objectives that the powers are to serve and the competencies allocated to the EC to serve that objective. The functions of such norms are generally set out in terms of the objectives of the EC/EU.[10] The role of objectives to serve as a basis for a constitutionalization of the extent of policy making powers of the EU under the treaties is based on the premise that they are sufficiently clearly stated. The role of the objectives stated in the treaties has thus been to define those functions of public authorities that the member states have delegated to the EC/EU.

The legitimacy of functional integration is primarily based on chains of delegation rather than output. Functional integration is, at least in the understanding of the European Court of Justice (ECJ) and the constitutional orders (including the courts) of the member states, made legitimate by the delegation of powers to the EU by the member states, and that delegation has been acceptable within the member states' respective constitutional orders due to its functional and limited character. In that regard, the use of implied powers is problematic. On one hand, implied powers may appear to be necessary in order to fulfil the functional goals but, to the extent the functional goals necessitate the use of more extensive powers than envisioned, it will require a consideration of non-functional, value-based choices. Functional integration is defined by the common institutions that are entrusted with powers of government defined in terms of specific tasks, and not in terms of territorial control. Functional delegation to specialized agencies of government also exists in national constitutionalism, but the dif-

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9. That particular view on the nature of EC/EU and subsequently EU law has also been included in Article 5 EC Treaty, and with regard to particular institutions in Articles 7(1), 8, 9, 13, 189, 225a, 237, 240 of the EC Treaty, as well as in Articles 9(2), 10(2), 18(3), 32(1), Art. II-51(1), III-8(1), III-80, III-217 of Draft Constitutional Treaty for the European Union proposed by the EU Constitutional Convention, and subsequently in the defunct EU Constitutional Treaty agreed by the IGC 2004 Article I-3(5), I-6, I-11, I-19, I-111, I-118, III-315, III-373, III-375, III-404 EU Constitutional Treaty. The principle of conferred powers was also retained in the Treaty on the Functioning of the European Union in Articles, 3(6) 4(1), 5(2), and 9(2). It is furthermore emphasised in Declaration Annexed to the Final Act of the Intergovernmental Conference which Adopted the Treaty of Lisbon, , 2008 O.J. (C 115) 344-45, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C :2008:115:0335:0359:EN:PDF

10. Opinion 2/94, Accession by the Community to the European Convention for the Protection of Human Rights & Fundamental Freedoms, 1996 E.C.R. I-1759, I-1788.

ference is that functional integration is based only on powers that are given to functionally-defined public bodies. Functional integration is in that sense based on an inherent paradox, namely the EU is supposed to be able to handle certain limited tasks of public policy-making more effectively than national institutions, whereas the objective of effectiveness often leads to a need to overstep the boundaries established for functional integration. As a result, functional integration has been retained in the phrasing of the treaties, while the functional integration has only been a weak constraint the scope of EU's policy-making powers. The limited character of functional integration is also what makes it acceptable in relation to national democracy and national constitutionalism, as the limited character of supranationalism makes it possible to retain the central aspects of democratic accountability within the nation state.[11] The dilemma is that functionalism, in its search for effectiveness, transcends its own boundaries, which causes the need for *political deliberation* over choices of policies and values to resurface. It thus undermines the possibility of containing such political discourse (and disagreement) within the national polity. That is a common ground for the view that the EC/EU requires some form of constitutional legitimacy independent from that of the delegation of the member states. Functionalism has been dependent upon a constitutional framework which allowed its powers to be effective, while at the same time, constraining those powers so as not to intrude on the domains where member states have not delegated any powers to the EU. The limited practical effect of functional constraints thus poses a problem of democratic legitimacy.

Functional integration lacks the kind of legitimacy that stems from continuous democratic processes, and rather relies on the fact that a sufficient degree of legitimacy can be attained by constitutionalizing the content of certain policy choices. Functional integration seeks to alleviate the democratic deficit by stabilizing and constitutionalizing policy competencies, and providing effective and efficient policy as a substitute for democratic participation and accountability.[12] Conferred powers and the principle of functional integration support each other, but as is obvious from the recently

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11. Sverker Gustavsson, *Preserve or Abolish the Democratic Deficit?, in* NATIONAL PARLIAMENTS AS CORNERSTONES OF EUROPEAN INTEGRATION 100, 117-21 (Eivind Smith ed.,1996); Christoph Gusy, *Demokratiedefizite postnationaler Gemeinschaften Unter Berücksichtigung der Europäischen Union*, *in* GLOBALISIERUNG UND DEMOKRATIE 131 (Hauke Brunkhorst ed., 2000).

12. *See, e.g.*, Ernst-Joachim Mestmäcker, *On the Legitimacy of European Law*, *in* WIRTSCHAFT UND VERFASSUNG IN DER EUROPÄISCHEN UNION 133 (1994/2003).

proposed revisions of the treaties, conferred powers and functional integration are not logically dependent upon each other. Powers can be conferred without being harnessed to attain precisely defined objectives. The functionalist form of integration lives with an inherent paradox that lurks in the background of the decisions of the ECJ. The ECJ has successively transformed its case law concerning implied powers of the EC from a review of implied powers conferred in the EC Treaty to a review of objectives of the EC stated in the EC Treaty. The expansion, and in particular, the merger of EC objectives into the objectives of the EU, as in the proposed treaty revisions, leads to the conclusion that the objectives will be broader, and their connection to particular competencies will be far weaker. The probable result is that broader objectives will be interpreted in a more extensive way, meaning that the practical role of conferred powers as a constraint will become more limited. More generally, the role implied powers have come to play is problematic given the traditional assumptions of the legitimacy of EC law as relying on the principle of functionally limited powers. The functional constitutional approach assumes that public powers ought to be exercised in a more single-minded fashion than normal democratic political processes allow for. Processes of policy making in political assemblies that are directly elected require, to a far greater extent, openness to deliberation over political preferences and values.

B. Implied Powers in a System of Conferred Powers

The role of implied powers is defined by the fact that the EC/EU does not have any inherent public powers.[13] The only powers it claims are the powers delegated to it by the member states. The basis for such delegation is that the powers are either explicitly mentioned in the treaties, or based on a general conferral of powers that are supposed to supplement the explicitly mentioned powers in the process of attaining EC/EU objectives. The existence of "implied powers" in a system based on conferred powers leads to a situation where one has to distinguish between "explicitly conferred powers" and "implicitly conferred powers." Alongside the

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13. There is a certain terminological confusion when it comes to Article 308 EC Treaty. Lenaerts & Van Nuffel use the terms "implicit" and "implied" competencies of the EU when referring to actions based on a conjunction of several articles under the EC Treaties, and they refer to Article 308 EC Treaty as a matter of "supplementary competences." *See* KOEN LENAERTS & PIET VAN NUFFEL, CONSTITUTIONAL LAW OF THE EUROPEAN UNION 90-95 (Robert Bray ed., 2d ed. 2005). The most common way to describe powers under Article 308 EC Treaty is however "implied competencies," and this paper will adhere to that terminology.

principle of conferred powers is hence, as mentioned above, the principle of functional integration.

Implied powers seem to be the consequence of an attempt to increase the flexibility of a constitutional order of conferred powers where there is, in principle, little flexibility. The ways to constrain implied powers have been by procedure and judicial control, which has been focused on reviewing whether the measures that can be adopted under "explicitly conferred powers" and serve the purposes of the EC. As may be inferred from the term "implied," such powers are subsidiary to the exercise of powers delegated "explicitly", and because of the differences in scope and decision making, the maintenance of that distinction seems to stem from a constitutional perspective. In a system where the objectives become too wide to serve as a basis for meaningful judicial review, the effect seems to be that controlling the exercise of implied powers will become increasingly accomplished by procedural rather than substantive means.

C. Implied Powers and the Problem of Democratic Deficit in the EU

The implied powers are related to another major problem in the constitutional discourse on the EU—the so-called "democratic deficit."[14] The basis of the democratic deficit[15] is the character of the decision making by the Council of Ministers. Their decisions are entirely a matter of decisions by the national governments, acting *in corporere*. As the national governments are elected in the respective member states according to constitutional and electoral law of each member states, by the citizens of each member state,

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14. Eric A. Stein, *International Integration and Democracy: No Love at First Sight?* 95 AM. J. INT'L L. 489, 519-24 (2001); Anne Peters, *European Democracy after the 2003 Convention,* 41 COMMON MKT. L. REV. 37, 41 (2004). *See* Andreas Føllesdal & Simon Hix, *Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik*, 44 J. COMMON MKT. STUDIES 533 (2006). There have been attempts to argue that there is no "democratic deficit," due to the fact that the EC/EU form a structure of regulatory governance, which is governed through objectives over which application with little disagreement (and political disagreement over the objectives can be relegated to the process of treaty ratification). *See* Giandomenico Majone, *The European Community: an Independent Fourth Branch of Government*? (European Univ. Instit. Political & Soc. Sci. Working Paper No. 9, 1993); *The Rise of Regulatory State in Europe*, 17 W. EURO. POL. 78 (1994); *see generally* GIANDOMENICO MAJONE, REGULATING EUROPE (Jeremy Richardson ed., 1996); Giandomenico Majone, *Europe's 'Democratic Deficit': The Question of Standards*, 4 EUR. L.J. 5, 5-28 (1998); Andrew Moravcsik, *In Defence of the 'Democratic Deficit': Reassessing Legitimacy in the European Union*, 40 J. COMMON MKT. STUDIES 603 (2002); *see* FRITZ SCHARPF, GOVERNING IN EUROPE: EFFECTIVE AND DEMOCRATIC? 21-23 (Oxford Univ. Press 2005).

15. Carol Harlow, *European Administrative Law and the Global Challenge*, *in* THE EVOLUTION OF EU LAW 266 (P. Craig & Gráinne de Búrca eds., 1999).

there is no possibility of holding the Council, as a collective accountable for its decisions.

Implied powers set the outer limits of what functional integration can achieve within the given treaty structure. However, implied powers as they have been designed and interpreted have also created a "constitutional deficit". The constitutional deficit is an effect of the need for effectiveness, combined with of the institutional design aimed at retaining control of the member states over the outer limits of the EC competencies by giving that control to the executives of the member states. As mentioned above, implied powers can be seen as a way to cope with the inherent paradox of functional integration. That can also be seen in the manner in which the ECJ has sought to manage the application of implied powers: by extending the use of explicitly delegated powers as much as possible, while at the same time, accepting the continuous expansion of the EC competencies through implied powers. The total effect has been to expand the powers of the EC/EU with clear support by the national executives, but without clear support in the treaties. That has deepened the democratic deficit, while also creating a constitutional deficit, without addressing the issue on whether there is any need for a basis of legitimacy other than the consent of the member states to the EU. Likewise, the chosen model has also largely excluded effective accountability and democratic control of the Council.

D. Subsidiarity as a Constraint on Implied Powers: From Substance to Procedure?

There are inevitable conflicts between subsidiarity and needs for effective supranational coordination, an issue which has partly been resolved through the use of implied powers. The two are interrelated in the sense that they concern the protection of democratic legitimacy conceived as (ultimately) satisfied at a lower level of decision making versus the idea of legitimacy to a great extent dependent on effective governance also if effectiveness would lead to less effective accountability. Subsidiarity was conceived as that decisions should be made at the lowest level possible which seems to rely on a notion of participation and accountability as central criterion of legitimate public decision-making. The question is raised below as to whether that will change under the TFEU, since functional integration as the main source of legitimacy seems to have been abandoned in the TFEU through the considerably broader empowerments that are harder to delimit than the competencies defined in the EC Treaty.

The use of implied powers under the EC Treaty has always been conditioned on a "necessity" requirement within the operation of the common market.[16] Since the introduction of the subsidiarity requirement, "necessity" is now a requirement for all actions by the EC. However, until now the subsidiarity requirement has only had an impact on a limited number of substantive issues, as a constraint it has been regarded as relatively weak. The introduction of procedural constraints to enforce subsidiarity in the EU Constitutional Treaty and the TFEU is a major change in the legal role of subsidiarity. The new constraints, in relation to the exercise of implied powers, concern both parliamentary control and a greater role for national parliaments through control of compliance with the principle of subsidiarity. Subsidiarity and implied powers have

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16. The principle of subsidiarity is set out in Article 5 EC Treaty, and in the Protocol on Subsidiarity and Proportionality which was added to the EC Treaty in the course of the Amsterdam Treaty. *See* DIE SUBSIDIARITÄT EUROPAS (Detlef Merten ed., 1993); Calliess, *supra* note 8, at 307; George A. Bermann, *Regulatory Federalisms: European Union and United States*, 263 RCADI 13 (1997); George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331 (1994); Gráinne de Búrca, *The Principle of Subsidiarity and the Court of Justice as an Institutional Actor*, 36 J. COMMON MKT. STUDIES 217, 218 (1998); *see generally*, Deborah Z. Cass, *The Word That Saves Maastricht? The Principle of Subsidiarity and the Division of Powers within the European Community*, 29 COMMON MKT. L. REV. 1107 (1992); Rudolf Dolzer, *Subsidiarity: Toward a New Balance Among the European Community and the Member States?*, 42 ST. LOUIS U. L.J. 529 (1997-98); Denis J. Edwards, *Fearing Federalism's Failure: Subsidiarity in the European Union*, 44 AM. J. COMP. L. 537 (1996); Christian Kirchner, *The Principle of Subsidiarity in the Treaty on European Union: A Critique from a Perspective of Constitutional Economics*, 6 TUL. J. INT'L & COMP. L. 291 (1998); Koen Lenaerts & Patrick van Ypersele, *Le Principe de Subsidiarite et son contexte: etude de l'article 3B du Traité CE*, CAHIERS DE DROIT EUROPÉEN 3 (1994); Paul D. Marquardt, *Subsidiarity and Sovereignty in the European Union*, 18 FORDHAM INT'L L.J. 616 (1994-1995); Gerald L. Neuman, *Subsidiarity, Harmonization, and their Values: Convergence and Divergence in Europe and the United States*, 2 COLUM. J. EUR. L. 573, 574-76 (1996); Pierre Pescatore, *Mit der Subsidarität Leben, Gedanken zu einer drohenden Balkanisierung der Europäischen Gemeinschaft*, *in* FESTSCHRIFT FÜR ULRICH EVERLING 1071 (1995); Jörn Pipkorn, *Subsidiaritätsprinzip im Vertrag über die Europäische Union – rechtliche Bedeutung und Gerichtliche Überprüfbarkeit*, 22 EUZW 697 (1992); Mathias Rohe, *Binnenmarkt oder Interessenverband? Zum Verhältnis Binnenmarktziel und Subsidiaritätsprinzip nach dem Maastricht-Vertrag*, RABELS ZEITSCHRIFT 1 (1997); Florian Sander, *Subsidiarity Infringements Before the European Court of Justice: Futile Interference with Politics or Substantial Step Towards EU Federalism?*, 12 COLUM. J. EUR. L. 517 (2005-2006); Theodor Schilling, *A New Dimension of Subsidiarity: Subsidiarity as a Rule and a Principle*, 14 Y.B. EUR. L. 203, 234 (1994); Rupert Scholz, *Das Subsidiaritätsprinzip im europäischen Gemeinschaftsrecht, - ein Tragfäigher Masβtab zur Kompetenzabgrenzung, in* FÜR RECHT UND STAAT: ZUM 60 GEBURTSTAG 441 (Klaus Letzgus et al. eds., 1994); Edward Swaine, *Subsidiarity and Self-Interest: Federalism at the European Court of Justic*e, 41 HARV. INT'L. L. J. 1 (2000); Christian Timmermans, *Subsidiarity and Transparency,* 22 FORDHAM INT' L. J. S106 (1998-1999); A.G. Toth, *The Principle of Subsidiarity in the Maastricht Treaty*, 29 COMMON MKT. L. REV. 1079 (1992); Joel P Trachtman, *L'État C'est Nous: Sovereignty, Economic Integration and Subsidiarity*, 33 HARV. INT'L. L. J. 459 (1992); W. Gary Vause, *The Subsidiarity Principle in European Union Law – American Federalism Compared*, 27 CASE W. RES. J. INT'L. L. 61 (1995).

not been explicitly connected to each other under the EC Treaty,[17] and the introduction of a control is a major novelty common to the various proposed revisions to the treaties.[18]

Subsidiarity and proportionality are both central principles when it comes to assessing the appropriate role of implied powers. The reason for that is that the use of implied powers is to be assessed on whether the powers are necessary to achieve the objectives of the common market (as under the EC Treaty) or the objectives of the EU (as under the EU Constitutional Treaty and under the proposed Treaty on the Functioning of European Union). Subsidiarity and proportionality have a strong structural similarity in the sense that they respectively require that decisions should be taken at the lowest feasible political level, and that public measures should be minimally intrusive (i.e. there is, both in the case of subsidiarity and proportionality, a two stage test of necessity and appropriateness of EC measures).[19] In that regard, subsidiarity and proportionality are two factors that have to be built into the test of necessity as a necessary requirement for the exercise of implied powers.[20]

That was recognized specifically in the EU Constitutional Treaty and in the TFEU which is now in the (yet uncertain) process of ratification. The common basis for subsidiarity and implied powers has thus been the principle of functional integration. As mentioned above, functional integration is defined by the fact that the powers delegated to a supranational organisation are limited and aimed at objectives which are, if not clearly delimited, at least

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17. However, subsidiarity and the use of implied powers both rely on a test of necessity, and the exercise of implied powers always has to pass the test of necessity under subsidiarity. There is thus a structural similarity when it comes to the relations between subsidiarity and implied powers, but effectively, implied powers depend on having passed the subsidiarity test. That does not, however, contradict the fact that the ECJ sometimes has used subsidiarity as the appropriate test to question whether a measure under Article 308 EC Treaty has been legal.

18. Anna Vergés Bausili, *Rethinking the Methods of Dividing and Exercising Powers in the EU: Reforming Subsidiarity and National Parliaments* (Jean Monnet Working Paper No. 9/02), *available at* http://www.jeanmonnetprogram.org/papers/02/020901.pdf; N.W. Barber, *Subsidiarity in the Draft Constitution*, 11 EURO. PUB. L. 196 (2005); N.W. Barber, *The Limited Modesty of Subsidiarity*, 11 EURO. L. J. 308 (2005); Ian Cooper, *The Watchdogs of Subsidiarity: National Parliaments and the Logic of Arguing in the EU*, 44 J. COMMON MKT. STUDIES 281, 281-82 (2006).

19. Gert Nicolaysen, *Notwendige Rechtssetzung Auch Ein Beitrag Zum Thema Subsidiarität*, *in* GEDÄCHTNISSCHRIFT FÜR EBERHARD GRABITZ 469, 474-75 (Albrecht Randelzhofer et al. eds., 1995).

20. Ute Mager, *Die Prozeduralisierirung des Subsidiaritätsprinzips im Verfassungsentwurf des Europäischen Konvents – Verbesserter Schutz vor Kompetensverlagerung aud die Gemeinschaftsebene*, 3 Zeitschrift für Europarechtliche Studien 471 (2003); Christian Koenig & R.A. Lorz, *Stärkung der Subsidiaritätsprinzips*, 58 JURISTEN ZEITUNG 167-73 (2003).

delimitable. The abandonment of traditional forms of functional integration thus also has extensive implications for subsidiarity and proportionality. Functional integration leads to the control of subsidiarity and proportionality becoming proceduralized rather than substantive. Thus the vast expansion of objectives of the EU, compared to the EC Treaty, leads to a common change constraining implied powers and protecting subsidiarity, where the focus changes from objectives to procedures.

E. Implied Powers Under the EC Treaty

As mentioned above, the EC/EU relies on the principle of conferred powers,[21] meaning that the EC/EU does not have any inherent powers of its own, but only has those powers that have been delegated to it by the member states.[22] In that respect, after the adoption of a new treaty, the EC/EU has powers only insofar as the states that are parties to the treaty have consented to, and the limits of the powers of the EU are set by the powers conferred to it in the treaty. [23] That also, as discussed above, sets the conditions of the use of implied powers of the EC.

II. THE BASIS FOR IMPLIED POWERS–ARTICLE 308 EC TREATY

Among those conferred powers is also a clause of so called "implied powers,"[24] that confers the right on the Council, after consultations with the European Parliament to decide on measures necessary "for the realization of the common market." The first way in which the implied powers clause was formulated was in Article 235 Treaty Establishing the European Community (Rome Treaty)[25] subsequently renumbered as Article 308 EC Treaty[26] states:

> If action by the Community should prove necessary to attain, in the course of the operation of the com-

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21. LENAERTS & VAN NUFFEL, *supra* note 12, at 86-89; STEPHEN WEATHERILL, LAW AND INTEGRATION IN THE EUROPEAN UNION 38 (Peter Cane et al. eds., 1995).

22. EC Treaty, *supra* note 4, at art. 5.

23. Lebeck, *supra* note 4, 365-09 (2007); Schütze, *supra* note 4, at 79, 82-86; Schütze *supra* note 4, at 333; Rossi, *supra* note 4, at 2537-60; Stadelmaier, *supra* note 4, at 353; Tschofen, *supra* note 4, at 471; Weiler, *supra* note 4 at 2443-53; Lachmann, *supra* note 4, at 447, 451-55; Marenco, *supra* note 4, at 147-57; Nicolaysen, *supra* note 4, at 129, 131-36.

24. EC Treaty, *supra* note 4, at art. 308.

25. Treaty Establishing the European Community, 1992 O.J. (C 191) [hereinafter revised version of the Rome Treaty].

26. *Id*.

> mon market, one of the objectives of the Community, and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.[27]

The implied powers in the constitutional structure of the EC (until now only form of implied powers) makes four formal requirements: (1) a measure should be aimed at attaining a community objective; (2) it should be *necessary*, and (3) connected to the *operation of the common market*, (a factor that the ECJ has chosen to interpret as anything provided for within the EC Treaty); and (4) it shall *not provided for the necessary powers* in the EC Treaty. The objectives of the EC are set out in Article 2 EC Treaty and consist of general goals of EC policies that are specified in Articles 3 and 4. However, Article 308 EC Treaty refers to actions "in the operation of the common market," which seems to mean that the area where implied powers can be applied is restricted to that part of the EC. The distinction between the common market and the other objectives of the community points to a limited understanding of the common market. The ECJ has in its case law under Article 308 EC Treaty never accepted any such limited understanding, instead the objectives of the community have been understood in a "global" sense, regarding the objectives as a whole, and sometimes combined with the objectives of the EU as set out under the EU-treaty when the EC-treaty provides for the EC to be used as a vehicle for implementation of EU-policies. The basis for interpreting the conferred powers are also related to the general constraints on implementation of objectives that are set out in Article 5 EC Treaty,[28] which enshrines the principle of conferred powers, and sets out the principle that in order to realize the purposes of the community, the community may not go beyond what is set out in the treaties, and the community may not take any action that is not necessary to realize the objectives.

A. The Legal Forms of Measures Under Article 308 EC Treaty

An important aspect of Article 308 EC Treaty is that it does not speak of *legislation* as such. The word used instead is "measures"

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27. *Id.*
28. Calliess, *supra* note 8, at 307-09.

which seems, in principle, to be unlimited.[29] The use of Article 308 EC Treaty has mostly been limited to the adoption of legislative measures, albeit of wildly varying generality. That means that the implied powers under the EC Treaty are legislative as well as executive, which means that the national governments acting as a collective in the Council of Ministers merges executive and legislative powers at the EC level as well as at the national level.

B. The Procedure of Decision Making

In relation to the decision making procedure, it is clear that the traditional approach has been limited and focused on the powers of the national executives acting *in corporere* within the Council. That approach can be characterized as "executive federalism," a constitutional structure consisting of states rather than a people as constituent parts, and where the constituent parts are represented at the federal or supranational level by representatives of their respective (usually indirectly elected) executives rather than through directly elected legislatures.[30] In a system of executive federalism, where the constituent parts are the member states and the member states regulate their own processes of political decision making, it is impossible to hold the "federal" level accountable. The only possible form of accountability is indirect through the national governments. The parliamentary control allowed within the traditional structure of implied powers in EC law has been limited to the European Parliament, and that control has been limited to rights of consultation that have been interpreted in a restrictive fashion.[31] The process of consultation does not include any procedure to hold the Council of Ministers to account for their views or to provide any rationale for its decisions. The process does not even include a requirement to await the opinion of the Euro-

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29. The word "measure" must be understood in a broader sense than "legislative acts," and it also seems to imply that the use of implied powers under Article 308 EC Treaty have been applicable to the exercise of public powers by the Council of Ministers. That means legal acts, which cannot in any normal sense be understood as legislative acts, have also fallen under Article 308 EC Treaty. There is, as will be mentioned below, no real difference in that respect between the Proposed Treaty on the Functioning of the European Union and the current EC Treaty, and in certain respects, this means that the Council of Ministers will be able to create legislative (i.e. general) and non-general legal norms.

30. PHILIPP DANN, PARLAMENTE IM EXEKUTIVFÖDERALISMUS (Armin von Bagdandy & Ruediger Wolfrum eds., 2003); *see also* Deirdre Curtin, *The Executive(s) of the European Union*, *in* 30 YEARS OF EUROPEAN LEGAL STUDIES AT THE COLLEGE OF EUROPE 83 (Paul Demaret et al. eds., 2005); Stefan Griller, *EU – ein staatsrechtliches Monstrum?, in* EUROPAWISSENSCHAFTEN 201 (Gunnar Folke Schuppert et al. eds., 2005).

31. Case C-417/93, Parliament v. Council, 1995 E.C.R. I-1185, I-1197-98, I-1213-15. The first attempt to formalize the duties of consultation was with Case 138/79, Roquette Fréres v. Council, 1980 E.C.R. 3333.

pean Parliament. As a result, the role of the European Parliament has been limited in that it has not had, as is the case in the co-decision procedure, a power to delay decision making and *create* a supermajority requirement in relation to the decision making of the Council of Ministers.

Another aspect is the importance of the EC executive branch, the European Commission, as it has exclusive powers of proposal, and hence a strong power of agenda setting. In that respect, legislation on the basis of Article 308 EC Treaty is not different from other types of legislation. Thus, the European Commission is the "gatekeeper" over legislation when the legislation is adopted on the basis of Article 308 EC Treaty. Whereas, implied powers are often used in an *ad hoc* manner, the agenda setting powers of the European Commission suggests that there is a strong and continuous institutional interest[32] of the Commission in expanding the reach of EC law. The only check on the exercise of power under Article 308 EC Treaty, in the present form, is the ECJ and the Court of First Instance (CFI). The only possible control is judicial, and although that might be effective, it also means that control will be limited when it comes to issues of policy. The consequence is relatively wide discretion, particularly in areas where judicial institutions traditionally tend to be deferential to the political branches. The ECJ has developed case law which sought to uphold the primacy of explicitly delegated powers[33] and sought to delimit the use of Article 308 EC Treaty. These developments were partly a result of the need to maintain institutional balance within the EC/EU,

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32. The theoretical approach related to institutional interests has been a central current in U.S. constitutional theory. Expressed with considerable simplification, the assumption of the theories based on institutional interests is that each branch of government seeks to maximize its power and influence. That idea has sometimes relied on a general theory of behaviour of political decision making which assumes influence-maximization. The view of institutional interests has been challenged on the basis that political decision makers need not want to maximize their own influence and power, e.g. in situations where political decision makers, for ideological reasons, want to delimit their own powers. In addition to that, one could also add that efficiency and effectiveness of the exercise of powers, may in some contexts, be enhanced through the delegation or separation of powers. Second, the interest in binding one's adversaries may, under certain institutional constraints, lead to an acceptance of more generalized forms of constitutional constraints. However, it should also be said that if decision makers have a general preference to enforce their policies, it seems likely over time that they will be interested in enhancing the powers of the institutions they represent. In the case of federal or quasi-federal systems, where there is no party-system, the institutional aspects seem even more important. Daryl Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006); Richard A. Epstein, *Why Parties and Powers Both Matter: A Separationist Response to Levinson and Pildes*, 119 HARV. L. REV. F. 210 (2006) *available at* http://www.harvardlawreview.org /forum/issues/119/june06/epstein.shtml.

33. *See* Case 8/73, Hauptzollamt Bremen v. Massey Ferguson, 1973 E.C.R. I-897, 907; Case 45/86, Comm'n v. Council, 1987 E.C.R. 1493, 1520.

since other legal bases for decision making give greater roles to the European Parliament (and in the case of IGCs, for national parliaments that are permitted, to accept or reject amendments to the treaties). The ECJ has restricted the discretionary power of the Council to choose a legal basis for its decision, to a minimum.[34] Furthermore the ECJ has interpreted the scope of the ordinary legal bases expansively in order to make them cover as much ground as possible, which has simultaneously restricted the role of implied powers in areas where the authority of the EC/EU is uncontested.[35] However, the ECJ has accepted a wide scope of implied powers in fields where the legal basis for actions by the EC/EU is less obvious. The structure of implied powers in EC law has certain institutional features. It created a very strong role of the national executives, and because of the unique characteristics of the EC/EU political system (lack of political parties, lack of a permanent opposition, lack of transparency regarding the deliberations of the Council of Ministers), the least common denominator of the Council presumably were the interests of the national executives.[36] The absence of political accountability and the continuous change in the composition of the federal legislature (following the varying electoral periods in the member states) preclude the emergence of political parties and a system with a ruling majority and a minority in opposition. The absence of permanent lines of political conflict instead leads to the least common denominator of decision making, national and institutional interests common to all executives of the member states. These traits are common to all forms of decision making in institutions that are characterized by executive federalism, such as the Council of Ministers. To a certain extent, the will of the Council might be tempered by parliamentary influences at the federal level, and in the co-decision procedure of the EC that is the case where the European Parliament works as a countervailing power to the Council of Ministers, but which is not the case when it comes to implied powers.

C. The Scope of Implied Powers: From Policies to the Objectives of the European Community

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34. *See* Case C-268/94, Portuguese Republic v. Council, 1996 E.C.R. I-6177, I-6216-I-6217, I-6186-I-6187.

35. *See* Case C-350/92 Spain v. Council, 1995 E.C.R. I-1985, I-2012-15; *see e.g.,* Case C-271/94, Parliament v. Council, 1996 E.C.R. I-1689, I-1710-11; Case C-377/98, Netherlands v. Parliament & Council, 2002 E.C.R. I-7079; Case C-436/03, Parliament v. Council, 2006 E.C.R. I-3733; Case C-217/04, U.K. v. Parliament & Council, 2006 E.C.R. I-3771 .

36. Lebeck*, supra* note 4, at 400-09.

The scope of the implied powers of the EC is primarily defined through the objectives of the European Community. Those objectives are set out in Article 2 EC Treaty and specified in Articles 3 and 4 EC Treaty. The substantive limits of the implied powers are based, first on the implications of the text, and then to include what cannot be read out from the text, and finally to be understood in light of the treaty objectives as a whole. This has been interpreted to mean that the objectives within the EC Treaty have applied in specific contexts where a legislative authorization to the EC has been made in order to realize some measures of the EU.

The specification of objectives is done in two steps within the EC Treaty, generally, in Article 2 EC Treaty, and more specifically, in Articles 3 and 4 EC Treaty. It is important to note that when the articles specifying objectives refer to each other, the general objectives are defined with reference to more specific objectives. A textualist approach to the statement of Article 2 EC Treaty seems to be that the EC objectives are tripartite, in common market, the Economic and Monetary Union (EMU), and in a number of other objectives. This linguistic understanding of EC objectives seems to point to a limited approach to the objectives of the EC. The text seems to imply *e contrario* that implied powers are not applicable in the field of the EMU, since the monetary union as such is distinguished from the common market in Article 2 EC Treaty. The objective of establishing a common market is defined through the policy measures enumerated in Articles 3 and 4 EC Treaty. The objectives in Articles 3 and 4 EC Treaty are set out with a high level of specificity, and they are to be applied in conjunction with more specific competencies of policies set out in the treaties. That is relevant when it comes to analyzing the possible meanings of implied powers when it comes to realising the objectives. The objectives, in conjunction with the principle of conferred powers, also raise the question of whether the EC/EU has a general power to regulate the internal market, a claim which ECJ rejected given the high degree of specificity of cmpetencies.[37]

In that regard, the role of implied powers becomes even more important.[38] The ECJ adopted an approach where the objectives

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37. Alan Dashwood, *The Relationship Between the Member States and the European Union/European Community,* 41 COMMON MKT. L. REV. 355, 357-62 (2004); Derrick Wyatt, *Community Competence to Regulate the Internal Market* (Univ. of Oxford Faculty of Law Legal Studies Research Paper Series, Paper No. 9/2007), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=997863.

38. *See* Case C-376/98, Germany v. Parliament, 2000 E.C.R. I-8419 ¶¶ 83, 84; Case C-74/99 The Queen v. Sec'y of State for Health *ex parte* Imperial Tobacco Ltd., 2000 E.C.R. I-8599.

set out in Article 2 EC Treaty, as specified by Articles 3 and 4, which also means that there is no possibility under such explicitly delegated competencies alone, to further other objectives.[39] From the outset, the basis of competencies spelled out in Article 3 EC Treaty was seen as specifying the meaning of explicit competencies, which could be interpreted in a more extensive fashion through Article 308 EC Treaty.[40] The objectives are mainly economic, and the specific policies and activities referred to in Articles 3 and 4 EC Treaty also set limits to the competencies of the EU. However, the idea that the competencies have been spelled out only through Article 3 EC Treaty has been abandoned since goals under Article 4 have also been included, and since the use of goals specified have been assumed to be the basis for the use of Article 308 EC Treaty to realise implied goals rather than implied powers. Although the interpretation has been expansive it has not been unlimited. That is because the case law has been inconsistent as to whether the competencies conferred in conjunction with Article 308 EC Treaty confer a general power to regulate the common market, or if it only confers specific powers applicable in certain fields. The present approach seems to be that the EC (given the view set out in Article 5 EC Treaty on the conferred and limited nature of the powers of EC) does not have any general power to regulate the internal market even under Article 308 EC Treaty. That is a view which provides for certain limits when it comes to interpreting implied competencies. This is true not only when it comes to interpreting explicitly stated competencies in conjunction with each other, but also to some extent to when it comes to the application of Article 308 EC Treaty.

Whereas the ECJ has held explicitly limited competencies to be specific and not general, they may (as long as they are used, to some extent, for their express purpose) regulate issues not related to economic policies. The scope of Article 308 EC Treaty has been most contested in the field of external policy and Common Foreign and Security Policy (CFSP), where the issue on the scope of EC powers in conjunction with Article 308 EC Treaty was claimed to reflect all possible purposes of the EC.. It was an approach accepted by the ECJ in Opinion 2/94, but the opinion also clearly limited that holistic interpretation to the objectives of the EC (as opposed to objectives of the EC). The authorizations of the EC have been understood broadly and it is not an exaggeration to claim that there has been a successive weakening of the distinction that

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39. Dashwood, *supra* note 37, at 358.
40. Lachmann, *supra* note 4, at 449-53.

legislative authorizations in the EC Treaty to use EC law to implement measures of the second pillar of the EU, the CFSP, have led to such measures receiving limited judicial scrutiny.[41] However, the expansionist stance has not precluded the ECJ from at some occasions, (most importantly in Advisory Opinion 2/94[42] on the competency of the EC), to acceding to the European Convention of Human Rights set a limit to the use of Article 308 EC Treaty, at least in cases where no purposes of the EC could be used to justify the decision. In relation to EC's accession to the European Convention on Human Rights, the ECJ rejected that claim to competency under Article 308 EC Treaty on the basis that the protection of fundamental rights was not a *purpose* of the EC.[43] Although the implied competency of the EU has been expansively interpreted, it has been exclusively tailored to measures regulated in the EC Treaty. Article 308 EC Treaty has been used to implement measures under the CFSP only in cases where there have been explicit provisions for use of EC law for such purposes within the EC Treaty. The ECJ/CFI held that the objectives of the EC Treaty, understood as a whole, should set the outer limits for the competencies of the EC, rather than more narrow textual interpretations. Several other features of the current case law are also notable, and given the most recent developments, will be carried on into the revised EU Treaty. Since the early seventies, the ECJ has held that there can never be a legislative choice between exercising implied powers and exercising ordinary legislative procedures, if the use of the latter is provided for in the EC Treaty. The ECJ has consistently limited the applicability of implied powers and flexibility clauses by interpreting ordinary explicitly conferred powers[44] in a broad manner, but also allowed for quite broad interpretations of implied powers when explicitly conferred powers have been exhausted. The court's approach avoids textual interpretations in favour of purpose-based interpretations, and also avoids limited interpretations of particular purposes in favour of a more general understanding of the purposes stated in the EC Treaty as a

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41. Case T-315/01, Kadi v. Council & Comm'n, 2005 E.C.R. II-3649.

42. Opinion 2/94, Accession by the Community to the European Convention for the Protection of Human Rights & Fundamental Freedoms, 1996 E.C.R. I-1759, I-1788-89.

43. However, one of the paradoxes of that view is that human rights are seen primarily as an area for positive governmental action, rather than just side-constraints on the activities of the government. The European Charter on Human Rights and the recently adopted Treaty on the Functioning of the European Union also reflects that view, where an explicit incorporation of the protection of human rights, as an aim of public policy, has been accepted (as well as a competency to accede to the ECHR).

44 . *See* EC Treaty, *supra* note 4, at art. 5.

whole.[45] It has led to a view where the purposes and objectives that can be deduced from the text and structure of the EC Treaty are central in ascertaining the competencies of the EC.[46]

However, more recently, the ECJ/CFI has also relied on the objectives of the EU as a whole to interpret articles (such as Article 60 EC Treaty), that explicitly authorize legislative measures under the EC Treaty to realise objectives under the intergovernmental pillars (e.g. in relation to the CFSP).[47] The CFI has so far interpreted the reach of the CFSP and the measures that the CFSP may justify in a quite expansive way, and it has not recognized any clearly demarcated distinctions between areas of foreign and domestic policy. The constraint (which is not without importance), as applied, has raised a concern that there has to be some link to CFSP and other policy areas of the EU on the basis of legislation. However, interpreting the CFSP widely has also led to a wide applicability of such powers when applied in conjunction with Article 308 EC Treaty.[48] The applicability of the CFSP has not formally led to the view that there is an all encompassing purpose of providing public security, but rather pointed to the notion that the area of CFSP cannot be territorially limited, (i.e. that measures directed to physical or moral persons within the EU also can be a matter of foreign policy).[49] Obviously, implied powers are not logically inconsistent with a system of conferred powers, however they tend to weaken the practical effects and the effectiveness of the constraints imposed by a principle of conferred powers, particularly when interpreted in an expansive way..[50]

D. Distinguishing Different Legal Grounds–From Flexibility to Formalism and Back Again

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45. Case 38/69, Comm'n v. Italy, 1970 E.C.R. 47.

46. Opinion 2/94, Accession by the Community to the European Convention for the Protection of Human Rights & Fundamental Freedoms, 1996 E.C.R. I-1759, I-1788.

47. Case T-315/01, Kadi v. Council & Comm'n, 2005 E.C.R. II-3649; Case T-306/01, Yusuf v. Council & Comm'n, 2005 E.C.R. II-3533.

48. It seems important to note that subsequent to the decisions of *Kadi* and *Al-Yusuf*, subsequent judgements of the CFI as well as the ECJ imposing procedural and substantive constraints on the exercise of legislative powers on the basis of Articles 60, 301 and 308 EC Treaty have been imposed, but that they have not explicitly turned down wide interpretation of which kind of legislative acts that may be justified under the said conjunction of articles of the EC Treaty with regard to the CFSP. *See* Case T-49/04, Faraj Hassan v. Council & Comm'n, 2006 E.C.R. II-52; Case T-253/02, Ayadi Hassan v. Council & Comm'n, 2006 E.C.R. II-2139; Case T-315/01, Kadi v. Council & Comm'n, 2005 E.C.R. II-3649; Case T-306/01, Yusuf v. Council and Comm'n, 2005 E.C.R. II-3533. *See also* Ulrich Haltern, *Gemeinschaftsgrundrechte und Antiterrormaßnahmen der UNO*, 62 JURISTEN ZEITUNG 537-47 (2007).

49. Case T-315/01, Kadi v. Council & Comm'n, 2005 E.C.R. II-3649; Case T-306/01,Yusuf v. Council & Comm'n; 2005 E.C.R. II-3533.

50. Lebeck, *supra* note 4, at 407-09.

When it comes to the choice of legal basis in legislation under the EC Treaty, it is clear that the choice must have objective, rather than subjective grounds.[51] The requirement of objective grounds is a minimal restriction to maintain the institutional balance between the EC institutions and between the EC and the member states, since different legal bases also allow for different forms of decision making. However, the doctrine of such objective grounds was not the first approach taken by the ECJ when it comes to use of implied powers. In the first cases concerning the use of implied powers, the ECJ held that the choice of legal basis was at the discretion of the Council of Ministers.[52] The constitutional effects of that initial flexibility were limited since it was at a time when most decisions were anyway adopted by consensus. From that perspective, it can be said that the initial flexibility concerning legal basis predates the supranational phase of EC law. The primacy of "explicitly delegated powers," which was pronounced in *Massey Ferguson v. Hauptzollamt*[53] was an adaptation over time to what is necessary in a constitutionalized system, where there is a successive tendency of differentiation between various forms of legislation. The development of case law concerning the need for objective grounds was a way to make constitutional constraints defining the system of EC law effective. However, the successive forms of differentiation also created the incentive of the political branches to avoid the effects of that kind of differentiation. It is not surprising that the use of Article 308 EC Treaty expanded drastically during the seventies,[54] as did the con-

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51. Case 45/86, Comm'n v. Council, 1987 E.C.R. 1498, 1520; Case C-84/94, U.K. v. Council, 1996 E.C.R. I-5755. In the latter case concerning the Sunday Trading directive, United Kingdom contended that the appropriate legal basis would have been the then Article 235 Rome Treaty, a position which was rejected by the ECJ on the ground of subsidiarity. Rome Treaty, *supra* note 25. In general it seems as if the ECJ did not argue that reasons of subsidiarity per se would be a reason for a particular choice of legal basis on the basis of Council practice. On the contrary, it seems as if the ECJ both wanted to uphold a more formal approach in restricting the legislative discretion of the Council in choices of legal bases. In particular in the pre-*Francovich* era, that also had an important effect in relation to the member states, when it comes to the role of direct and indirect effect. *See also*, Case C-300/89, Comm'n v. Council, 1991 E.C.R. I-2867; Case C-268/94, Portugal v. Council, 1996 E.C.R. I-6216, I-6217; Case C-209/07, Comm'n v. Council, 1999 E.C.R. I-8067, I-8089.

52. Joined Cases C-73 & 74/63, Internationale Crediet - en Handelsvereniging Rotterdam v. Minister van Landbouw en Visserij, 1964 E.C.R. 1 (English Spec. Ed.).

53. Case 8/73, Hauptzollamt Bremerhaven v. Massey Ferguson, 1973 E.C.R. 897, 907.

54. Lachmann, *supra* note 4, at 449-53.The legislation of the EC during the seventies experienced a drastic shift towards the use of Article 308 EC Treaty (then Article 235 EC Treaty) as a way to forge political compromises in the Council of Ministers. Some governments of the member states expressed their concern on that shift since they saw it as a

flicts on the use of Article 308 EC Treaty as opposed to other legal grounds.[55]

However, the primacy of the explicitly delegated powers has also led them to be interpreted in a more extensive way. This means that the primacy of "ordinary" forms of legislation has been protected, whereas the protection of the member states associated with the use of Article 308 EC Treaty has been limited. Simultaneously, Article 308 EC Treaty has been interpreted in a way which seems to have expanded the outer limits of the EC competencies through the use of Article 308 EC Treaty. Thus the tendencies of formalism, when it comes to the legal basis of the use of competencies, have never been an obstacle for generally expansive interpretations of EC law. This leads to the last point in this discussion of the regulation of such competencies under the EC Treaty.

E. Implied Powers Under the EC Treaty–The Joint Problems of Constitutional and Democratic Deficits

As discussed above, the understandings of legitimacy of the EC/EU have focused either on delegation, or outcome-based legitimacy. In the former, the legitimacy is based on a chain of delegation, whereas in the latter it is based on the practical problem-solving capacities of a political order. From the perspective of outcome-based legitimacy[56] one may argue that role of Article 308 EC Treaty is to increase flexibility and thus also the capacity for action and problem solving of EC.[57] That approach to implied powers, relying on the idea of "planned crisis management" was central in early justification of the role of implied powers in EC law.[58] The underlying assumption is that outcomes will be better if powers of political decision-making are relatively unconstrained . That seems not to be a self-evidently correct assumption, and thus it seems as if there is a certain risk associated with the design of Article 308 EC Treaty, since it means that constitutional constraints of the EC as well as the member states are inevitably weakened. From a proceduralist perspective on democracy, the institute of implied powers has often been criticised for contributing to the problems of the democratic deficit of the EC/EU. To a certain extent, one may argue that the creation of a clause of implied powers which provides flexibility can be seen as a way to strengthen the outcome-based

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way to undermine the process of ordinary legislation and hence also constitutional constraints of the EU.

55. *See also*, Case 56/88, U.K. v. Council, 1989 E.C.R.1615-16.

56. SCHARPF, *supra* note 13, at 26-28.

57. Wyatt, *supra* note 37, at 3-5.

58. GIUDOTTO GRAF HENKEL VON DONNERSMARCK, PLANIMMANENTE KRISENSTEUERUNG IN DER EUROPÄISCHEN WIRTSCHAFTSGEMEINSCHAFT (Alfred Metzner Verlag 1971).

legitimacy of the EU. However, that may of course happen at the expense of procedural legitimacy, as well as at the expense of stability of constitutional structures, both in the EC/EU itself, and indirectly in the legal orders of the member states. As I have sought to sketch out above, the problem associated with Article 308 EC Treaty is only partly a matter of democratic deficit, but is also a matter of "constitutional deficit."[59] This means that implied powers provide an excessive degree of legislative discretion to the Council, making constitutional constraints relatively ineffective and democratic accountability very difficult. The problem with the present form of implied powers is mainly that the constraining effect of conferred powers has been watered down, whereas at the same time, there has been little or no attempt to alleviate the democratic deficit. This problem led to a dramatic expansion of the joint legislative powers of the national executives in the EU.

The structure of decision making under Article 308 EC Treaty combines a strong executive-federal form and comparably weak judicial control concerning the application of Article 308 EC Treaty as far as Article 308 EC Treaty does not intrude on the "explicitly" conferred competencies. The weakness of judicial control seems to a certain extent to be possible to explain from the institutional structure of decision making under Article 308 EC Treaty, which gives ample opportunities for exercise of judicial *Kompetenz-Kompetenz* which is more extensive than most forms of decision making under the EC Treaty. The institutional interests of national executives in expanding EC powers under Article 308 EC Treaty (as opposed to expansion under other legal bases of legislation provided for in the EC Treaty) has hence been controlled only to a limited extent. The structure of decision making seems also to weaken the argument in favour of the implied powers clause based on outcome-legitimacy, since it provides a strong bias in favour of expanding powers of national executives, not just in cases where the power is necessary, but also in cases where there is only in the institutional interest of the national executives to do so. Hence, although the capacity for action is increased, there is no possibility under Article 308 EC Treaty to distinguish between advancement of the institutional interests of national executives, and crisis management. The structure of decision making under Article 308 EC Treaty weakens the possibilities for political accountability

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59. The notion of "constitutional deficit" has also been associated with the incremental and unplanned constitutional development of EC law through judicial precedents. *See* Tanja Hitzel-Cassagnes, *Der EuGH im Spannungsfeld von Konstitutionalisierung und Demokratisierung*, *in* POLITIK UND RECHT 377-95 (Michael Becker & Ruth Zimmerling eds., 2006).

within the EC, presupposing that effective of control of legislative powers under Article 308 EC Treaty have to come from the ECJ. The price of greater political capacity for action at the EC level is thus that constitutional control in the member states is undermined and increased judicialisation at the EC/EU-level. The absence of parliamentary control at both the national and supranational level is an incentive for the national executives to use implied powers as a way to evade national as well as European parliamentary control. Article 308 EC Treaty thus increases discretion of the Council as the EC legislature while diminishing political control of its powers.[60] The limited parliamentary control is an incentive to extend the use of implied powers, and that is also a driving force for the constitutional deficit. The constitutional deficit also vividly illustrates the limits when it comes to judicial control in relation to legislative powers which are not subjected to democratic accountability.[61] The extent of judicial control of legislative powers is always limited, not just because of democratic legitimacy, but more generally for functional reasons. The democratic deficit of functional integration remains difficult to "solve" judicially, once a very general delegation of power to a particular institution has been made.

The problem is that implied power undercuts the sustainment of the principle of conferred powers and the possibility of effectively delimiting the powers of EU. The structure of incentives of the Council facilitates expansion of EC powers, at the expense of the national parliaments as well as the European parliament. In that regard the attempts of "parlimentarizing" the exercise of implied legislative powers in the TFEU is an important step towards maintaining both effectiveness of institutional balance and accountability under EC/EU law. Despite that, it is not a self-evident that an increased role for the European Parliament will automatically result in a greater degree of balance between the member states and the EC/EU. Contrary to what some authors[62] have claimed, democratic principles need not imply a greater degree of constitutionalization within the framework of the EU.

III. IMPLIED POWERS IN THE DRAFT CONSTITUTIONAL TREATY AND THE EU CONSTITUTIONAL TREATY–RADICAL REFORMS THAT DID NOT HAPPEN-THEN

60. Tschofen, *supra* note 4, at 493-94.

61. Hartmut Aden, *National, europäische und international Verrechtlichung in wechelseitiger Abhängigkeit – Mehrebenenrecht und Machtverschiebung zur Exekutive*, *in* POLITIK UND RECHT 357 (Michael Becker & Ruth Zimmerling eds., 2006).

62. *See, e.g.*, Tschofen, *supra* note 4, at 494-96.

The first proposed revision of implied powers came with the Draft Constitution proposed by the EU Constitutional Convention in 2003. Comparing the Draft EU Constitution that was produced by the EU Constitutional Convention and the EU Constitutional Treaty, one is bound to notice a number of changes. However the changes were very limited concerning the subject of implied powers. Because of that, the proposals of the EU Constitutional Convention and by the 2004 IGC in the EU Constitutional Treaty that were rejected through referenda in the Netherlands and France in 2005 are treated together in one section. In the versions of the Draft Constitutional Treaty and the EU Constitutional Treaty agreed upon in October 2004 by various heads of state, the clause of implied power read as follows:

> Art I-18 Constitutional Treaty of the European Union (IGC 2004)
>
> 1. If action by the Union should prove necessary, within the framework of the policies defined in Part III, to attain one of the objectives set out in the Constitution, and the Constitution has not provided the necessary powers, the Council of Ministers, acting unanimously on a proposal from the European Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures.
>
> 2. Using the procedure for monitoring the subsidiarity principle referred to in Article I-11(3), the European Commission shall draw national Parliaments' attention to proposals based on this Article.
>
> 3. Measures based on this Article shall not entail harmonisation of Member States' laws or regulations in cases where the Constitution excludes such harmonisation.[63]

Article I-18 of the proposed text of the IGC 2004 (the EU Constitutional Treaty) was considerably different from Article 308 EC Treaty. It changed the subject matter of implied powers by referring to them in Part III of the EU Constitution, which dramatically increased the subject matter covered by the implied powers. Implied powers were proposed to be possible to use not only for spe-

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63. EU Constitutional Treaty, *supra* note 3, at art. I-18.

cial purposes, but in relation to the objectives of the EU as a whole. The objectives concerned the EU as a whole, not, as under the EC Treaty only the EC. Compared to the implied powers set out in Article 308 EC Treaty, the powers related to the general objectives of the EU would have been far broader. The other radical change in implied powers was the greater degree of parliamentary control at the European level, which also means that the Council of Ministers' use of implied powers, would be subject to political control, a feature retained from the EU Constitutional Convention in the EU Constitutional Treaty as well as the TFEU.

A. The Scope of Implied Powers under the EU Constitutional Treaty

Under the EU Constitutional Treaty, both the scope of the fields of policy where implied powers could be used and the scope objectives that implied powers could be used to attain were expanded. The IGC 2004 proposed to abolish the split between objectives of EC and EU that were central to the ECJ in Opinion 2/94. However, unlike the objectives of the EC, EU objectives were seen as relevant only in special, if widely interpreted, circumstances. The most dramatic expansion of the scope of implied powers under the EU Constitutional Treaty was the merger of EC and EU objectives.

1. The Objectives of the EU in the EU Constitutional Treaty

Implied powers under the EC Treaty are defined in light of the objectives of the EC. A major change of objectives would have had extensive repercussions when it comes to the role of implied powers. The objectives of the EU, as set out in the EU Constitutional Treaty were as follows:

> Article I-3 of the EU Constitutional Treaty
>
> The Union's objectives:
>
> 1. The Union's aim is to promote peace, its values and the well-being of its peoples.
>
> 2. The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, and an internal market where competition is free and undistorted.
>
> 3. The Union shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive so-

> cial market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.
> It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.
> It shall promote economic, social and territorial cohesion, and solidarity among Member States.
> It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced.
>
> 4. In its relations with the wider world, the Union shall uphold and promote its values and interests. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.
>
> 5. The Union shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Constitution.[64]

Compared to the objectives in the EC Treaty, these objectives are wider in scope and much less precise. It should also be noted that in Articles 2 and 3 EC Treaty, the objectives of the community refer to policies aimed at realizing the common market not the kind of "global" objectives that were proposed in the EU Constitutional Treaty. The EC may at least theoretically have objectives and policies that are separate from the policies aimed at realizing the common market, and such objectives and policies would not be a possible basis for measures under Article 308 EC Treaty. The structure of the objectives in the EU Constitutional Treaty was radically different from the structure of objectives of the EC Treaty and the EU Treaty. The recitals of objectives in the EU Constitutional Treaty resembled the statement of objectives of the EU

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64. *Id*. at art. I-3.

Treaty. However, the central difference is that the current EU Treaty does not include any clause on implied powers, which is a structural limitation. The fact that the EU Constitutional Treaty included implied powers and made them applicable also to traditionally intergovernmental areas of policy illustrates the extent of supranationalization that would have occurred through the EU Constitutional Treaty.

It is notable that in the flexibility clause of the EU Constitutional Treaty it was stated that "one of the objectives" set out in the EU Constitutional Treaty would have been sufficient as a justification for action on the part of the EU. Given the extremely wide scope of the objectives, as well as the correspondingly wide scope of policies, the implied powers under the EU Constitutional Treaty would have constituted a dramatic expansion of the outer limits of EU competencies compared to competencies of the EC and the EU under their respective treaties. The objectives were defined in ways that would have made them virtually impossible to delimit. The aim to promote peace and prosperity among the peoples of the Union by definition would have covered, every possible area of policy making in relation to a modern, secular public authority. In a similar fashion, the objectives regarding freedom, security, justice, the power to create a common market with "undistorted competition," the powers of social policy, the aims of economic development, and social and territorial cohesion would likewise, have been so extensive as to be practically unlimited. One of the most important aspects of the objectives in the EU Constitutional Treaty concerned the CFSP, traditionally the second pillar of the European Union. Under this objective, the EU would have had almost unlimited foreign policy power enabling the pursuit of the policy objectives outside the EU. These foreign policy powers would have given almost unlimited power to the Council of Ministers, and would have made judicial constraints irrelevant with regard to the EU's foreign policy powers. The objectives in the EU Constitutional Treaty were defined without specific reference to policy areas. The extent of implied powers was instead undefined, except in the sense that they could only have been used to extend policies delegated to the EU under Part III of the EU Constitutional Treaty.

2. The Framework of Policies in Part III of the EU Constitutional Treaty

The assessment of the role of implied powers is not complete without a discussion about the scope of powers. The first major limitation regarding the use of implied powers in the EU Constitu-

tional Treaty would have been that they were confined to Part III of the EU Constitutional Treaty. The EU Charter of Human Rights could not have been used as a basis for implied powers, the *objectives* enshrined in the EU Constitutional Treaty were limited to policy areas already set out within the EU Constitutional Treaty. Those included, *inter alia*, the internal market (encompassing free movement of individuals, goods, capital, and services), economic policies, the coordination of economic policies, and justice and home affairs as well as external policies and the common foreign and security policy. In those respects, it was clear that the combination of different competencies and objectives could have been a basis for extensive use of implied powers.

The structural restriction of Part III, defined the possible use of implied powers. Implied powers could only extend powers of policies that were already given under Part III of the EU Constitutional Treaty. However, the powers set out in Part III of the EU Constitutional Treaty concerned, more or less, all powers of a legislative or executive character that would have been given to the EU under the EU Constitutional Treaty. The major difference between the EC and the EU Treaties and the EU Constitutional Treaty was that all powers under Part III of the EU Constitutional Treaty were incorporated into a supranational framework, whereas earlier, a considerable part of those powers had previously been exclusively intergovernmental powers. The text of the flexibility clause provided that implied powers were broader than the explicitly stated powers, but the exercise of implied powers would still have had remain within the "framework of policies" set out in Part III of the EU Constitutional Treaty.

With regard to the exercise of implied powers, there was also a certain difference, between the EC Treaty and the proposed EU Constitutional Treaty namely that for the exercise of many powers, the EU Constitutional Treaty provided for specific forms of legal action (either through so-called European laws, or in framework laws). The formalization of the legislative powers limits the use of implied powers. In relation to the use of Article 308 EC Treaty, and the role of specific legislative measures, the approach of the ECJ has that such measures should be used as extensively as possible, and that the use of implied powers that are not clearly outside the scope of an explicitly granted power of policy should be minimized. Although the EU Constitutional Treaty never came into force, there is no reason to believe that the practice of the ECJ would have changed dramatically on that point. Thus, the greater specificity of the exercise of powers under Part III of the EU Con-

stitutional Treaty delimited some aspects of the use of implied powers.

However, there were fields stated in special articles where harmonization (i.e. supranational legislation) would have been expressively precluded,[65] and thus the flexibility clause is not applicable to those fields. The fields in which harmonization would have been expressly precluded were quite limited, considering the wide scope of EU Constitutional Treaty. The policy areas where harmonisation would have been precluded, included measures to avert "discrimination based on sex, racial or ethnic origin, religion or belief, disability, [and] age or sexual orientation."[66] Measures on improving working environments, working conditions, social security, workers, information and consultation of workers, defending workers' and employers' interests and co-determination [at the labour market] , equality between genders regarding employment opportunities, combating social exclusion, and modernisation of social security programs,[67] policies of integration third country nationals,[68] crime prevention policy,[69] policy for industrial competitiveness,[70] and policies to enhance civil protection against natural or manmade disasters[71] would also have been included in the fields where harmonisation were precluded. In such cases, coordination was acceptable, but not through supranational means, which would have enabled the use of implied powers.

With regard to the broad powers accorded to the EU under the EU Constitutional Treaty, and the general possibility of an expansive interpretation of those powers (in light of the extensive objectives of the EU Constitutional Treaty) one may question whether the functionalist understanding of integration would have been tenable if the EU Constitutional Treaty. The EU is still based on the principle of conferred powers insofar as that the EU does not have any inherent powers. However, given the breadth of legislative powers accorded to the EU, the practical effect of the principle of conferred powers as a constraint would have been limited under the EU Constitutional Treaty. In light of the combined effect of the powers conferred to the EU, and the objectives they are aimed at achieving, the overall effect would not have been easily distinguishable from ordinary inherent powers. Thus, the functional ap-

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65. *Id.* at art. I-18(3).
66. *Id.* at art. III-124.
67. *Id.* at art. III-210(1)(a)-(c), (e)-(f), (i), (k).
68. *Id.* at art. III-267(1).
69. *Id.* at art. III-272.
70. *Id.* at art. III-279(1).
71. *Id*. at art. III-284.

proach seems to have less explanatory power than before, in relation to the EU. The legitimacy appears to be based on delegation and that the EU is able to adopt policies which are seen as substantively acceptable to the citizens and the role of European Parliament as a constraint on that power seems to reflect a change towards a situation with less clearly delimited powers and politically controlled.

B. The Procedures of Decision Making: Sharing of Powers between the Council and the Parliament

The second, and more radical, aspect of the proposed change was that the unanimity requirement within the Council of Ministers would have been retained but was supplemented with a rule requiring simple majority approval in the European Parliament, whereas the requirement that the European Commission should propose legislation was retained.[72] Most of the changes to the decision making procedure for implied powers proposed in the EU Constitutional Treaty are proposed to be retained in the TFEU. With regard to implied powers, parliamentary control would have increased dramatically, and changed from being practically nonexistent, to being equal to that of the Council of Ministers. The increased parliamentary involvement would have contributed to a greater degree of deliberative openness during the process of decision making. This deliberative openness could have changed the structure of incentives of political action of the institutions since one of the legislative branches will have more of their concerns publicized during the legislative process. The result is that the accountability of the EU, through the European Parliament, is enhanced as the European Parliament is susceptible to a considerably greater degree of accountability than the Council of Ministers. However, the European Parliament, unlike the Council of Ministers, has a party system and although national parties join parliamentary parties, the possibilities for some degree of accountability are considerable, on the other hand that would not have increased the possibility to revise decisions adopted under the flexibility clause that was proposed in the EU Constitutional Treaty.

The Parliament is institutionally biased, to a greater extent than the members of the Council, toward the expansive interpretations of competencies of the EU since that is Parliament's only

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72. For a background of them, see RUDOLF STREINZ ET AL., DIE NEUE VERFASSUNG FÜR EUROPA 74 (2005); Klaus Bünger et al., *Die Zuständigkeiten der Union, in* DIE EUROPÄISCHE VERFASSUNG 107-09, (Marcus Höreth et al. eds., 2005).

available avenue to influence policy-making. However, in relation to the institutional constraints, it seems that all things being equal, the hurdles to use of implied powers would have not lessened under the EU Constitutional Treaty. It also appears that the potential for inter-institutional conflicts over bases of actions between the European Parliament and the Council of Ministers would have diminished in the sense that the European Parliament has been made a part of the decision making in the context of implied powers. Whereas, the Parliament's participation in the decision making can be said to increase transparency and accountability, it would not *per se* have changed the pro-integration dynamics surrounding the use of implied powers as compared to the earlier treaties adopted. However, the absence of an effective division between opposition and government, a division which is part and parcel of parliamentary systems, would have remained within the Council of Ministers. The European Parliament in this respect is generally a veto player and thus, will at most have a constraining effect on the use of implied powers, although it can be supposed to have a quite strongly pro-integrationist default position. However, it is clear that the institutional bias of implied powers affecting the decision making process under the EC Treaty (favouring the institutional interests of the national executives) are, if not remedied completely, at least more limited under the new treaty.

1. Flexibility and the Proceduralisation of Subsidiarity: National Parliaments' Power to Delay

The principle of subsidiarity has been one of the major developments in EC law. Under the EC Treaty, there was no special relation between control of subsidiarity and the use of implied powers, but that successively changed in the Draft Constitutional Treaty and the EU Constitutional Treaty. A background of the legal status of the principle of subsidiarity will be discussed first, and then the effects of the proposed changes in the EU Constitutional Treaty to the exercise of implied powers will be discussed.

a) The Background of Subsidiarity – From Edinburgh to Amsterdam

The principle of subsidiarity was first introduced in conjunction with the creation of the Treaty on the European Union (the so called Maastricht Treaty which entered into force in 1993). The principle has subsequently been incorporated into the EC Treaty and the EU Treaty. The principle was further developed in the re-

visions on the EC Treaty and EU Treaty agreed to in a Protocol 1997 (the so called Amsterdam treaty) That protocol was not revised in the treaty revisions of 2001 (the so called Nice Treaty). The first attempt to solidify the content of subsidiarity was decided at the Edinburg Summit in 1992, where various heads of state decided to allow the Council of Ministers to make an inter-institutional agreement (which is a form of sub-constitutional norms) with the European Parliament and the European Commission in order to further the effective application of the principle of subsidiarity to all institutions.[73] The introduction of the principle of subsidiarity in EC/EU Law occurred through the EC Treaty as a part of the revisions adopted at the summit in Maastricht in 1992 (then Article 3b, now Article 5 EC Treaty), and it is clear that the provisions in the treaty are the core of subsidiarity. However, the binding Protocol on subsidiarity, which was attached to the EC Treaty after the 1997 summit in Amsterdam, worked as a clarification to Article 5 EC Treaty, and the Protocol repeatedly states that it does not aim to modify the application of the provisions of treaties, but only to fill lacunas relating to the provisions of subsidiarity.[74] This was the background of the procedural protection of subsidiarity until 1997. There was a mix between a general norm of "hard" law enshrined in the treaty, and "soft" norms trying to ensure compliance with the principle. The Protocol on Subsidiarity and Proportionality annexed to the EC Treaty is a binding rule aimed to institutionalize the inter-institutional agreement from 1993.

The judicial application of the subsidiarity clause in the EC Treaty has not been non-existent, but it has remained limited, and it is questionable whether it has been an effective constraint on EC law. The role of judicial review in a federal system is to uphold the vertical separation or balance of powers, and to maintain stability in vertical power relations. The role of subsidiarity as a basis for judicial review to maintain federal balance between the EU and the member states has been limited.

The difficulty with subsidiarity as a principle of law is that it theoretically provides extremely broad judicial discretion which is difficult to square with most notions of the scope of legitimate judicial powers. Some authors have argued[75] that the role of subsidiar-

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73. European Council in Edinburgh, Edinburgh, U.K., Dec. 11-12, 1992, *Conclusions of the Presidency*, ¶paragraph 5, *available at* http://www.europarl.europa.eu/summits/edinburgh/a0_en.pdf.

74. KLAUS PETER NANZ & REINHARD SILBERRG, DER VERTRAG VON AMSTERDAM 96-98, 104-08 (Kurt Schelter & Werner Hoyer eds.,1997).

75. *See* SANDER, *supra* note 4, at 532-47.

ity must be to provide incentives for federal restraint and for the maintenance of lower levels of government, through political rather than judicial means. It is not unfair to say that, in general, the political incentives to do so have been limited on the part of the EC/EU judicial and political institutions. In the case of the political "branches" of the EC/EU, their roles are dependent on subsidiarity remaining relatively limited. One of the major problems of delimiting competencies between supranational-federal and national-state authorities is that major conflicts will emerge, not when it comes to authorities that are clearly divided in areas where the authority is shared. [76] In that sense, the functional approach of subsidiarity is an answer to that problem, albeit one which resolves problems of vertical division of powers but which implies problems of horizontal division of powers, as it presupposes judges to make decisions on choices of institutions to implement policies.

The conflict between the need for effectiveness and harmonization and the need for maintaining a balance between different layers of government was not solved through the norm of subsidiarity, and hence the more detailed prescriptions in the Protocol was a way to enforce some kind of minimal procedural requirement of considerations of subsidiarity. Sander points out that the possibility to use subsidiarity as an effective constraint has been very limited, and as other authors have pointed out it is questionable whether judicial enforcement of the principle of subsidiarity can be upheld, and that it can thus also be argued that subsidiarity is a very problematic way to constitutionalize the balance of functions between the member states of the EC/EU and the EC/EU itself. It therefore seems that a stable form of functional division of powers is very difficult to achieve through judicial rather than political control.

In order to make the application of subsidiarity more effective and more formalized, the Protocol on Subsidiarity and Proportionality was attached to the EC Treaty in 1997.[77] The principle of

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76. Ernest A. Young, *Protecting Member State Autonomy in the European Union: Some Cautionary Tales from American Federalism*, 77 N.Y.U. L. REV. 1612 (2002). A problem, when it comes to protecting member state autonomy from intrusions of supranational/federal authority through federal means, is to get political and judicial control to reinforce federalism. An additional dilemma is the general conflict between effectiveness, understood as the greater approximation of policies (the principle of *effet utile* interpreted by the ECJ), which tends to diminish the role of constitutional constraints agreed upon by the member states. Further, the structural rules of the EU set a general framework for political as well as legal policy-making that seems far more effective than various forms of constraints, imposed as substantive rules, on EC competencies by the member states.

77. Protocol on the Application of the Principles of Subsidiarity and Proportionality, 1997 O.J. (C 310) 207.

subsidiarity, as defined in the EC Treaty, is a constraint which for obvious reasons is only applicable to shared competencies. The creation of the Protocol on Subsidiarity and Proportionality made the more detailed provisions to a part of the EC Treaty, but it seems also as if the introduction of the Protocol per se was a way to formalize and proceduralize the protection of subsidiarity, and also to integrate into the work of the political branches. [78] However, at the same time, it seems as if the effects were greatly limited, since the role of national parliaments was left outside the Protocol, and the duty of consultation was limited to an obligation to "consult widely." The Protocol on Subsidiarity and Proportionality in its present form provides for protection of proportionality and subsidiarity through institutions that cannot be expected to take a strong interest (i.e., in EU-institutions themselves) in subsidiarity.

The substantive rules enshrined in the Protocol created certain guidelines for how subsidiarity should be safeguarded in the legislative process. It is stated that the application of subsidiarity neither affects the *acquis communautaires,*[79] the general principles of EC law,[80] nor the institutional balance between the EC/EU institutions.[81] Subsidiarity is also to be exercised with respect for the objectives of the EU.[82] Furthermore, the Protocol states that subsidiarity is a dynamic concept and hence it can expand and contract as a constraint on EC decision making over time. The Protocol does not seek to impose any substantive coherence over time on the basis of requirement of subsidiarity. The tendencies towards formalization of subsidiarity existed at a quite early stage, but the effectiveness of protection due to insufficient institutional support was a central reason for why the development towards a more extensive role of subsidiarity was so slow. The present model (under the EC-treaty) leads to the conclusion that the intended role for subsidiarity was limited and that the various attempts to concretise subsidiarity happened through proceduralisation which reflects the problematic character of subsidiarity as a substantive and judicially enforceable norm.

b) Subsidiarity in the EU Constitutional Treaty

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78. *Id.* at art. 1.
79. *Id.* at art. 2.
80. *Id.*
81. *Id.*
82. *Id.*

In the proposal of the IGC 2004, the Protocol on Subsidiarity and Proportionality was revised, and explicitly referred to within the text of the Treaty, giving it a higher legal status. However, in relation to subsidiarity, it seems also to be clear that these changes are not *per se* related to implied powers. The reference to subsidiarity and Article I-11(3) will be discussed below. It should be noted that following the formulations of the subsidiarity clause in the EU Constitutional Treaty compared to the formulations of the EC Treaty, subsidiarity would not have been radically strengthened. However, it was given a special relation to the role of implied powers, and the procedural side would have been given a greater express role in the EU Constitutional Treaty.

> Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.
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> The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments shall ensure compliance with that principle in accordance with the procedure set out in that Protocol.[83]

The restrictions on the flexibility clause with regard to subsidiarity were proposed to be relatively stringent, also constraining the role of implied powers.[84] Subsidiarity has always been a general constraint in the sense that implied powers may only be used when that is necessary in order to achieve some of the goals of the EC/EU. In relation to Article I-11(3) the measures covered by the flexibility clause belong to the non-exclusive competencies of the EU. The principle of subsidiarity had not previously been as strongly formulated in the treaties.

The duty of the Commission to make consultations in the EU Constitutional Treaty set out along the lines of "comply or ex-

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83. EU Constitutional Treaty, *supra* note 3, at art. I-11(3).
84. Bünger et al., *supra* note 72, at 109-15; STREINZ et al., *supra* note 72, at 51-53.

plain,"[85] which would have given it a certain freedom. The only reason for an exception to the requirement of justification would be the urgency of a measure adopted, which limits the possibilities for the use of it, particularly with regard to the introduced requirement of parliamentary participation through the European Parliament. The creation of such a requirement is more radical than the preceding requirement in the Protocol on Subsidiarity and Proportionality set out in the EC Treaty (after 1997), and it was comparable to the wording under the Protocol annexed to the EC Treaty.[86] In the past, requirements of consultation and providing reasons were often been interpreted quite narrowly, and in that sense, it remains to be seen what the practical outcome of the requirements of justifications.[87] Article 5 EC Treaty suggests a relatively heavy burden of justification with regard to subsidiarity on the part of the European institutions, since it includes qualitative as well as (if possible) quantitative requirements of justifications. The burden of justification with regard to proportionality is not very detailed and it seems limited. The control of subsidiarity through national parliaments is only supposed to concern procedural as opposed to substantive issues. It has been questioned whether that is a viable distinction, since it is hard to divide substantive issues from procedural issues. The reason for is of course that considerations of subsidiarity concern the role of institutional roles, but the underlying basis of decisions is still related to choices of policy.[88] In a system of conferred powers and functional goals, it can be said that it is theoretically possible (although probably not practically feasible) to make such a distinction. With goals as wide as the ones that were proposed in the EU Constitutional Treaty, and incorporated into the TFEU, it seems simply impossible. Likewise, the envisaged distinction between subsidiarity and proportionality seems problematic in the context of EU law. The limits of subsidiarity as well as proportionality review by national parliaments are dependent a high degree of agreement on the scope and character of functionally defined powers, but these powers are

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85. Protocol on the Application of the Principles of Subsidiarity and Proportionality, 2004 O.J. (C 310) 207, (following IGC 2004) arts. 5-6 [hereinafter 2004 Protocol].

86. It should also be noted that the Amsterdam Treaty did not, when it came to the declarations of subsidiarity, include any reference to it in the text of the Treaty, something which considerably lessened its weight, whereas the immediate reference to it within the text of the Treaty as such, in principle at least should place it on the same level as the rest of the Article in question.

87. Margherita Poto, *The Principle of Proportionality in Comparative Perspective*, 8 GERMAN L.J. 835 ff. (2007).
With regard to the practice of providing reasons under Article 308 EC Treaty, see Case 151/77, Peiser v. Hauptzollamt, 1979 E.C.R. 1469, 1485-86.

88. Bausili, *supra* note 18, at 7-9.

proposed in a constitutional system where functional integration has largely been abandoned.

The protection of the role of national parliaments with regard to the flexibility clause seems to entail exclusively control of subsidiarity, not of proportionality. This in turn seems to lead to the conclusion that the only control of the latter will be judicial rather than political. The Protocol on Subsidiarity and Proportionality creates a procedural requirement that give national parliaments the right to see legislative acts in advance, and they are given six weeks to consult and give opinions with regard to subsidiarity.[89] That is the so called "early warning system" the Protocol on Subsidiarity and Proportionality created an, which provides a basis for actions of the national parliaments something which suggests that there is a possibility for national parliaments to act collectively in order to defend their institutional interests.[90] Though that is true, the effects of successful actions by national parliaments will remain very limited. The national parliaments have not been given veto powers. They were only given power to impose a more stringent justification requirement on the European Commission, but there is no way to enforce that requirement in the face of a defiant Commission.[91] A side effect of the procedure of protection of subsidiarity is that it increases the transparency of the deliberations, albeit in a limited manner.[92] Article 7 of the Protocol on Subsidiarity and Proportionality states that if a sufficient number of national parliaments find that a proposed legislative act does not comply with the principle of subsidiarity (proportionality is not mentioned) the national parliaments can then call for the legislative proposal to be reviewed again.[93] The current system requires twenty-seven votes out of fifty-four votes (each National Parliament having two votes)[94] in relation to measures not included by

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89. 2004 Protocol, *supra* note 85, at art. 6.

90. In terms of its structure, the role of the Protocol can be compared to other constitutional guarantees aimed at giving different groups greater time to mobilize in the face of potential legislative changes, but the powers of delay are very limited and have little practical effect.

91. One should also note that the European Commission and the National Parliaments are entirely independent of each other, and the structure of incentives of the European Commission will be much more attuned to the Council and the Parliament with powers to appoint, approve, and in the case of Parliament, ultimately censure the European Commission.

92. 2004 Protocol, *supra* note 85, at arts. 3, 7. One should also note that the duty of consultation is applicable to all bodies exercising legislative functions, including the Council of Ministers, the European Commission, and the European Parliament. The duty of consultation also applies in cases where others propose legislative acts, including the ECB, the ECJ, and even groups of member states.

93. *Id*. at art. 7.

94. *Id.* at art.7, 2d recital.

the Justice and Home Affairs, and twenty votes in relation to legislative proposals with regard to Justice and Home Affairs in order for such a proposal to be reviewed.[95] The strange effect is that the hurdles are higher for national parliaments to have influence on Justice and Home Affairs which concern the very core of government powers, than in other fields. However, there is little or no guidance offered when it comes to what such a review would entail.[96]

2. Conclusions on the Procedure of Decision Making

The changes in the decision making procedure would have created a veto power outside the Council of Ministers, and to a power to delay legislation under Article I-18 EU Constitutional Treaty. In that sense, transparency and accountability would undoubtedly have increased, and will do if the proposed changes retained in the TFEU are ratified. The changes in procedure of decision making create limited, but still an increase in, accountability through the greater role of the European Parliament, and a greater role of transparency through the further requirements for review, circulation of the proposal by the Commission and participation of national parliaments. Among the forms of decision making envisaged in the treaties, the use of implied powers is considerably more transparent in the EU Constitutional Treaty and the TFEU compared to the EC Treaty. The introduction of an element to protect subsidiarity was a radical step that increased the roles of national parliaments (i.e., not just the European Parliament), and it can be seen as a way, however weak to create more political accountability.

The greater role of national parliaments, although set out in a weak form where national parliamentary influence would still face considerable hurdles and where the final powers of decision making would still lie with the European institutions, would create a far greater form of transparency, as compared to the current limited transparency *before* the adoption of a measure under Article 308 EC Treaty. A second important aspect of transparency is that other institutional interests will be represented in the process of

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95. *Id.* One may also note that the Protocol thus includes a sub-majority rule where a minority of the National Parliaments can trigger a review of legislative proposals in the field of Justice and Home Affairs. The function of such a rule can also to some extent be to counterbalance the increased influence of the bigger countries in the decision making of the EU.

96. Anna Vergés Bausili, *Beyond the Early Warning System: The Reform of EU Governance and the National Parliaments*, *in* A CONSTITUTION FOR EUROPE: THE IGC, THE RATIFICATION PROCESS AND BEYOND 211-22 (Ingolf Pernice & Jiri Zemánek eds., 2005).

adopting measures under the flexibility clause. Thus, transparency is increased considerably, and more institutions are represented, but it does not change the fact that these constraints can be considered "soft" rather than "hard". The only hard constraint imposed is that the European Parliament is given veto power, instead of the very limited "right of consultation" which exists under the EC Treaty. The expansion of veto powers appears to be the only (limited) new restriction on implied powers.

A. Judicial Control

The role of the ECJ as a guardian of the treaties and arbiter of conflicts between different competencies will increase, given the character of the constitutional framework. Comparing the EC Treaty and the proposed EU Constitutional Treaty, the latter included a clause on the use of EC/EU powers which explicitly spoke about the basis of EU powers as conferred, not inherent competency. The radical character of the change to implied powers in the EU Constitutional Treaty can be classified in two ways. First, it included an express statement about the nature of the powers of the EU as one conferred by the member states, rather than being inherent. Second, it included a vast expansion of the subject matter of EU law, through the creation of a unified legal order with two treaties, but no differentiation between the treaties with regard to the objectives of the EU, and generalized applicability of the flexibility clause. The continued judicialisation of the control of implied powers vis-a-vis other grounds of powers would probably, despite the increased political constraints to have enhanced the role of the ECJ.

B. The Implied Powers of the Constitutional Treaty: Expanding Powers and Increasing Accountability

The EU Constitutional Treaty was never adopted, but the model of implied powers that it set out, is still of importance as it was the basis for the TFEU as proposed by the IGC 2007. The regime of implied powers proposed in the EU Constitutional Treaty was considerably different from the regime of implied powers in the EC Treaty. The central and most obvious difference is that the EU Constitutional Treaty included powers that under the EC/EU-treaties belong to the second pillar of the EU, the CFSP, and the third pillar of the EU, Police and Judicial Cooperation in Criminal Matters. These powers could be the basis for action under Article I-18 of the EU Constitutional Treaty.

The imposition of political control outside the Council of Ministers, through the roles of the European Parliament and the national parliaments, creates limits on the exercise of implied powers. Although the European Parliament is a co-legislator, the parliamentary control of the exercise of the powers under the flexibility clause was far more limited than under the co-decision procedure. Under the latter procedure, a joint "conciliation" committee of the Council of Ministers, the European Parliament, and the European Commission deliberate over given legislative proposals, and the members of the parliament can take an active role in the deliberations. Compared to those other forms of decision making, the parliamentary control under Article I-18 EU Constitutional Treaty would have been limited, although it leads to the idea that parliamentarians will have to take stands on legislations and justify them to the public.[97]

The model of implied powers under Article 308 EC Treaty creates a bias in favour of the institutional interests of national executives acting through the Council. Under the EU Constitutional Treaty, implied powers are exercised jointly by the Council of Ministers and the European Parliament. While that would have created a modicum of parliamentary accountability, the European Parliament, the European Council, and EU institutions would still have had a strong institutional interest in an expansive interpretation of implied powers.and ultimately of powers of the EU. The increased role of national parliaments under the Protocol on Subsidiarity and Proportionality means that EU Constitutional Treaty would have delimited the tendency towards both executive federalism but not towards other forms of federalism.. That is because effective control by national parliaments presupposes forms of collective action which are difficult to achieve. The main difference seems to be that the EU Constitutional Treaty included a much broader scope of powers, while still appealing to the policies contained in Part III of the EU Constitutional Treaty.

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97. The more general point is that parliamentary deliberation has several roles; one to modify and improve legislative practices by forcing parliamentarians to make sustained public justifications for their positions on legislative proposals (which should be distinguished from legislative deliberation) and secondly that it is obvious that controls based on publicity presuppose that the public can, in some way, act to influence the decision making. In that regard, the public exercises its control over Parliamentary decision making at the voting booth. One may speak of greater accountability in relation to the flexibility clause in the EU Constitutional Treaty as well as in the TFEU but it is a reactive form of control since the European Parliament cannot act to influence the content of a proposal in any institutionalized way under the scheme of the Treaty.

IV. IMPLIED POWERS IN THE PROPOSED TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION-REFORMS APPEARING LESS RADICAL?

The TFEU relies on and extends the proposal developed by the European Council in Berlin on June 22-23, 2007. The changes made at the June 2007 summit concerning implied powers were limited compared to the EU Constitutional Treaty. The proposal, developed in the aftermath of the summit of June 2007 and signed at a December 2007 summit in Lisbon, was identical to the EU Constitutional Treaty regarding the revision of the decision making procedures, but it sought to delimit the fields of policy where the decision procedure of implied powers should be applicable. The attempts to delimit the effects of implied powers Article 352 TFEU[98] are based on a mix of textual changes and common declarations to be annexed to the Treaty. As the procedure of decision making was identical to the case in the EU Constitutional Treaty, there is little need to reiterate the effects of the proposed changes of decision making procedure in any detail.

A. The New Implied Powers—Article 352 TFEU

Below is the proposed text of Article 352 (then Article 308) from August 2007:

> 1. If action by the Union should prove necessary, within the framework of the policies defined by the Treaties, to attain one of the objectives set out by the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures.
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> 2. Using the procedure for monitoring the subsidiarity principle referred to in Article 5(3) of the Treaty on European Union, the Commission shall draw national Parliaments' attention to proposals based on this Article.

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98. In the TFEU, Article 308 EC Treaty is converted (and revised) to Article 352. TFEU, *supra* note 1. In the text I use Article 352 consistently, as that is the numbering used in the consolidated versions of the TFEU and EU Treaty, and which can be expected to be of greatest use for the readers.

> 3. Measures based on this Article shall not entail harmonisation of Member States' laws or regulations in cases where the Treaties exclude such harmonisation.[99]

Article 352(4) of the proposed revision of October 2007 reads:

> 4. This Article cannot serve as a basis for attaining objectives pertaining to the common foreign and security policy and shall respect the limits set out in Article 25, second paragraph, of the Treaty on European Union.[100]

The new Article 352 TFEU (consisting of the combined proposals from August and October 2007, cited above) is largely similar,[101] but on certain important points also distinguishable from the flexibility clause of the EU Constitutional Treaty. In particular, the scope of application may become more limited through the declarations added to the Treaty June 2007, although the practical effects of those declarations still remain to be seen. Compared to the EU Constitutional Treaty the major change is the restriction with regard the scope of implied powers concern the role of use of such powers to CFSP.

A. Changes in the Scope Through Textual Revisions

The generally formulated limitation of the scope of implied powers was set out in the flexibility clause of the EU Constitutional Treaty; namely that they were only to be applicable to powers under part III of the EU Constitutional Treaty is *not* included in the TFEU. That leads to the conclusion that all fields of policy, except in cases where harmonization has been expressly precluded in the Treaty, can be subject to legislation under the new flexibility

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99. Conference of the Representatives of the Governments of the Member States, Brussels, Belgium, July 23, 2007, *Draft TFEU Amending the Treaty on European Union and the Treaty Establishing the European Community*, ¶ 291 (amended Aug. 3, 2007), *available at* http://europapoort.eerstekamer.nl/9345000/1/j9vvgy6i0ydh7th/vgbwr4k8ocw2/f=/vhmpgxeg0px5.pdf. *See also,* Peter-Christian Müller-Graff, *Die Zukunft des europäischen Verfassungstopos und Primärrechts nach der deutschen Ratspräsidentschaft*, INTEGRATION 223 (2007); Timo Goosmann, *Die "Berliner Erklärung" – Dokument europäischer Identität oder pragmatischer Zwischenschritt zum Reformvertrag?*, INTEGRATION 251 (2007). For the final version of the TFEU, see TFEU, *supra* note 1.

100 Conference of the Representatives of the Governments of the Member States, Brussels, Belgium, Oct. 18, 2007, *Draft Treaty Amending the Treaty on European Union and the Treaty Establishing the European Community*, (Oct. 5, 2007), *available at* http://www.consilium.europa.eu/uedocs/cmsUpload/cg00001re01en.pdf.

101. The *TFEU* contains this provision almost exactly, stating, "4. This Article cannot serve as a basis for attaining objectives pertaining to the common foreign and security policy and shall respect the limits set out in Article 25b, second paragraph, of the Treaty on European Union." *TFEU*, *supra* note 1, at art. 352(4).

clause. However, there are two substantive limitations, the express exclusion of harmonization set out in connection to Articles providing for policy making powers and in Article 352(4) TFEU, where the objectives of the CFSP cannot be attained through the use of the flexibility clause. The first version of Article 352(4) TFEU only referred to matters of CFSP, whereas in the second revised version of the TFEU, the reference concerning CFSP concerns an article of the EU Treaty whose purpose is to delimit the supranational side of EU law concerning CFSP. It is clear that the reference to Article 25 EU (in the proposed revised version of the EU Treaty) is a reference to a quite general article, which does not in and of itself significantly clarify the scope of the CFSP. The difference is one of the Treaty's design in that the constraint on the use of implied powers is dependent on a cross-reference to another article, and the way it refers to CFSP. It is an attempt to retain some meaningful constitutional constraints on foreign policy powers of the EU.

This restricts the scope of implied powers compared to the EC Treaty since the CFI has presently held that objectives of foreign policy may be considered as a basis for the use of implied powers under Article 308 EC Treaty in cases where there is a textual basis in the EC Treaty to implement measures of the European Union, on that point, there is no difference between the old and new treaties. It seems, thus, as if the TFEU may control that more effectively. However, if one only considers the text of Article 352 TFEU, the effects compared to the EU Constitutional Treaty would be small when it comes to delimit implied powers.

Like the EU Constitutional Treaty, there is also a second restriction on the scope of implied powers through the insertion of rejections of the possibility for harmonization in treaty articles where the member states want to avoid the possibility of direct supranationalization. The most general constraint is that harmonization cannot be enforced through the EC Treaties, and hence not through implied powers, when it comes to coordinating and supplementing actions.[102]

As was the case in the EU Constitutional Treaty, harmonization is also precluded in the TFEU concerning policies of: discrimination on the basis of gender, ethnicity and race, religion, disabilities and on the basis of sexual orientation[103], integration of immigrants from third countries,[104] crime prevention,[105] employment

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102. *Id*. at art. 2(5).
103. *Id*. at art. 19.
104. *Id*. at art. 79.
105. *Id.* at art. 84.

policies[106], educational cooperation[107], cultural policies[108], European space policy,[109] measures aimed at limiting the health effects of use of alcohol and tobacco,[110] industrial policy,[111] tourism sector,[112] civil protection against natural and man-made disasters,[113] but unlike the EU Constitutional Treaty, also measures concerning administrative capacity building to enforce EU law.[114]

In comparison with the restrictions on harmonization in the EU Constitutional Treaty, changes in the TFEU are limited. However, member states have more clearly emphasized that the enforcement of EU law shall remain a national issue, and that each member state has the freedom to design institutions in that field, whereas the national governments accept that harmonization of measures concerning the common market may take place. Likewise, the member states safeguard their power over immigration policies, crime prevention, and certain fields of social and industrial policy and the management of civil emergencies, all of which belong to the core of governmental powers. In the text of Article 352 TFEU, the scope of application was limited to subject matters (CFSP) and cases where harmonization had been expressly precluded in the relevant parts of the TFEU. That is clearly a greater limitation than what was contemplated in the first EU Constitutional Treaty.

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106. *Id* .at art. 149.
107. *Id.* at art. 165.
108. *Id.* at art. 167.
109. *Id.* at art. 173(3).
110. *Id.* at art. 147.
111. *Id.* at art. 153(2)a.
112. *Id.* at art. 195(2).
113. *Id.* at art. 196(2).
114. *Id.* at art. 197(2).

B. Restricting the Scope of Implied Powers Through Soft Law?

The IGC mandate of the summit in June 2007 included two declarations for a proposal aimed at limiting the scope of Article 352 TFEU. However, that proposal was also relegated to annexed *declarations* on the scope of the articles, which raises questions about its status in relation to the body of the Treaty. The scope of the application of when it comes, not to particular policies, but to objectives was entirely relegated to common declarations. The sections concerning the most radical restrictions regarding the scope of implied powers, (i.e., the declarations restricting which objectives that may justify the use of implied powers), are only found in a political declaration.

The parties to the treaties have made a number of joint, as well as unilateral declarations to all the current treaties, and the proposed TFEU is no exception. The role of unilateral declarations is obviously very limited whereas the role of joint declarations is more ambiguous. Such declarations have an ambiguous role because they have not been regarded as legally binding within EC/EU law. The ECJ has never considered them to be a part of EC law, but it seems likely that in some contexts, declarations have affected legislative practices.[115]

1. The Status of Declarations Annexed to EU Treaties

In the EU, declarations annexed to the treaties are seen as having a political, rather than a legal role. That has also been the case in the ECJ with respect to judicial interpretations of joint declarations relating to the treaties; as such declarations have never been treated as a source of law. Hence, the declarations are neither a part of the text of the treaties themselves, nor seen as Protocols annexed to the treaties. They seem to provide at best political constraints whose effects are difficult to predict, and it is questionable whether they will actually work to constrain the use of implied powers.

From the perspective of public international law, following Article 31 of the Vienna Convention of the Law of Treaties, the declarations are regarded as an aid to treaty interpretation.[116] It should

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115. *See* Knud Erik Jörgensen, *The Social Construction of the Acquis Communautaire: A Cornerstone of the European Edifice*, 3 EIoP 5 (1999), *available at* http://eiop.or.at/eiop/texte/1999-005.htm (last visited July 10, 2008).

116. *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 634-40 (Oxford Univ. Press 5th ed. 1998); Jean-Marc Sorel, *Article 31 – Convention de 1969, in* LES CONVENTIONS DE VIENNE SUR LE DROIT DES TRAITES, vol. II, 1289 (Oliver Corten & Pierre Klein

be noted that while declarations signed by all contracting parties to a treaty under Article 31 Vienna Convention of the Law of Treaties, and accepted by all parties are regarded as binding, the case law in ECJ hitherto has been very limited in that regard.[117] Anthony Aust argues that the use of such declarations can have a practical role in making treaties more readable by excluding certain definitions or interpretations, but also can have a political role in the sense that they make it possible for parties to relegate compromises to joint declarations and therefore exclude them from the main text of the treaty.[118] From Aust's position, it follows that although declarations may be created for practical and editorial reasons there is no reason not to regard the norms as binding. Malcolm Shaw takes a different approach focusing on whether there was any intention of the parties to be bound.[119] The reason for that seems to be to institutionalize a certain degree of uncertainty and thus to create a possibility of compromises. That depends on the interpretation of treaties, which will at least to some extent, be influenced by such joint declarations. In the case of the EU, one may question given the absence of any case law providing for interpretations of declarations whether they are anything else than political constraints.

2. The Text of the Declarations

The texts of the two declarations respectively refer to the scope of objectives, and make general statements on the role of implied powers as a part of a system of conferred powers.

> Declaration on Article 352 TFEU
>
> The Conference declares that the reference in Article 352(1) of the Treaty on the Functioning of the European Union to objectives of the Union refers to the objectives as set out in Article 3(2) and (3) of the Treaty on Euro-

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eds., 2006); Yves Bouthellier, *Article 31 – Convention de 1969, in* LES CONVENTIONS DE VIENNE SUR LE DROIT DES TRAITES, vol. II, 1339 (Oliver Corten & Pierre Klein eds., 2006).

117. When it comes to the role of so-called declarations annexed to European treaties, the legal doctrine is very limited, however, it seems to point to the view that the declarations are, from the perspective of international law, obligatory, and certain parts of them are also treated as binding. However, it should be said that whereas certain declarations have been treated as binding when it comes to constitutional practices of the political branches, especially by the Council of Ministers, it should also be added that their *judicial* status is much more uncertain. It also seems as if constraints where the member states want to make them unconditionally binding, are also made in the form of Protocols. A.G. Tôth, *The Legal Status of Declarations Annexed to the Single European Act*, 23 COMMON MKT. L. REV. 803, 811 (1986).

118. ANTHONY AUST, MODERN TREATY-LAW AND PRACTICE 190-91(Cambridge Univ. Press 2000).

119. MALCOLM N. SHAW, INTERNATIONAL LAW 634-36 (Cambridge Univ. Press 4th ed. 1997).

> pean Union and to the objectives of Article 3(5) of the said Treaty with respect to external action under Part Five of the Treaty on the Functioning of the European Union. It is therefore excluded that an action based on Article 352 of the Treaty on the Functioning of the European Union would only pursue objectives set out in Article 3(1) of the Treaty on European Union. In this connection, the Conference notes that in accordance with Article 31(1) of the Treaty on European Union, legislative acts may not be adopted in the area of the Common Foreign and Security Policy.

The statements in declaration on Article 352 TFEU, include a limit to which objectives of the EU that implied powers may be used to further, namely the objectives of Articles 2(2) and 2(3) EU Treaty. The declarations repeated what was already stated in hard law in Article 352(4) TFEU excluding the objectives related to the CFSP from the scope of implied powers. That is further emphasised by declarations where the objectives for which the new implied powers article may be used, will not *exclusively* include Article 2(2) in the EU Treaty which only refers to that the EU shall promote peace and prosperity, which apparently was thought to be a too widely defined goal. That is (for sure) a considerable expansion of powers, including the common market and the area of freedom, justice and security, but it seeks to exclude, albeit through soft law, policies of the EMU from the scope of Article 352 TFEU, thus the role of implied powers may be seen as more ambiguous than what only the text of Article 352 TFEU suggests. In a similar way, the declaration reiterates the prohibition of legislative acts in the area of CFSP adds on to those constraints.

> The Conference underlines that, in accordance with the settled case law of the Court of Justice of the European Union, Article 352 of the Treaty on the Functioning of the Union], being an integral part of an institutional system based on the principle of conferred powers, cannot serve as a basis for widening the scope of Union powers beyond the general framework created by the provisions of the Treaties as a whole and, in particular, by those that define the tasks and the activities of the Union. In any event, Article 352 cannot be used as a basis for the adoption of provisions whose effect would, in substance,

> be to amend the Treaties without following the procedure which they provide for that purpose.[120]

The interest in avoiding a possibility of backdoor amendments is expressed far clearer than previously, but it should be added that although this is a part of the instructions for the next IGC, it will only be a part of the *travaux préparatoires* of the new treaty, which will limit their role, at least when it comes to the role of judicial interpretations of the new treaty. The conclusions regarding the role of implied powers in the new treaty are not entirely clear. The EC Treaty, being transformed into the TFEU, points in the direction that the implied powers, compared to the current treaty, will be more extensive, and that they most importantly also will cover the Justice and Home Affairs part, which formerly was a part of the intergovernmental pillars (although the rules of decision making will still leave the individual member states more influential there than in many other areas). Even though recitals in the second declaration concerning implied powers were added to the TFEU, it should also be noted that the ECJ is already affirming those principles, and in that respect, it is questionable whether that will change the role of implied powers.

A. The New Implied Powers–Legal Delegation, Political Constraints?

That constitutional documents are sometimes ambiguously drafted is nothing new. In fact, ambiguity and the possibility of interpretation seem to be central facets in creation of constitutional norms.[121] To a certain extent, the use of ambiguities in the design of constitutional documents is a way to overcome what would otherwise be irresolvable political conflicts.[122] Traditionally, linguistic ambiguities have been used in constitutional texts, but in the case of the EC/EU treaties, ambiguities were created in the hierarchical norms, including inter-institutional agreements, po-

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120. *Id.*

121. The role of uncertainty has been emphasised particulary in rationalist theories of constitutional design which argue that the effectiveness of constitutional norms is determined by their general acceptability, and as such also dependent on that they are understood as reasonably impartial. The impartiality, this line of argumentation then arise from that such norms may not be obviously favoring a particular interest, i.e. that there has to be a "veil of uncertainty." That obviously is related to the *ex ante* justification of constitutional norms. *See* RUSSEL HARDIN, LIBERALISM, CONSTITUTIONALISM, AND DEMOCRACY 28-31 (Oxford Univ. Press 1999).

122. CASS R. SUNSTEIN, DESIGNING DEMOCRACY – WHAT CONSTITUTIONS DO 49-61 (Oxford Univ. Press 2001).

litical declarations, and informal agreements between the member states (such as the Luxembourg compromise), instead of the more traditional linguistic ambiguities typically found in constitutions. However, such ambiguous instruments have a considerable limitation over time since they are neither formalized, nor independently enforced, which clearly sets them apart from the constitutional texts of the treaties.

The TFEU continues the approach where the core of EU competencies are set out in "hard" law and are highly institutionalized, while many of the limitations are set out in terms of "soft" law (e.g. political declarations) that are non-binding and susceptible to change through practices. The constraints on the exercise of implied powers through the annexed declarations are, from a legal perspective, very weak. The political declarations aimed at limiting the application, but not the applicability of the clause of flexibility appear designed less to create constitutional constraints, but more to facilitate harmonization of law. In this respect, the tendencies toward executive federalism remain, although the Council of Ministers is subjected to a greater burden of reason giving with respect to the use of implied powers. However, it is a form of control which is political, and which does not aim at creating constitutional stability in relation between the member states and the EU, and which provides for less parliamentary influence compared to parliamentary veto powers.

IV. CONCLUSIONS: IMPLIED POWERS BEYOND FUNCTIONAL INTEGRATION?

As mentioned above, implied powers in a constitutional system, such as that of the EU, is problematic since implied powers may undermine the effectiveness of the constitutional limits to delegation of powers to the EC/EU. The attempts to revise the flexibility clause in Article 308 EC Treaty, led in the case of the EU Constitutional Treaty, to a radical expansion of its scope along with greater parliamentary control (primarily at the European level, but also at national level). In Article 352 TFEU, the reforms of the decision making process for implied powers proposed in Article I-18 EU Constitutional Treaty remained but the scope of application of the implied powers were limited. Given the character of the procedure of decision making, a strong pro-integrationist bias in how the powers under the flexibility clause will remain. This undermines the possibility of maintaining the constraints on the exercise of implied powers that had made it fit with the functional understanding of the principle of conferred powers. The most important

expansion of scope under the TFEU was the possibility of harmonization, through the flexibility clause, in the field of Justice and Home Affairs. The TFEU, compared to the never realised EU Constitutional Treaty, expanded the scope of implied powers with the exception of the CFSP, and that powers under the flexibility clause cannot be used to exercise powers of coordination. However, the changes of the scope in the TFEU (compared to the EU Constitutional Treaty) expanded the fields where harmonization would be possible, in particular with regard to social policies. At the same time though, it also added two non-binding declarations of the member states on the scope of implied powers intended by the parties. In those declarations the member states declared which objectives may be the basis for decisions under the clause of implied powers. However, the non-binding character of those declarations and the absence of references to such declarations in the judicial practice of the ECJ, suggest that their role will be limited. The traditional approach of functional integration has been that supranational powers have been given to the EC/EU in functionally defined areas, whereas the rest have been retained by the member states. The model of the new clause of implied powers is rather that the EU has powers to use implied powers with supranational effect in all fields except where the member states have explicitly limited the power of the EU. In that regard, implied powers under TFEU are beyond the traditional approach of functional integration.

A. Defining Implied Powers–Ambiguity by Design

The expansion of the scope of implied powers and the relative weakness of institutional constraints leads to the conclusion that the outer limits of EU powers will expand under the TFEU. The limitations to the scope of the applicability of the flexibility clause are "soft," and given the history of judicial interpretation of joint declarations, they cannot be expected to be effective at least in judicial practice. Despite the absence of judicial protection of joint declarations annexed to treaties, the joint declarations seem to have had a certain political effectiveness at least in some cases, which may be a reason to think there still is a certain ambiguity in the design of implied powers. The only exceptions to the soft regulation are the CFSP and the coordination of complementary actions, which are excluded from the scope of the flexibility clause in the text of the treaty.

It is important that such declarations are often made, but that they have not been regarded as sources of law. Although they may

be subsidiary sources for interpretation of a treaty, they have not been and currently are not, regarded as "hard" law. The role of the joint declarations as "soft" instruments is, at best, unclear. The "soft" norms have sought to delimit the role of the flexibility clause, whereas the "hard" law of the treaty has expanded it. Thus, the continued use of implied powers will be largely political, due to the increased involvement of parliamentary institutions, and the norms aimed at constraining the use of implied powers are dependent upon political opinions in order to be enforced. In these respects, implied powers have expanded and the political control of their application has increased. The more specific restrictions on their scope have weakened, and the political incentives to constrain the use of implied powers remain, at best, limited. The constraining effect of the principle of conferral of powers has been weakened. The weakness of the principle is not new, but by further limiting its role as a practical constraint, it appears inevitable that the absence of constitutional constraints and lack of institutional balance will not be remedied. The lines drawn in the revised treaties concerning control of the use of implied powers are most likely, drawn in the sand.

B. Procedures of Decision Making: Retaining the Pro-Integration Bias

The increased participation of the European Parliament limits the development toward executive federalism in that the Council of Ministers. The introduction of another body with veto power lessens the democratic deficit, but it does not establish any robust political constraints on the exercise of implied powers. The increased participation of the European Parliament creates an incentive for greater expansive use of the *explicitly* conferred powers, since the differences and the institutional incentives of the Council of Ministers to use Article 308 EC Treaty as a way to avoid parliamentary influence at the EU level, will disappear.

The most problematic aspects of the democratic deficit and lack of accountability will be limited, but that does not diminish the problems of the constitutional deficit associated with the exercise of implied powers. Due to the dramatically increased scope of implied powers (compared to the EC Treaty), the constitutional deficit has expanded rather than contracted. The retained pro-integration bias in the institutional process means that although certain precise constraints have been imposed on the exercise of the implied powers, it is incumbent upon the ECJ to uphold those constraints. The result is still a high degree of judicialisation, at

least regarding the outer limits of the EU's competencies.[123] The increased role for national parliaments, regarding subsidiarity, seems only to change the role of national parliaments from non-existent to very weak. The barriers to the use of implied powers appear to remain unchanged in any substantial way. While the democratic deficit will be alleviated, it appears that the biased decision making process and the weak substantive controls over the exercise of implied powers will prevent elimination of the constitutional deficit.

C. Final Remarks– Implied Powers Beyond Functional Integration?

The traditional dilemma regarding the exercise of implied powers under Article 308 EC Treaty was the problem in delimiting the role of implied powers. The model chosen in the revised treaties creates a general power of legislation through the clause of implied powers, but specifying certain fields of exception that cannot be subject to harmonization and where Article 352 TFEU cannot be used (most importantly in the field of CFSP) The possibility of harmonization is the general rule, and the impossibility of harmonization is the exception. Together with the vastly expanded objectives, it leads to that the traditional understanding of the EU as based on functional delegation need to be reconsidered. A more reasonable approach seems to be that the EU is competent to act, except where it is explicitly ruled out.

While the democratic deficit is reduced, it is not abolished: the only parliamentary power that exists is veto power of the European Parliament and a power to delay, for a short period of time, the national parliaments. In that regard, the functional model of integration has been watered down through the very broad goals of the EU, and the principle of limited delegation has been undercut through the use of supranational legislation under implied powers. The democratic deficit has been partially remedied when it comes to influence by directly elected decision-makers but it remains in important respects when it comes to the possibility of *ex post facto* accountability, the powers of agenda setting, and transparency within the Council of Ministers. However, the constitutional deficit

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123. One should note that, given the case law of the ECJ, the constraint in relation to the objectives of the CFSP seems feasible. It seems far more questionable if the declarations from the next IGC, agreed upon at the summit, will be particularly effective since there will not be any references to the declarations in the final text and since preparatory works, in general, have a low status as sources for treaty interpretation. In that sense, the declarations seem to provide much less of a constraint than the revisions in the actual flexibility clause.

from the flexibility clause and the pro-integration bias remains, in a way that does not stabilize the division of powers between the member states and the EU for the future.

Appendix A: Fields of Policy Where Harmonization is Precluded

EU Constitutional Treaty	Treaty on the Functioning of the EU (2007)
•Gender Discrimination	•Gender Discrimination
•Racial/Ethnic Discrimination	•Racial/Ethnic Discrimination
•Religious Discrimination	•Religious Discrimination
•Discrimination Against the Disabled	•Discrimination Against the Disabled
•Discrimination on the Basis of Sexual Orientation	•Discrimination on the Basis of Sexual Orientation
•Age Discrimination	•Age Discrimination
•Working Conditions	•Integration of Third-Country Nationals
•Social Security for Employees	•Management of Civil Disasters
•Consultation with Workers	•Policies to Increase Competitiveness of Industries
•Information to Workers	•Crime Prevention
•Co-determination of Employers/Employees	•European Space Policy
•Gender Equality in the Labour Market	•Tourism Sector
•Integration of Third-Country Nationals	•Administrative Capacity-Building of to Enforce EU Law
•Management of Civil Disasters	
•Policies to Increase Competitiveness of Industries	
•Crime Prevention	

COLOMBIA'S INCURSION INTO ECUADORIAN TERRITORY: JUSTIFIED HOT PURSUIT OR PUGNACIOUS ERROR?

LUZ E. NAGLE*

I. INTRODUCTION

Fuerzas Armadas Revolucionarias de Colombia – Ejército del Pueblo (FARC) is the oldest and largest leftist guerrilla group in Colombia, founded in 1964 to overthrow the government and install a Marxist regime through armed struggle. Various governments of Colombia have battled this group. The organization claims to number at least 16,000 fighters and operates throughout the national territory. FARC finances its operations with kidnapping-for-ransom, extortion, and various forms of smuggling and drug trafficking. FARC is on the United States' and European Union's lists of terrorist groups.

Colombia's Foreign Minister Fernando Araujo Perdomo has justified Colombia's recent incursion into Ecuador to attack a FARC encampment with the statement that, "[t]he terrorists, among them Raul Reyes, have had the habit of murdering in Colombia and invading the territory of neighboring countries to

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find refuge."[1] Therefore, the Minister continued, "Colombia did not violate the sovereignty, but instead acted under the principle of legitimate defense."[2]

The facts as they are reported show the following:

1. Tips from informers verified by the intelligence services established that Reyes would be present Friday at a camp on the other side of the Putumayo River in Ecuadorian territory.
2. The Colombian air force staged air strikes around 12:25 a.m. Saturday morning.
3. The operation was launched from Colombian territory.
4. Following the bombardment on the Camp, Colombian ground forces were ordered in to secure the area and neutralize the enemy.
5. Colombian forces entered Ecuadorian territory and transported to Colombia the bodies of Reyes and Conrado, leaving behind the other dead and wounded guerrillas.
6. On Saturday morning, Colombian President Alvaro Uribe Velez called Ecuadorian President Rafael Correa to inform him of the operation in which Reyes died. Uribe claimed that the incursion into Ecuadorian territory was in hot pursuit because Colombian troops responded to fire from the FARC combatants, who had entered Ecuadorian territory to escape the fighting.
7. Reports from Ecuadorian military patrols indicated that the scene of the fighting was 1.2 miles inside Ecuador's frontier with Colombia.
8. In an improvised encampment, the Ecuadorian troops found the bodies of fifteen guerrillas and two wounded female guerrillas. The dead were in their underwear.
9. According to Correa, the guerrillas "were bombed and massacred while sleeping, using pinpoint technology, which located them at night, in the jungle, surely with the assistance of foreign powers."[3]

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1. Fernando Araujo Perdomo, *Communicado del Ministerio de Relaciones Exteriores* (Mar. 2, 2008) (Luz E. Nagle trans.), *available at* http://www.cancilleria.gov.co/wps/portal (follow hyperlink "Comunicados" under menu "Prensa MRE").

2. *Id.*

3. Colombian Ministry of Defense, *Press Release* (Mar. 4, 2008), http://www.cancilleria.gov.co/wps/portal (follow hyperlink "Comunicados" under menu "Prensa MRE"); Sibylla Brodzinsky, *Colombia's Cross-Border Strike on FARC Irks Neighbors*, THE CHRISTIAN SCIENCE MONITOR, Mar. 3, 2008, at World 4 http://www.csmonitor.com/2008/0303/p04s02-woam.html (last visited July 12, 2008); *Ecuador expels Colombian; Bogota accuses Quito of rebel ties*, NOTIEMAIL, Mar. 3, 2008, http://news.notiemail.com/noticia.asp?nt=12106379&cty=200 (last visited July 12, 2008).

Colombia asserts that it has repeatedly warned Ecuador of the existence of guerrilla groups in their territory and asked them to stop the flow of these terrorists onto Ecuadorian soil.[4] Colombia launched an air attack to hunt down FARC members on Ecuadorian soil, arguing that such a strike was justified under international law because FARC is a terrorist group and the Colombia military was engaged in a hot pursuit operation.[5]

II. PROPER METHOD TO ACT: HOT PURSUIT VS. APPREHENSION

Some could argue that Colombia should have captured Reyes and the other FARC members since it does not seem that there was an actual exchange of fire to have justified the killings.[6] Prosecuting them for crimes against humanity, war crimes, and other money laundering and drug related offenses would have been a better approach.[7] Because Colombia and Ecuador do not have an extradition treaty, waiting to intercept the party when they came back across the border would have been the proper method of obtaining them. Colombia maintains that they were on "hot pursuit" of the group therefore they were justified in using the method they chose.[8]

Hot pursuit "pertains to the law of the sea and the ability of one state's navy to pursue a foreign ship that has violated laws and regulations in its territorial waters (twelve nautical miles

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4. Colombian Ministry of Foreign Relations, *Reply of the Ministry of External Affairs to the Government of Ecuador* (Mar. 2, 2008), http://www.cancilleria.gov.co/wps/portal (follow hyperlink "Comunicados" under menu "Prensa MRE")(last visited July 12, 2008).

5. Chris Kraul, *Incursion a Gamble for Colombia; as Border Tensions Mount, Experts say Killing of a FARC Leader in Ecuador was a Calculated Risk*, L.A. TIMES, Mar. 4, 2008, at A3, *available at* http://www.latimes.com/news/nationworld/world/la-fg-bordermess4mar
04,0,2724158.story; *See* Perdomo, *supra* note 1.

6. ALAN M. DERSHOWITZ, PREEMPTION: A KNIFE THAT CUTS BOTH WAYS 121 (2006) (noting that "[d]etention is the tactic of choice against suspected terrorists, but it is not always feasible to capture terrorists who pose an immediate and serious danger to a state. Many states have opted, under these circumstances, for a more drastic form of preventive incapacitation—namely, targeted killing").

7. Some argue that "terrorism is a law enforcement issue," therefore, terrorists "must be arrested and tried, not hunted down and killed. They may be killed only in self-defense — if they pose an immediate danger to the arresting officers . . . . [killing terrorists] constitutes extrajudicial execution." *See* DERSHOWITZ, *supra* note 6, at 124–25. Others consider terrorism a military issue since terrorists are at war with the West and that "all military killings are by their nature extrajudicial." *Id.* However, to consider those killings lawful and moral the evidence must show "that the targeted suspect is in fact a terrorist involved in ongoing operations, the imminence and likelihood that these terrorist operations will succeed, the availability of other less lethal alternatives, and the possibility that others will be killed or injured in the targeted attack." *Id*.

8. Kraul, *supra* note 5.

from shore), even if the ship flees to the high seas."[9] In international law, the right to hot pursuit on land is recognized as the *chasing* of armed aggressors across international borders.[10] Still, the issue of hot pursuit applicable to sovereign territories "remains unsettled."[11] Few nations would complain about a government waiting for terrorists to "cross into [another nation] and launch an attack and then chase them over [a third nation's] border . . . . But to invade another country without an actual pursuit on is going to stretch the idea of international law."[12]

The hot pursuit argument could work if Colombian forces had been chasing FARC members over the Ecuadorian border and then launched the attack. However, the argument does not work if Colombia crossed into Ecuador without "following the tail" of the FARC members.[13] Even then, under international law this active hot pursuit argument is debatable. Hot pursuit entails the use of force against the territory of a sovereign nation, which in turn conjures sensitive and delicate issues involving state sovereignty.[14] While it may be argued that hot pursuit is justifiable under principles of self-defense, it is difficult to make the case that the Colombian forces can go into Ecuadorian territory and kill FARC members without Ecuador's consent.

III. NEUTRALITY ARGUMENT

Could Colombia claim that Ecuador is a neutral party and under the rules of armed conflict, Colombia could pursue the FARC members onto Ecuadorian soil? The principle of neutrality applies to international armed conflicts by using customary international law and treaties designed for international armed conflicts.[15] The first thing Colombia must do is to acknowledge that

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9. Lionel Beehner, *Can States Invoke 'Hot Pursuit' to Hunt Rebels?,* COUNCIL ON FOREIGN RELATIONS, June 7, 2007, http://www.cfr.org/publication/13440/ (last visited July 12, 2008).

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* (Hot pursuit means that a force is "literally and temporally in pursuit and following the tail of a fugitive." (quoting Michael P. Scharf)).

14. *Id.*

15. *The Declaration of Paris, 1856*, 1 AM. J. INT'L L. (SUPP.) 89, 89-90 (1907); *Final Act and Conventions of the Second Peace Conference: Convention Regarding the Rights and Duties of Neutral Powers and Persons in Case of War on Land*, 2 AM. J. INT'L L. (SUPP.) 1, 117 (1908); *Final Act and Conventions of the Second Peace Conference: Convention Respecting the Rights and Duties of Neutral Powers in Naval War*, 2 AM. J. INT'L L. (SUPP.) 1, 202 (1908); and, *Diplomatic Conference on Reaffirmation and Development on International Humanitarian Law Applicable in Armed Conflicts: Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of*

the conflict in Colombia is an internal armed conflict and not what President Uribe has insisted is a terrorist threat.[16] But, the implications for acknowledging there is an internal armed conflict is bad for a nation's economy, which is why Uribe cannot have it both ways.[17] Colombia could contend that the principle of neutrality should apply to Colombia's internal armed conflict by claiming that the discriminatory application of rules between international and internal armed conflicts must change, and that based on humanitarian reasons, it is time to treat the victims of both types of conflicts equally. Colombia could further argue historical evidence that there are more internal conflicts today, that there is a diminution in the application of the laws of war to internal armed conflicts, and that all the internal armed conflicts taken place establish that those "in most need of legal protection are the civilians."[18]

Under established principles of neutrality, an adversary party is entitled to undertake hot pursuit and attack the belligerent in the neutral party territory if (1) the belligerent forces enter neutral territory, and (2) the neutral territory is unable or unwilling to expel or intern them.[19] The adversary can even seek compensation from the neutral nation for the breach of neutrality.[20] On the facts, it does not seem that Colombia could prove that Ecuador was "unable or unwilling to expel or intern" FARC members. On the contrary, the information presents a nation that was able and willing to expel and go after them.

In arguing that the principle of neutrality is applicable to internal armed conflict, Colombia could also argue that entering Ecuadorian territory was justified because (1) FARC entered Ecuadorian territory and (2) that Ecuador was unable or unwilling to expel FARC members despite knowing that FARC had been

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International Armed Conflicts, 72 AM. J. INT'L L. 457 (1978). *See* INT'L COMM. OF THE RED CROSS, THE LAW OF ARMED CONFLICT: NEUTRALITY (2002) [hereinafter INT'L COMM. OF THE RED CROSS] *available at* http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5P8EX4/$File /LAW8_final.pdf.

16. Mamie Mutchler & Andrea Lari, *Colombia Cannot Deny Internal Armed Conflict*, REFUGEES INT'L, Jan. 24, 2005, *available at* http://www.refugeesinternational.org /content/article/detail/4962 (last visited July 12, 2008).

17. *Donors Set Conditions for Support for Paramilitary Disarmament*, IPSNEWS, Feb. 7, 2005 (quoting Colombian business leader, Luis Carlos Villegas, about Uribe's position and stating that it is "a serious thing to say there is an armed conflict when there isn't one. But to me it is absolutely inconceivable to say that there is no armed conflict in Colombia").

18. "The traditional laws of war rely on the ability and willingness of the contending parties to distinguish between civilians and combatants, and between military and non-military targets. During internal armed conflict, however, such clear distinctions may be impossible." LINDSAY MOIR, THE LAW OF INTERNAL ARMED CONFLICT: THE HISTORIC REGULATION OF INTERNAL ARMED CONFLICT 2 -3 (Cambridge University Press 2003) (2002).

19. INT'L COMM. OF THE RED CROSS, *supra* note 15.

20. *See id.*

using Ecuadorian soil for some time. Yet, it seems problematic for Colombia to prove that Ecuador was unable or unwilling to expel FARC combatants. Ecuador has not harbored FARC members, according to Ecuador's vice-president.[21] On the contrary, "Ecuador has dismantled guerrilla campsites each time they detected them and Ecuador has captured eleven guerrillas who reside in its prisons."[22] Moreover, the vice-president asserts, the Colombian government was aware of meetings between FARC and Ecuadorian officials and that that presidents of Colombia and Ecuador met as recently as December to establish "channels of facilitation for the liberation of the hostages."[23]

IV. ANTICIPATORY SELF-DEFENSE

Colombia could also try to justify its incursion into Ecuadorian territory by arguing the doctrine of Anticipatory Self-Defense. However, the anticipatory self-defense doctrine is very controversial.[24] Some legal scholars hold the view that under Article 2(4) of the U.N. Charter, nations are to "refrain in their international relations from the threat or use of force" by limiting their right of individual or collective self-defense to situations in which an armed attack has already occurred.[25] To these scholars, a United Nations Security Council resolution is required before armed force could be used, and then it could be used only to repel an armed attack on one's own territory.[26] The argument against its practice is based on the fear that the use of force can become a frequent occurrence when based on suspicions, assumptions, intelligence warnings, or mistakes—which can lead to larger scale warfare and national and regional destabilization.[27]

Some legal scholars maintain that within the right of self-defense resides a right to anticipatory self-defense to prevent an

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21. Asdrubal Guerra, *Ecuador no es albergue de guerrilleros de las FARC: Vicepresidente*, (Noticias WFM broadcast Mar. 5, 2008), (transcript *available at* http://www.wradio.com.co/nota.asp?id=558767).

22. *Id.*

23. *Id.*

24. Mary Ellen O'Connell, *The Myth of Preemptive Self-Defense*, Aug. 2002 AM. SOC'Y OF INT'L LAW PRESIDENTIAL TASK FORCE ON TERRORISM 15-21 (2002), *available at* http://www.asil.org/taskforce/oconnell.pdf (last visited July 12, 2008).

25. U.N. Charter art. 51 ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security").

26. O'Connell, *supra* note 24, at 5.

27. *See id.*

armed attack from happening.[28] A state may anticipate self-defense "where there is convincing evidence not merely of threats and potential danger but of an attack being actually mounted."[29] At that point, an armed attack may then be said to have begun even if the actual combat has not yet crossed a frontier.[30] Clear and convincing intelligence must show that a group or a state is under orders to attack the nation using anticipatory self-defense or that such a group or state would attack and that preparations to commit forces to combat were underway.[31]

The United States bases its right to anticipatory self defense on the 1837 *Caroline* case.[32] In *Caroline*, the British self-defense claim that the ship was suspected of carrying weapons to anti-British rebels failed to show a need of self-defense that was "instant, overwhelming, and leav[es] no choice of means, and no moment for deliberation."[33] This case articulated the circumstances in which the anticipatory self-defense formula properly applies. In modern times, this "formula represents common sense and fits the [intentions] of the United Nations Charter when [applied] to determin[ing]" the starting point of an armed attack or whether an attack is in evidence.[34] "[I]t is the attack that provides the decisive test."[35] This case offers strict limits that preclude action against states that present potential threats, unless it could be credibly shown that an attack was imminent.[36]

The United States Secretary of State in the Caroline conflict, Daniel Webster, held a position in the *Caroline* case that could be useful to the Colombian-Ecuadorian situation.[37] Assuming that Ecuador had respected its obligation under international law, it is for Colombia to justify its actions by demonstrating "a necessity of self-defense, instant, overwhelming, leaving no choice of means,

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28. *Id.* at 12.

29. *Id*. (quoting C.H.M. Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 HAGUE RECUEIL 451, 498)

30. *Id.*

31. *Id.* at 9.

32. In December 1837, British and Canadian rebels crossed the Niagara River from Canada into New York to attack and destroy the steamer *Caroline*, which had been carrying supplies to Canadian insurgents. The *Caroline* burned and drifted downriver, and at least one United States citizen was killed and several others were wounded. R.Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT'L L. 82 (1938).

33. O'Connell, *supra* note 24, at 8.

34. *Id*. at 9.

35. *Id.*

36. WYBO P. HEERE, TERRORISM AND THE MILITARY: INTERNATIONAL LEGAL IMPLICATIONS 36 (2002).

37. Jennings, *supra* note 32, at 89.

and no moment for deliberation." [38] Supposing the necessity of the moment authorized Colombia to enter Ecuadorian territory, Colombia would also need to show that it "did nothing unreasonable or excessive; since the act, justified by the necessity of self-defense, must be limited by that necessity, and kept clearly within it."[39] Colombia will also need to prove that warning the party in the Ecuadorian encampment was "impracticable, or would have been unavailing."[40] Colombia would have to prove, as Webster asserted more than 160 years before, that "day-light could not be waited for; that there could be no attempt at discrimination between the innocent and the guilty; that it would not have been enough to seize and detain" those in the encampment, and that "there was a necessity, present and inevitable, for attacking [them] in the darkness of the night," while they were asleep, "killing some, and wounding others."[41]

The inviolability of territorial integrity and the sovereignty of nations is recognized as crucial for the security and maintenance of peace among nations. Nonetheless, there are times, some will argue, when this principle must be suspended. If suspension is due to the invocation of anticipatory self-defense, then the suspension must be due to an *overwhelming necessity and urgency*.[42] Colombia can invoke the anticipatory self-defense argument only if there was not a moment to spare for deliberating a diplomatic course, and the circumstances and necessity of denying the FARC group from further use of the encampment as a site for planning further attacks in Colombia, for regrouping, or for seeking safe haven overwhelmed the normal respect of one nation for the national territory of it neighboring state.

The *Caroline* case was also cited by the Nuremberg judges and it has been a recognized international standard for anticipatory self-defense and preemptive action.[43] Even if one accepts the legality of anticipatory self defense within the strict limits of *Caroline*, doing so precludes action against states that present potential threats, unless it could be credibly shown that an attack were imminent.[44] In the case of Norway, the Nuremberg judges rejected the argument made by the German defendants that their invasion of Norway was justified on a reasonable fear that Norway

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38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.* (emphasis added).
43. International Military Tribunal at Nuremberg, Judgment and Sentences (Oct. 1, 1946), *reprinted in* 41 AM. J. INT'L L. 172, 206 (1947) [hereinafter Nuremberg Tribunal].
44. *Id.*

would become a base for an Allied attack on Germany.[45] According to the judges, the plans to attack Norway "were not made for the purpose of forestalling an imminent Allied landing, but, at the most, that they might prevent an Allied occupation at some future date."[46] The court stated that Germany alone could not decide if preventive action was a necessity. According to the court, such decision "must ultimately be subject to investigation and adjudication if international law is ever to be enforced."[47]

Based on the principles established by the *Caroline* case and the Nuremberg Norway case, Colombia has some work to do to justify its incursion into Ecuador using anticipatory self-defense. Colombia needs to prove that the attack was a case of necessity and immediacy, and even then, a unilateral decision on the applicability of a right of self-defense can be found by a tribunal to be "no more than the right of autointerpretation subject to investigation and conclusive adjudication."[48]

Following the terrorist attacks of September 11, 2001, action by the United Nations Security Council can be cited to support anticipatory self-defense in situations where: 1) an armed attack has occurred, and 2) there is convincing evidence that more attacks are planned, even if not yet underway.[49] Instead of waiting for new attacks to occur, a victim, once attacked, can use force where there is "*clear and convincing evidence that the [assailant] is preparing to attack again*."[50] The victim can also defend itself within a reasonable time following the initial attack.[51]

"If terrorists are planning a sequence of attacks in a campaign of terror, a state may respond," in order to stop future attacks if it can be shown that "convincing evidence exists that [future] attacks are [contemplated or being] planned."[52] Lacking such convincing evidence could constitute unlawful reprisal.[53] According to the Security Council's Resolution 1368 (2001) and Resolution 1373 (2001) in the aftermath of the September 11, any right to resort to anticipatory attack for purposes of self-defense, *"requires a priori predictability: flawless intelligence and the absence of doubt.*"[54]

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45. *Id.*
46. *Id.*
47. LEO GROSS, ESSAYS ON INTERNATIONAL LAW AND ORGANIZATIONS 389 (Brill 1984) (citing Nuremberg Tribunal, *supra* note 43).
48. *Id.*
49. O'Connell, *supra* note 24, at 3-4.
50. *Id.* at 9-10 (emphasis added).
51. *Id.* at 6-7.
52. *Id.* at 9-10.
53. *Id.* at 10.
54. ADAM LICHTENHELD, UW-MADISON: POLITICAL SCIENCE DEPARTMENT, THE PRACTICALITY OF PREEMPTION IN UNITED STATES FOREIGN POLICY 1, *available at*

Colombia could use the actions by the United Nations Security Council to support its anticipatory self-defense by proving that it took action against the FARC group on the strength of evidence that more attacks would be forthcoming. Colombia would need to show that prior to the use of force on Ecuadorian soil, the FARC group had attacked Colombia as part of a series of offensives, and that more assaults were planned. This assertion can be proven by offering evidence tying the group to prior attacks on Colombian soil and perhaps producing the testimony of apprehended individuals who revealed that more attacks were planned.

V. PREEMPTIVE SELF-DEFENSE: THE BUSH DOCTRINE AND ITS APPLICATION TO THE COLOMBIA-ECUADOR SITUATION[55]

Preemptive self-defense is defined as "military action against a potential adversary in advance of a suspected attack."[56] Under this defense, a military reaction is divested of defensive character since the defense is future-oriented and the threat is merely a potential one.[57] After long consistent support by the United States government for the prohibition of preemptive use of force, the Bush administration changed the government's position. "Preemption is the use of military actions against a state to disable an enemy in order to prevent an attack."[58]

Today, under what is known as the Bush Doctrine, the United States legitimizes preemptive attacks.[59] This is a doctrine the

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HTTP://209.85.165.104/SEARCH?Q=CACHE:4SHMHJUVW_MJ:WWW.POLISCI.WISC.EDU/USERS/PSA/JOURNAL/LICHTENHELD.DOC+THE+PRACTICALITY+OF+PREEMPTION+IN+UNITED+STATES+FOREIGN+POLICY&HL=EN&CT=CLNK&CD=1&GL=US (last visited Sept. 30, 2008) (emphasis added).

55. *Id.* at 3 ("the Bush Doctrine was included in the new National Security Strategy of 2002, claiming that the U.S. could strike against any enemies perceived as posing a 'serious' (though not necessarily imminent) threat to American security . . .").

56. Preemptive self-defense is distinguished from interceptive self-defense. *See* TARCISIO GAZZINI, THE CHANGING RULES ON THE USE OF FORCE IN INTERNATIONAL LAW 201 (2005).

57. *Id.*

58. LICHTENHELD, *supra* note 54, at 2.

59. This policy began during the first Bush Administration as a "blue print for maintaining U.S. preeminence, precluding the rise of a great power rival, and shaping the international security order in line with American principles and interests," by outlining United States military strategies, and setting out a framework for developing the defense budget. POLITICAL RESEARCH ASSOCIATES,1992 DRAFT DEFENSE GUIDANCE, http://rightweb.irc-online.org/profile/1571.html (last visited Aug. 4, 2008). Another policy document, the Defense Planning Guidance (DPG), delineated several points, including "the use of preventive—-or preemptive—-force, and the idea of forsaking multilateralism if it didn't did not suit U.S. interests." *Id.* The DPG advocated intervention in disputes throughout the world, even when the disputes were not directly related to U.S. interests, and argued that the United States should "retain the preeminent responsibility for addressing selectively those wrongs which threaten not only our interests, but those of our allies or friends, or which could seriously disrupt international relations." *Id.* In 1997, the

United States relies on to justify military action against terrorist states. The Bush Doctrine is cavalier with regard to proceeding with little support, or in spite of lack of support, from the United Nations. The doctrine "is not a Clintonian multilateralism, [it does] not appeal to the United Nations, [does not] profess faith in arms control, or raise hopes for any 'peace process.'"[60] The Doctrine contains three essential elements: Active American global leadership, regime change, and promoting liberal democratic principles, and is a reaffirmation that lasting peace and security are to be won and preserved by stressing both U.S. military strength and American political principles. [61]

The United States relies on this Doctrine to justify military action against terrorist states. President Bush alluded to this idea in a policy address at West Point when he noted that "[w]e must take the battle to the enemy, disrupt his plans, and confront the worst threats before they emerge."[62] Moreover, the 2002 National Security Strategy document articulates the scope of the Bush Doctrine:

> The greater the threat, the greater the threat of inaction--and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively...in an age where the enemies of civilization openly and actively seek the world's most destructive technologies, the United States cannot remain idle while dangers gather.[63]

Those following President Bush's position argue that the threats posed by terrorist groups and rogue regimes in today's

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Project for the New American Century (PNAC) was established in order to "promote American global leadership." PROJECT FOR THE NEW AMERICAN CENTURY, REBUILDING AMERICA'S DEFENSES: STRATEGY, FORCES, AND RESOURCES FOR A NEW CENTURY (2000), *available at* http://cryptome.org/rad.htm (last visited Aug. 4, 2008). "The PNAC constituted an effective proponent of neoconservative ideas between Clinton's second administration and the 2003 invasion of Iraq." Project for the New American Century, http://rightweb.irc-online.org/profile/1535.html (last visited June 1, 2008).

60. Memorandum to: Opinion Leaders, Project for the New American Century (Jan. 30, 2002), http://www.newamericancentury.org/defense-20020130.htm (last visited June 1, 2008).

61. *Id.* The WHITE HOUSE, PRESIDENT BUSH DELIVERS GRADUATION SPEECH AT WEST POINT (June 1, 2001),

http://www.whitehouse.gov/news/releases/2002/06/20020601-3.html (last visited Aug. 4, 2008).

63. LICHTENHELD, *supra* note 54, at 3 (citing THE WHITE HOUSE, NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (Sept. 2002), *available at* http://www.whitehouse.gov/nsc/nss.pdf) [hereinafter NATIONAL SECURITY STRATEGY].

world are very different from those of World War I or II. Danger today stems from terrorist groups and rouge regimes that care nothing about international law or commitments under treaties. [64] They relish in the use of excessive violence, follow no rules, and only recognize the power of military force. In the face of such an implacable foe, one can argue that preemptive action is the best means for intimidating, containing, and ultimately defeating them.

According to the Bush Doctrine, the concept of imminent threat requires an adaptation to "the capabilities and objectives of today's adversaries," who rely on acts of terror and seek out the use of weapons of mass destruction. [65] Recalling that the *Caroline* case recognized that the right to self-defense is inherent to a State, such a right is "conditional to the occurrence of an armed attack."[66] The statement "an armed attack occurs" requires interpretation of the "contemporary international and technological context of limited reaction time."[67]

Today's trend among some strategists in the United States is to advocate exceptions of non-intervention when governments fail on their international obligation since, "there is a need for protecting civilians against terrorist attacks and a need to uphold their sovereignty by striking first against those who menace the international community."[68] The proponents of the doctrine consider it extended self-defense. "Preemption warrants the execution of offensive war, usually hinging on the interpretation of the imminence of the threat."[69]

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64. United States defines rogue states as states that

> brutalize their own people and squander their national resources for the personal gain of the rulers; display no regard for international law, threaten their neighbors, and callously violate international treaties to which they are party; are determined to acquire weapons of mass destruction, along with other advanced military technology, to be used as threats or offensively to achieve the aggressive designs of these regimes; sponsor terrorism around the globe; and reject basic human values and hate the United States and everything for which it stands.

NATIONAL SECURITY STRATEGY, *supra* note 63, at 14.

65. The United States' position is that under international law states do not need to suffer an attack before they can lawfully defend themselves.

> We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries. Rogue states and terrorists do not seek to attack us using conventional means. They know such attacks would fail. Instead, they rely on acts of terror and, potentially, the use of weapons of mass destruction—weapons that can be easily concealed, delivered covertly, and used without warning.

Id. at 15.

66. Louis-Philippe Rouillard, *The Caroline Case: Anticipatory Self-Defence in Contemporary International Law*, 1 MISKOLC J. OF INT'L L. 104, 111 (2004) *available at* http://www.uni-miskolc.hu/~wwwdrint/20042rouillard1.htm.

67. *Id.*

68. Sean D. Murphy, ed., *Contemporary Practice of the United States Relating to Int'l Law,* 97 AM. J. INT'L L. 179, 204-05 (2003).

69. LICHTENHELD, *supra* note 54, at 2.

This doctrine, however, fails to adhere to present legal norms and offers a different approach to international law. For instance, international law sanctions the use of force in self-defense against potential threats; the threat must be an actual threat. Yet, the doctrine allows precisely that, that the use of force is available when the threat is potential. The *jus ad bellum* doctrine applies when there is "just cause, an honest intention; [and] war was a last resort only after other means of solving a conflict had been exhausted."[70] To use force, as quoted earlier, "even if uncertainty remains as to the time and place of the enemy's attack," implies a use of force contrary to the *jus ad bellum* principle.[71] If attacks can occur based on imminence of a threat, instead of on perceived threats, this renders the use of force a first option rather than a last resort.

The Bush doctrine, then, seems to legitimize aggressive warfare, as defined by the United Nations, by encouraging "the use of armed force by a state against the sovereignty, territorial integrity or political independence of another state, or in any other manner inconsistent with the Charter of the United Nations." [72] If this is true, then the doctrine is legitimizing the Statute of the International Military Tribunal and the United Nations positions that aggressive wars are illegal. Taken one step further, the role of the Security Council, to determine what acts warrant military action, then becomes extraneous. Under the Bush doctrine, nations alone will be the ones determining what merits military action. This approach threatens the security and peace of the world by allowing individual nations to determine when to use force, thereby infringing upon state sovereignty and inviting a world run by individual rather than collective interests.[73]

Turning "inward" and rejecting existing institutions is not going to bring victory. The reality is that the fighting international terrorism is "not a strategic challenge [the United States] can or should meet alone."[74] In order to "wage the present struggle and to built a safer future," the United States needs "to strengthen the traditional alliances that can stand with us over the long haul, not neglect them in favor of temporary ad hoc coalitions."[75] True

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70. John Hammond, *The Bush Doctrine, Preventive War, and International Law*, 36 THE PHILOSOPHICAL FORUM 97, 105 (Spring 2005).

71. *Id.* NATIONAL SECURITY STRATEGY, *supra* note 63, at 15.

72. G.A. Res. 3314, art. 1, U.N. Doc. A/RES/3314 (Dec. 14, 1974).

73. *See* LICHTENHELD, *supra* note 54, at 4.

74. Robert Kagan & Ronald D. Asmus, *Commit for the Long Run*, THE WASHINGTON POST, Jan. 29, 2002, at A19, *available at* http://www.cfr.org/publication/4310/commit_for_the_long_run.html.

75. *Id.*

victory requires stronger institutions that can prevent and resist another terrorist attack.

Additionally, such an extension to the right to self-defense has yet to be accepted by the international community and therefore has yet to be part of international law. Nevertheless, using the Bush Doctrine, Colombia could argue that it was justified to act under the principle of preemptory self-defense by proving that FARC was using acts of terror, that Ecuador failed in its international obligations, that Colombia had a need to protect its citizens against the acts of this particular FARC unit, and that there was a clear and urgent need to uphold Colombian sovereignty and imperatives by striking first against that FARC unit.

VI. SELF-DEFENSE[76]

The United Nations Charter specifies a prohibition of the right to use force. Article 2(4) bans the use of force.

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.[77]

The Charter offers only two exceptions: 1) Collective security actions. As provided under Chapter VII, the Security Council may use force to keep the peace, and 2) Under Article 51, States have the right to use force in individual and collective self-defense. The section expressly permits cross-border military force:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by members in the exercise of this right of self-defense shall be immediately reported to the Security Council and

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76. *See* Michael N. Schmitt, *Preemptive Strategies in International Law*, 24 MICH. J. INT'L L. 513, 539 (2003) (noting that States today treat self-defense as law applicable to acts committed by non-State actors).

77. G.A. Res. 3314, art. 1, U.N. Doc. A/RES/3314 (Dec. 14, 1974).

> shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.[78]

The U.N. Charter prohibition on use of force is a broad prohibition inviting various interpretations. One is the restrictive view, which was rejected by the Security Council and the international community.[79] According to this view, "Article 2(4) is not a general prohibition on force, but rather only a prohibition on force aimed at the territorial integrity and political independence of states or inconsistent with the purposes of the United Nations."[80] Under this interpretation, Colombia could rationalize the strike against this FARC group in Ecuador by claiming that Colombia was justified in order to prevent this group from attacking Colombia, that the attack was aimed at the FARC group, that the attack in no way compromised the territorial integrity or political independence of Ecuador, and that the attack was not inconsistent with the purpose of the United Nations.

The second exception to Article 51 concerns the prohibition on the unilateral use of force and the right of a State to use force in self-defense against an armed attack.[81] The wording of the Article 51 determines when the right of self-defense starts. The right is conditional to the happening of an armed attack.[82] Therefore, armed action in self-defense is allowed only against armed attack. The Security Council and the ICJ have tried to clarify "when an armed attack begins."[83] Accordingly, "[a]n attack must be underway or must have already occurred in order to trigger the right of unilateral self-defense. Any earlier response requires the

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78. U.N. Charter art. 51.

79. Professor Anthony D'Amato . . . used such an interpretation to justify Israel's 1981 strike against the Iraqi nuclear reactor at Osirik. Israel wished to prevent Iraq from developing nuclear weapons. The strike aimed at long-term Israeli security. In D'Amato's view, the Israeli attack did not compromise the territorial integrity or political independence of Iraq, nor was it inconsistent with the purposes of the UN. By this narrow view of sovereignty, D'Amato concludes that the strike did not violate the prohibition in Article 2(4). International reaction to the Israeli strike, however, was uniformly negative. The Security Council passed a unanimous resolution condemning it as a violation of the Charter.

O'Connell, *supra* note 24, at 4.

80. *Id.*

81. *Id.* at 4.

82. "For self-defense to be a legitimate response, to a threat of force, the threat would have to meet the Webster tests in the Caroline." *See* ROSALYN HIGGINS, PROBLEMS & PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 248 (1994).

83. O'Connell, *supra* note 24, at 8.

approval of the Security Council."[84] Colombia has no right to use force to *prevent a possible armed attack*.[85] It can however, use force to prevent an *actual armed attack*.[86]

The International Court of Justice (ICJ) in the Nicaragua case concluded that the United States could not invoke self-defense if the threshold of the actual armed attack was not reached.[87] According to the Court, Nicaragua's provision of weapons to rebels in El Salvador was not an armed attack, and that an armed attack eliciting a unilateral self-defense may include "the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to . . . an actual armed attack conducted by regular forces."[88]

Under the Nicaragua case, Colombia could not argue that FARC's presence alone in Ecuadorian territory was a threat by force. Because the threat did not amount to an armed attack, Colombia needed to resort to measures less than armed self-defense, or should have sought Security Council authorization to do more. Furthermore, under the immediacy limit to self-defense in the fight against international terrorism, the military measures must be executed *during terrorist attack*.[89] Massive use of force against terrorist groups can be defended as indispensable to counter *ongoing threats* posed by terrorist groups operating from a country *with the support of the local government*.[90] If the terrorists activities were being carried out from Ecuadorian territory within the framework of a large hostile military plan, Colombia could resort to force in self- defense only if it can prove: 1) that FARC operated from Ecuador *with the support of the Ecuadorian government*; 2) the massive use of force was indispensable to counter FARC's "ongoing armed attack" carried out from Ecuadorian territory, and; 3) there was a continuous armed attacked from FARC coupled with the *imminent and concrete risk* of further FARC attacks.[91]

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84. *Id.* at 5.
85. *Id* at 3 (emphasis added).
86. *Id.* (emphasis added).
87. Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. U.S.), 1986 I.C.J. 14 (June 27) [hereinafter Nicaragua] *available at* http://www.icj-cij.org/docket/files/70/6503.pdf.
88. *Id.* ¶ 195.
89. The limits on of self-defense on the fight against terrorism are: (1) immediacy, (2) necessity, and (3) proportionality. *See* GAZZINI, *supra* note 56, at 191-99.
90. *Id.* at 193 (emphasis added).
91. *Id.*

Moreover, in order to use force in self-defense, it is "generally not enough that the enemy attack originated from the territory of a state."[92] Use of force in self-defense can be used against a state that is legally responsible for the armed attack. A state would be responsible if it used its own agents to carry out the attack,[93] if it controlled or supported the attackers,[94] perhaps when it failed to control the attacks,[95] or when it subsequently adopted the acts of the attackers as its own.[96]

Under these principles, for Colombia to justify the use of force in self-defense, it will need to show that Ecuador is legally responsible for any armed attack FARC perpetrates. It will need to prove that Ecuador used its agents to carry out attacks with FARC, or that Ecuador controlled or supported FARC, or that Ecuador failed to control FARC attacks, or that after the attacks were perpetrated, Ecuador adopted them as its own. For Ecuador to be directly responsible of FARC's actions, Colombia will need to prove that Ecuador exercised "effective control" or "overall control" over the FARC group.

Under international law, the acts of private individuals can be attributed to states that have "effective control" over their conduct. The Nicaragua test has a very high threshold for attribution.[97] Drawing from the lessons learned in the *Nicaragua* case, the Contras' activities were not attributed to the United States even though the United States helped to finance, equip, organize, and train the Nicaraguan Contras.[98]

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92. *See* Javier Leon Diaz, Humanitarian Intervention Issues, *available at* www.javier-leon-diaz.com/docs/humanIntervIssues_Status.htm (last visited Sept. 30, 2008) (discussing the right to individual or collective self-defense under Art. 51 of the Charter).

93. *See* G.A. Res. 56/83 arts. 4-11, U.N. Doc. A/RES/56/83 (Jan. 28, 2002) *available at* http://daccessdds.un.org/doc/UNDOC/GEN/N01/477/97/PDF/N0147797.pdf?OpenElement; G.A. Res. 3314, at art. 3, U.N. GAOR, 29th Sess., Supp. No. 31, U.N. Doc. A/9631 (Dec. 14, 1974). [hereinafter G.A. Res. 3314].

94. *See* G.A. Res. 3314, at art. 3(g) ("The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein."). *See also Prosecutor v. Tadic*, No. IT-94-1-T, ¶ 137 (May 7, 1997).

95. Turkey and Iran have taken armed action against Kurdish irregulars in northern Iraq in an area beyond Iraq's control. These actions were reported to the Security Council which did not dispute the claim of self-defense. Israel, Portugal, South Africa, and the United Kingdom have used force on a similar basis, too, but with more equivocal reactions.

O'Connell, *supra* note 24, at 7 n.33.

96. *Id.*

97. Helen Duffy, *Effective or overall control, in* THE 'WAR ON TERROR' AND THE FRAMEWORK OF INTERNATIONAL LAW 49-51 (Cambridge Univ. Press 2005).

98. Nicaragua*, supra* note 87.

In the *Tadic* decision, the International Criminal Tribunal for Yugoslavia (ICTY) applied the Nicaraguan test.[99] The Trial Chamber noted that "different tests applied in respect to private individuals who are not militarily organized and paramilitary or similar groups."[100] For the Trial Chamber, the test for the paramilitary or similar groups was "whether the state exercised overall control"[101] over the activities of the group, and whether "there had been a relationship of great dependency on the one side,"[102] so as to amount to a relationship of control. In other words, the state has to have a role in organizing, coordinating, or planning the military actions; only financial assistance, military equipment or training are insufficient factors to meet the threshold test.[103]

Looking at *Nicaragua* and *Tadic*, Colombia will need to make a very strong case to prove responsibility by the Ecuadorian government for any attacks carried out by FARC operating from Ecuadorian soil. The Security Council is the organ entitled "to adjudge the legality of a State's resort to self-defense and to decide whether such recourse is legitimate."[104]

Military action directed at curbing terrorism must respect strictly the principles of necessity and proportionality. Necessity limits the use of military force to the achievement of legitimate military objectives.[105] States are allowed to take military actions "[w]hen countering a terrorist attack which is still underway," only *"extrema ratio"* and the option must be a smaller scale of force. [106] Colombia must have reported immediately to the Security Council and provided it with evidence that the military action was necessary to prevent and deter future FARC attacks.

Under the principle of necessity, Colombia must prove 1) Ecuador's continuing involvement in terrorist activities; 2) that

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99. *Prosecutor v. Tadic*, Case No. IT-94-1-T, Opinion and Judgment, ¶¶ 585-86 (May 7, 1997).

100. *See* HELEN DUFFY, INTERIGHTS, RESPONDING TO SEPTEMBER 11: THE FRAMEWORK OF INTERNATIONAL LAW 19 (2001), *available at* www.anti-corruptionbureau.mw/acbm /Disk%201/DUFFY%20Responding%20to% 20Sept11.doc (last visited Sept. 30, 2008)(full text on file with author).

101. *See id.*

102. *Prosecutor v. Tadic*, No. IT-94-1-T, Opinion and Judgment, ¶ 588 (May 7, 1997),

103. *Id.*

104. Judge Schwebel concluded that the Security Council is clearly "entitled to adjudge the legality of a State's resort to self-defense and to decide whether such recourse is legitimate or, on the contrary, an act of aggression." Nicaragua, *supra* note 87, ¶ 46 (Schwebel, dissenting).

105. O'Connell, *supra* note 24, at 8 (citing the I. C. J., which asserted that in any decision to use armed force both necessity and proportionality must be respected); Advisory Opinion,1996 I.C.J. 245, ¶ 41(July 8).

106. GAZZINI, *supra* note 56, at 193.

based on past FARC attacks, Colombia has convincing indications that future FARC attacks may be expected "accompanied by bellicose statements by those associated with [FARC],"[107] and; 3) that Colombia chose use force after repeated efforts failed "to convince the Government . . . to shut terrorist activities down and to cease their co-operation with the [FARC] organisation [sic]."[108]

Moreover, a claim of self-defense using military measures to counter a terrorist attack requires proportionality.[109] "Acts done in self-defense must not exceed in manner or aim the necessity provoking them."[110] A military action must be proportionate to the objective purpose, specifically impeding the terrorists attack or minimizing its effects.[111] The neutralization of the terrorists groups or the reduction of their capacity to conduct terrorist activities is "the most important objective of the defensive action."[112] Self-defense cannot be justified when measures are not "expected to affect the terrorist network and activities."[113] Self-defense actions by the use of force against terrorists still require the application of humanitarian rules relevant to armed conflict. The problem rests with the lack of international guidance as to limit to a defensive action when dealing with terrorist groups. The typical defensive measure is air strikes "directed at destroying terrorist training camps *actively engaged* in hostile military

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107. Israel justified its bombing of the P.L.O. in Tunisia on a series of past attacks, claiming that Israel had convincing indications that future attacks may be expected based on "a series of attacks accompanied by bellicose statements by those associated with the terrorists." OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE, 167-168 (Martinus Nijhoff Publishers 1991). On the contrary, the United States justified its bombing of Libya on one attack, relying on "an intelligence finding (revealed by intercepted communications) that Libya was planning a series of future attacks on U.S. installations in various parts of the world." *Id.* The United States was subsequently criticized for its failure to "produce specific evidence . . . that future attacks were planned by Libya." *Id.*

108. "State practice shows that reacting States feel legally obliged to resort to non-military measures before using force." The United States, with regard to the 1986 strike against Libya, argued before the Security Council that a self-defense action became the only alternative after quiet diplomacy, public condemnation, and economic sanctions failed to get Colonel Qaddafi's attention. *See* GAZZINI, *supra* note 56, at 194 n.61.

109. "This doctrine originated with the 1907 Hague Conventions and was codified in Article 49 of the 1980 Draft on State Responsibility of the International Law Commission. [It] is also referred to indirectly in the 1977 Additional Protocols of the Geneva Conventions. Regardless of whether states are party to the[se] treaties . . . the principle is part of what is known as customary international law." Lionel Beehner, *Israel and the Doctrine of Proportionality*, COUNCIL ON FOREIGN RELATIONS, http://www.cfr.org/publication/11115.

110. SCHACHTER, *supra* note 107, at 153.

111. This perspective is preferred with regards to terrorism instead of the comparison of the quantum of force and counter-force used. Such an approach is acceptable when "the defensive action targets the attacking armed forces." GAZZINI, *supra* note 56, at 197.

112. Such actions have to be dealt with under the category of armed reprisals since they may have a deterring or punitive effect. *Id.* at 198.

113. *Id.*

activities."[114] International opinion tends to condemn defensive actions as illegally disproportionate when they are greatly excessive to the provocation, with proportion being determined by measuring casualties and the scale of weaponry deployed.[115]

Under the proportionality principle, Colombia will need to prove: 1) that it refrained from targeting civilians and property; 2) that it did not use force excessive of targeting the FARC, and; 3) that the offensive was directed at destroying a FARC training camp known to be actively engaged in hostile military activities against Colombia.

Colombia could state that United Nations Security Council Resolutions 1373 and 1368 not only authorized it to act in self-defense but that the Resolutions authorized Colombia to use "all means" to combat terrorist threats to international peace and security.[116] This would include authorization to use force.[117] However, Resolution 1373 specifically states that nations must combat terrorism "in accordance with the Charter of the United Nations."[118] Colombia cannot use means that violate another nation's sovereignty; not only because it is against the Charter and constitutes *jus cogens* violation,[119] but also because such aggression can trigger acts of retaliation. Moreover, using means in violation of the Charter represents a threat to international peace and security, thereby defeating the purpose of attacking terrorist groups to preserve that which is perturbed by the means used.[120]

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114. *Id.*

115. *See* SCHACHTER, *supra* note 107, at 153. According to Gazzini, there is a compelling need for international control. Gazzini qualified the Security Council's passivity during the Afghan crisis as one "to be regretted," and expressed his concern over the failure of any criticism regarding proportionality and the disproportional character of the intervention. GAZZINI, *supra* note 56, at 198.

116. S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001) *available at* http://www.state.gov/s/ct/index.cfm?docid=5108; S.C. Res. 1368, U.N. Doc. S/RES/1373 (Sept. 12, 2001).

117. *Id.*

118. Press Release, SCOR, Security Council Unanimously Adopts Wide-Ranging Anti-Terrorism Resolution, U.N. Doc. SC/7158 (Sept. 28, 2001), [hereinafter SC/7158], *available at* http://www.un.org/News/Press/docs/2001/sc7158.doc.htm.

119. O'Connell, *supra* note 24, at 13. Article 2(4) is a jus cogens norm, and as such, cannot be changed or contracted against it. *See* Nicaragua, *supra* note 87, ¶ 190.

120. The Colombian incursion into Ecuadorian territory triggered a strong reaction by both Venezuelan and Ecuadorian governments, with both governments ordering troops to their respective frontiers with Colombia. *See Tensions Rise in Latin America after Colombia Raid*, THE ONLINE NEWSHOUR, http://www.pbs.org/newshour/bb/latin_America /jan-june08/andes_03-04.html.

VII. DUTIES/RIGHTS OF GOVERNMENTS UNDER INTERNATIONAL LAW IN LIGHT OF TERRORISM

Under principles of state responsibility and United Nations Security Council Resolution 1373, states have the duty to "work together" in order to "prevent and suppress terrorist acts," and to suppress all financing of terrorism.[121] Under the Resolution, state sovereignty entails a duty to control one's territory and to deny safe haven to those who commit terrorist acts, to prevent the movement of terrorists by asserting effective border controls, and to disallow its territory from being used by terrorist groups to carry out attacks against its neighbors.[122] The Resolution imposes upon States the duty to "take the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other States by exchange of information."[123] Moreover, States must cooperate with each other.[124]

Colombia could claim that Ecuador failed in its responsibilities under Resolution 1373 because there were no effective border controls to prevent FARC movements back and forth across the frontier.[125] However, the test to apply should be effective border control under the circumstances. The topography of the border region includes rugged Andean mountain ranges, dense Amazonian rain forest, and a river networks that render border control difficult even under the best of conditions.[126] The main point of transit across the Colombian-Ecuadorian frontier is located at the International Bridge of San Miguel (Puente Internacional de San Miguel).[127] The bridge has been the location of several clashes between Colombian army units and FARC combatants.

Under the new government in Ecuador, the military budget was increased thirty percent in order to address growing security concerns.[128] Forces along border region were reinforced and reorganized, at a cost of two million dollars a month, into 13 military units comprising more than 8,000 personnel tasked with

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121. SC/7158, *supra* note 118; S.C. Res. 1373, *supra* note 116.

122. SC/7158, *supra* note 118.

123. *Id.*

124. *Id.*

125. *Id.*

126. *La Frontera es vigilada por 13destacamentos,* EXPRESO (2006),http://www.expreso.ec/Especial%20expreso/html/frontera.asp. [hereinafter EXPRESO]

127. *Id.*

128. BBC, *Un conflicto improbable* (Mar. 3 2008), http://news.bbc.co.uk/hi/spanish/latin_america/newsid_7274000/7274866.stm.

patrolling the 629 kilometer Ecuadorian-Colombian frontier.[129] Ecuador also redeployed to the Colombian-Ecuadorian border units that had been stationed along the border with Peru.[130]

The facts at issue in the current crisis indicate that the Ecuadorian government fulfilled its responsibility under Resolution 1373 by reinforcing its border security, by building infrastructure to house more military units, and by better equipping personnel. While it can be argued that the terrain along the border is a factor that makes effective detection of FARC combatants difficult; on the other hand, Ecuador seems to have displayed effective border controls when a routine identification and migration procedure resulted in the capture in Quito of Simon Trinidad.[131] Simon Trinidad is the highest ranking FARC leader "to be captured during Colombia's 40-year-long insurgency.".[132] Since the cooperation of the Ecuadorian president was crucial in Trinidad's capture, this would indicate that Ecuador has fully complied with its international obligations under Resolution 1373.[133] By adding military forces to secure its border, by capturing several FARC combatants, and by denying safe haven to "those who commit terrorist acts," Ecuador has tried to "prevent the movement of terrorists," has implemented "effective border controls," and has "disallowed its territory from being used by terrorist groups to carry out attacks against" Colombia.[134]

On the other hand, Ecuador could argue that Colombia has failed to fulfill its duties under Resolution 1373. Strengthening the

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129. EXPRESO, *supra* note 126.

130. [Since the year 2000, the Navy created the Northern Operations Command (named Esmeraldas), and established a contingent in the town of Mataje and reinforced its unit in the port of El Carmen, in the locality of Sucumbios, by deploying more men and patrol boats. The Army, for its part, established detachments in Tobar Donoso (bordering between Esmeraldas y Carchi), Chical, Maldonado; el Carmelo, Puerto Nuevo, Cantagallo y en Puerto Rodríguez. Moreover, it dispatched military personnel to the border that until then had done little politically other than to be vigilant with Peru.

The military reinforcements have been constant and at the moment, more than 8,000 men patrol the border, assigned to 13 detachments, totally equipped and sustained at a cost to the state of 2 million dollars a month.

From the Colombian side, the military presence is minimum because the vigilance is done with mobile patrols attacks. The only permanent military unit is the Caballería Cabal (mounted cavalry), in Ipiales (Department of Nariño), that looks like a fortress.]

Id. (translated by author*).*

131. *Paz y Conflicto, La detencion de Simon Trinidad*, ACTUALIDAD COLOMBIANA No. 375, *available at* http://www.actualidadcolombiana.org/boletin.shtml?x=593.

132. Simon Trinidad is the *nom de guerre* of Juvenal Ovidio Ricardo Palmera Pineda. Simon Trinidad – Biography, http://www.mundoandino.com/Colombia/Simon-Trinidad.

133. El Universo, *FARC critica al presidente de Ecuador por captura de rebelde*, Jan. 14, 2004.

134. SC/7158, *supra* note 118; S.C. Res. 1373, *supra* note116.

border security with Ecuador has been a priority not only because of guerrilla movements across the border; but also because Colombia's internal armed conflict has caused a refugee crisis for Ecuador as well as exacerbating international criminal activities such as kidnappings, drug trafficking, and various forms of smuggling.[135]

The Ecuadorian Minister of Defense stated that "Ecuador performs great economic sacrifice to look after the security of its population at the border and it needs reciprocity from Bogotá in this regard."[136] According to the Minister, despite requests to Colombia to look after its own side of the border, "there is no military presence" on the Colombian side commensurate with that in Ecuador.[137] According to Ecuadorians, "the weight of border control is on Ecuador's shoulders."[138] Colombia prefers to deploy a mobile rather than permanent border presence due to the logistics of patrolling and defending a very long frontier spanning across several nations.[139] Maintaining permanent border outposts is not practicable because Colombia's internal security strategy, known as Plan Patriot, aims to recover broad swathes of territory from FARC control while hunting down guerrilla leaders.[140] In fact, it likely may have resulted in the military having neglected critical border departments of Nariño (Iscuandé) and Putumayo (Teteyé) where recent FARC surprise attacks rendered the military unable to repel the guerrillas.[141]

Ecuador could also assert that Colombia violated the Resolution by failing to cooperate in improving and accelerating the exchange of operational information regarding FARC movements across the frontiers and FARC's usage of sophisticated communications technologies. Ecuador argues, Plan Patriot has placed access to the most sophisticated intelligence gathering and communications capabilities at Colombia's disposal.[142] One

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135. La Fogata, *Un Fin de semana Perturbador*, *El Tiempo,* http://www.lafogata.org/05latino/latino7/colo_01_3.htm, (last visited June 1, 2008).

136. *Ecuador reclama presencia militar colombiana en su frontera*, PRENSA LATINA, http://www.prensalatina.com.mx/article.asp?ID=%7B8CF4DD9B-216A-4B29-A48C04AC5D0FA7E4%7D (last visited Mar. 7, 2008).

137. *Id.*

138. Hector Latorre, *El ejercito Colombiano busca el control*, BBC (July 2005), http://news.bbc.co.uk/hi/spanish/latin_america/newsid_4726000/4726551.stm.

139. TRANSNATIONAL INSTITUTE, AERIAL SPRAYING KNOWS NO BORDERS: ECUADOR BRINGS INTERNATIONAL CASE OVER AERIAL SPYING (Sept. 15, 2005), http://www.tni.org/policybriefings/brief15.pdf.

140. *Id.*

141. *Id.* at 3 n.5 (citing ALFREDO RANGEL, LECCIONES DEL PUTUMAYO, FUNDACIÓN SEGURIDAD Y DEMOCRACIA, BOGOTÁ).

142. Hearing Before the House Comm. on Government Reform: Subcomm. on Criminal Justice, Drug Policy and Human Resources, 107 Cong. 33 (2001) (statement of

example is state-of-the-art radar-equipped aircraft that would have allowed both governments to obtain real time or near real time information on FARC movements.[143] Finally, because Ecuador had already captured several FARC members within its territory, including the high ranking FARC official, Simon Trinidad, Colombia could not claim that mistrust of Ecuador's capabilities and commitments justified its failing to fulfill these obligations.[144]

VII. WHAT ARE ECUADOR'S RESPONSIBILITIES UNDER INTERNATIONAL LAW?

Under United Nations Security Council Resolution 1373, Ecuador must prevent its territory from being used as a safe heaven for terrorists and patrol its border to prevent terrorists from entering its soil.[145] Ecuador, must, as stated in the Resolution, "deny safe haven to those who . . . commit terrorist acts from using [its territory] for those purposes against other states or their citizens."[146] Citing U.N. Security Council Resolution 1373, Colombia could argue that Ecuador has the responsibility to prevent the misuse of its territory by FARC. As presented before, the facts do not support Colombia's argument. Not only had Ecuador displayed extra forces and spent millions in border security but it has captured several FARC members in its territory.[147]

Ecuador also has duties under the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations approved by the United Nations General Assembly on October 24, 1970.[148] This declaration states that "every State has

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Donnie R. Marshall, Administrator Drug Enforcement Administration ("DEA")), *available* at http://www.dea.gov/pubs/cngrtest/ct030201.htm.

143. *Id.*

144. TRANSNATIONAL INSTITUTE, *supra* note 139.

145. S.C. Res. 1373 , *supra* note 116.

146. *Id.* ¶ 2(c).

147. Wikinoticias, *Ecuador Captura supuesto Integrante de la FARC* (Sep. 25, 2005), http://es.wikinews.org/wiki/

Ecuador_captura_supuesto_integrante_de_las_FARC. *See also* El Universo, *FARC critica al presidente de Ecuador por captura de rebelde*, Jan. 14, 2004, http://www.eluniverso.com/2004/01/14/0001/8/84363723DBB645D1A89A0

A1C8DA16270.aspx; La Vision Newspaper, *Ecuador captura a nueve supuestos rebeldes de las FARC,* Feb. 19, 2006, http://lavisionnewspaper.com/online/content/view/1124/30/.

148. *See* Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, G.A. Res. 2625/XXV, U.N. Doc. A/RES/8082 (Oct. 24, 1970) *available at* http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/348/90/IMG/NR034890.pdf?OpenElement (last visited Sept. 21, 2008).

the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts."[149] In no uncertain terms, Ecuador must refrain from assisting FARC in any way and the facts show that it has done so.

Were Colombia to argue that the Law of Neutrality as it applies to international armed conflict should apply to Colombia's longstanding internal armed conflict, the following will be the duties of Ecuador as a neutral State:

1. Ecuador must take measures to ensure and enforce the protection of its neutrality in the neutral space for which it is responsible in relation to the belligerent parties and especially to their armed forces.
2. The government must give "clear instructions on who they are to operate in relation to the defense of their territory and in dealing with incursions. For isolated and accidental violations of neutral space, the instructions might include the need to issue warnings or give a demonstration of force. For increasingly numerous and serious violations, a general warning might be called for and the use of force ramped up.
3. Ecuador must ensure respect for its neutrality, using force, if necessary, to repel any violation of its territory. In defending its neutrality, Ecuador must respect the limits which international law imposes on the use of force.
4. Ecuador must never assist the FARC, a party to the armed conflict. Specifically, Ecuador must not supply weapons, ammunition or other war materials directly or indirectly to the FARC.[150]

IX. CONCLUSION

The feasibility of the rules on the use of force has been questioned. Some argue that the Charter system and its rules are no longer practical due to the constant breach of Charter rules. Others have declared the Charter is dead because it is continuously ignored.[151]

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149. *Id*.

150. INT'L COMM. OF THE RED CROSS, *supra* note 15.

151. O'Connell, *supra* note 24 (citing Thomas M. Franck, *Who Killed Article 2(4)?* 64 AM. J. INT'L L. 809 (1970); Jean Combacau, *The Exception of Self-Defense in U.N. Practice*, *in* THE CURRENT LEGAL REGULATION OF THE USE OF FORCE 32 (A. Cassese, ed., Martinus Nijhoff Pub. 1986); Michael Glennon, *The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter* 25 HARV. J. L. & PUB. POL'Y 539, 546

However, if a state's practice of ignoring or breaching the law constitutes a violation and not a "practice moving toward a new customary rule, the rules remain viable . . . . [i]f the international community continues to express support for the rules—another form of state practice—the rules remain."[152] Colombia has neither argued for new rules nor argued that the existing rules are obsolete and passé.

Today, the reports of a dead Charter system and rules on use of force and self-defense seem exaggerated.[153] Yes, there are complaints and suggestions, but nations continue using the Charter and its rules.

> The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally be treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.[154]

These are the rules we have today and it remains to be seen if the present threats will lead to a different practice and implementation of a new law.

The unfettered use of anticipatory self-defense invites nations fighting terrorism to opt for unchecked militarism over diplomatic approaches. In order to avoid resorting to further controversial anticipatory or preemptive action, Colombia and its neighbors in the region need to promote multilateral strategies, alliances, intelligence and information resource sharing. The Colombian

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(2002). *See also* Michael J. Glennon, *Preempting Terrorism: The Case for Anticipatory Self-Defense*, WKLY. STANDARD 24 (Jan. 28, 2002).

152. O'Connell, *supra* note 24.

153. *Id.* (citing Louis Henkin, *The Reports of the Death of Article 2(4) Are Greatly Exaggerated*, 65 AM. J. INT'L L. 544 (1971)).

154. Nicaragua*, supra* note 87, ¶ 186.

government must ask itself: "Was this action the last choice, the last option? Will terrorism be defeated at the hands of these types of offensive strikes, or will these approaches intensify the same problem they aimed at destroying: terrorism?" One hopes that diplomacy can be a better solution than using force because continuing to use force in an anticipatory manner could perpetuate wars without end.

"RACHEL'S LAW" WRAPS NEW YORK'S LONG-ARM AROUND LIBEL TOURISTS; WILL CONGRESS FOLLOW SUIT?

JUSTIN S. HEMLEPP*

State and federal legislators have recently made significant efforts to protect American publishers from foreign courts that apply foreign laws effectively chilling speech in the United States.[1] So-called libel tourism, or international forum shopping by libel plaintiffs looking for friendly jurisdictions, has become increasingly prevalent in the past decade.[2] The most popular destinations for libel tourists tend to be traditional common law countries, particularly England, where the availability of even one copy of a defamatory writing creates jurisdiction and a cause of action,[3] and where, unlike in the United States, defamation jurisprudence is exceedingly plaintiff-friendly.[4] The Internet's impact on this scheme cannot be overestimated.[5]

While forum-shopping plaintiffs are not a new Internet-related phenomenon, in the wake of the Australian High Court of Justice's landmark ruling in *Dow Jones v. Gutnick,*[6] publishers the world over have awakened to the prospect of being hauled into courts "from Afghanistan to Zimbabwe"[7] to face libel plaintiffs. In *Gutnick*, the High Court applied the traditional common law of defamation to the Internet and held that the act of publication takes place where the material complained of is comprehended by a reader.[8] An Australian court was therefore not a clearly inappropriate forum for an American media defendant accused of

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1. *See, e.g.,* Free Speech Protection Act of 2008, H.R. 5814, 110th Cong. (2008), *available at* http://www.thomas.gov/cgi-bin/query/z?c110:H.R.5814: (last visited July 9, 2008); Libel Terrorism Protection Act, N.Y. C.P.L.R. 302(d), 5304(b)(8) (McKinney 2008).

2. Doreen Carvajal, *Britain, a destination for "libel tourism",* INT'L HERALD TRIBUNE, Jan. 20, 2008, *available at* http://www.iht.com/articles/2008/01/20/business/libel21.php (last visited Jan. 9, 2008); *see* Richard N. Winfield, *Globalization Comes to Media Law,* 1 J. INT'L MEDIA & ENT. L. 109, 109-10 (2006).

3. *See* UTA KOHL, JURISDICTION AND THE INTERNET 122-23 (2007).

4. Carvajal, *supra* note 2.

5. *See generally* Ashley Packard, *Wired But Mired: Legal System Inconsistencies Puzzle International Internet Publishers,* 1 J. INT'L MEDIA & ENT. L. 57 (2006) (examining "transnational approaches to private international law involving material on the Internet").

6. (2002) 210 C.L.R. 575 (Austl.).

7. *Id.* at 609.

8. *Id.* at 606-07.

defaming a Victoria resident in an American Internet publication that enjoys paltry readership down under.[9] The ruling, which was quite unremarkable outside the United States,[10] sent shivers down the spines of publishers now worried about potential worldwide liability for their online actions.[11]

The fears were well-founded. A legal industry specializing in holding American publishers to account in foreign courts has developed in common law countries, and libel plaintiffs have not failed to take advantage of the situation.[12] Indeed, "[l]ibel tourism is alive and well in London, the world's most hospitable forum for well-heeled plaintiffs from Russia, Saudi Arabia and the United States seeking to sue American media outlets."[13]

Among the most well-known examples of libel tourism is the case of author Rachel Ehrenfeld and the wealthy Saudi businessman Khalid bin Mahfouz, whom the author wrote in her book, "Funding Evil: How Terrorism is Financed – and How to Stop It," was an Al Qaeda financier.[14] The businessman sued the author in England.[15] But Ehrenfeld, whose book was not distributed in England, refused to appear.[16] The English court thus entered a default judgment against her.[17]

Ehrenfeld then sought from the U.S. District Court for the Southern District of New York a declaratory judgment that the foreign judgment was unenforceable.[18] The District Court found it could not exercise personal jurisdiction over Bin Mahfouz under the state's long-arm statute because he had insufficient contacts with New York.[19] During the appeal of the District Court's

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9. *Id.* at 609.

10. *See e.g.,* Michael Saadat, *Jurisdiction and the Internet after Gutnick and Yahoo!* ,J.INFO. L. & POL. (2005), *available at* http://www2.warwick.ac.uk/fac/soc/law/elj/jilt /2005_1/saadat/ (last visited July 9, 2008).

11. *See, e.g.,* Editorial, *A Blow to Online Freedom*, N.Y. TIMES, Dec. 11, 2002, *available at* http://query.nytimes.com/gst/fullpage.html?res= 9D05E7DE143AF932A25751C1A9649C8B63&sec=&spon=&pagewanted=print; Press Release, *Court decision jeopardises freedom of expression on the Internet,* Reporters Without Borders, Dec. 12, 2002, *available at* http://www.ifex.org/en/content/view/full/18113 (last visited July 9, 2008); Douglas McCollam, *Dateline Everywhere? How the Web may make us vulnerable to long-distance libel,* COLOM. JOURNALISM REV., May/June 2003 at 10; *Publish and be damned (or at least sued),* LAWYERS WEEKLY MAGAZINE (Aust.), Nov. 26, 2004.

12. *See* Winfield, *supra* note 2, at 110.

13. *Id.*; *see also* Samuel A. Abady & Harvey Silvergate, Op-Ed, *'Libel tourism' and the war on terror*, BOSTON GLOBE, Nov. 7, 2006, *available at* http://www.boston.com/ae/media/articles/2006/11/07/libel_tourism_and_the_war_on_terror/.

14. Ehrenfeld v. Bin Mahfouz, 2006 WL 1096816 *1 (S.D.N.Y. Apr. 26, 2006).

15. *Id.*

16. *Id.*

17. *Id.* at *2.

18. *Id.* at *1.

19. *Id.* at *5.

decision, the U.S. Court of Appeals for the Second Circuit certified a question to New York's highest court, the Court of Appeals: What is the scope of the State's long-arm statute?[20]

The N.Y. Court of Appeals found that foreign parties must have contacts that further a business objective in order to trigger the long-arm statute.[21] Bin Mahfouz's cease-and-desist letters and service of documents related to his action against Ehrenfeld did not further a business objective, the court explained, so New York therefore enjoyed no personal jurisdiction over him.[22] In other words, the English judgment against Ehrenfeld could not be declared unenforceable in New York.

New York's State Assembly reacted quickly to the State Court of Appeals ruling, passing unanimously the Libel Terrorism Protection Act, or Rachel's Law.[23] Gov. David Paterson signed the bill into law April 30, 2008.[24] Rachel's Law, which amends New York's Civil Practice Law and Rules, provides that the state's courts have personal jurisdiction over libel tourists when New York publishers seek to have the tourists' prevailing judgments declared unenforceable.[25] Additionally, it makes clear that foreign judgments emanating from laws that run contrary to U.S. constitutional press guarantees need not be enforced in New York courts.[26]

Rachel's Law was hailed by the press[27] and media advocacy groups.[28] Ehrenfeld herself was also praised for "the role she played in creating this country's first haven against foreign libel judgments."[29] However, as noted by Governor Paterson at the bill's signing, a federal law on point is needed to protect non-New Yorkers. "Although New York State has now done all it can to

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20. Ehrenfeld v. Bin Mahfouz, 489 F.3d 542, 551 (2d Cir. 2007).

21. Ehrenfeld v. Bin Mahfouz, 881 N.E.2d 830, 834-38 (N.Y. 2007).

22. *Id.*

23. Assemb. B. 9652, 2007 Leg., 230th Sess. (N.Y. 2008) (identical companion to S. 6687). *See* Posting of Matthew Pollack to the Reporters Committee for Freedom of the Press' Sidebar, http://www.rcfp.org/sidebar/index.php?op=keyword&key=91 (April 1, 2008) (last visited July 9, 2008).

24. Press Release, *Governor Paterson Signs Legislation Protecting New Yorkers Against Infringement of First Amendment Rights by Foreign Libel Judgments*, May 1, 2008, *available at* http://www.ny.gov/governor/press/press_0501082.html (last visited July 9, 2008).

25. N.Y. C.P.L.R. 302(d) (McKinney 2008).

26. N.Y. C.P.L.R. 5304(b)(8) (McKinney 2008).

27. *See, e.g.,* Editorial, *Sign Rachel's Law,* N.Y. POST, April 29, 2008, *available at* http://www.nypost.com/seven/04292008/postopinion/editorials/sign_rachels_law_108609.htm

28. *See, e.g.,* Douglas Lee, Commentary, *N.Y. protects authors against foreign libel judgments,* FIRST AMENDMENT CENTER ONLINE, May 12, 2008, *available at* http://www.firstamendmentcenter.org/commentary.aspx?id=20033 (last visited July 9, 2008); Posting of Matthew Pollack, *supra* note 23.

29. Lee*, supra* note 28.

protect our authors while they live in New York, they remain vulnerable if they move to other states, or if they have assets in other states," Paterson said, according to a press release.[30] "We really need Congress and the President to work together and enact federal legislation that will protect authors throughout the country against the threat of foreign libel judgments."[31]

Congress appears to have heeded the call. Proposed legislation prohibiting enforcement of foreign libel judgments offensive to the First Amendment is now working its way through both houses on Capitol Hill. The Free Speech Protection Act of 2008, introduced in the House of Representatives by Rep. Peter King (R-N.Y.) on April 16, 2008[32] and in the Senate by Sen. Arlen Specter (R-Pa.) on May 6, 2008,[33] would create a federal cause of action for American publishers defending against foreign defamation suits where "the writing, utterance, or other speech at issue in the foreign lawsuit does not constitute defamation under United States law."[34] The bill would also establish U.S. jurisdiction over the plaintiff bringing the foreign libel suit.[35] If the American defendant in the foreign suit proves the foreign action or judgment is contrary to First Amendment guarantees, "the district court *shall* order that any foreign judgment in the foreign lawsuit in question may not be enforced in the United States"[36] and may award injunctive relief.[37]

The bill also would make damages available to an American defendant in a foreign libel suit based on "[t]he amount of the foreign judgment . . . [t]he costs, including all legal fees, attributable to the foreign lawsuit that have been borne by [the American defendant] . . . [and t]he harm caused . . . due to decreased opportunities to publish, conduct research, or generate funding."[38] Treble damages would be available where it is determined

> that the person or entity bringing the foreign lawsuit at issue intentionally engaged in a scheme to suppress First Amendment rights by discouraging

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30. Press Release, *supra* note 24.
31. *Id.*
32. Free Speech Protection Act of 2008, H.R. 5814, 110th Cong. (2008), *available at* http://www.thomas.gov/cgi-bin/query/z?c110:H.R.5814: (last visited July 9, 2008).
33. Free Speech Protection Act of 2008, S. 2977, 110th Cong., 2d Sess. (2008), *available at* http://www.thomas.gov/cgi-bin/query/z?c110:S.2977: (last visited July 9, 2008).
34. H.R. 5814 § 3(a).
35. H.R. 5814 § 3(b).
36. H.R. 5814 § 3(c)(1) (emphasis added).
37. *Id.*
38. H.R. 5814 § 3(c)(2)(a-c).

> publishers or other media not to publish, or discouraging employers, contractors, donors, sponsors, or similar financial supporters not to employ, retain, or support, the research, writing, or other speech of a journalist, academic, commentator, expert, or other individual [. . .][39]

As of this writing, the House version of the bill is before the Subcommittee on Courts, the Internet, and Intellectual Property.[40] Its identical Senate companion is before the Judiciary Committee.[41]

Rachel's Law and its proposed federal counterpart, though steps in the right direction, are wholly insufficient to eradicate the issue of global forum shopping by libel plaintiffs. For instance, publishers with assets outside the United States would not be cloaked by the proposed federal law, and non-New Yorkers are not protected by Rachel's Law. As the problem of libel tourism is international in scope, the solution is necessarily international as well.[42] Agreement on such a solution is unlikely in the near term, however, because the interests implicated by defamation are linked to a society's core values.[43] According to Columbia law professor Richard Winfield, "[t]o learn the law of defamation of a nation is to glimpse into that society's tolerance for dissent and freedom to criticize the powerful."[44] American tolerance for critical journalism, anchored in the *N.Y. Times v. Sullivan*[45] line of cases, is notably higher than in all other countries. Persuading a world wary of "American legal hegemony"[46] to abandon its traditions and instead embrace American-style press freedoms is a mammoth, if not impossible, task indeed.

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39. H.R. 5814 § 3(d).

40. Search Results, The Library of Congress, THOMAS, H.R. 5814, *available at* http://www.thomas.gov/cgi-bin/bdquery/z?d110:h.r.05814: (last visited July 9, 2008).

41. Search Results, The Library of Congress, THOMAS, S. 2977, *available at* http://www.thomas.gov/cgi-bin/bdquery/z?d110:SN02977: (last visited July 9, 2008).

42. *See* Packard, *supra* note 5, at 96 ("governments are going to have to negotiate a solution").

43. *See id.* at 89-92 (detailing Hague talks toward a convention on the jurisdiction and recognition of foreign judgments and the failure of U.S. and E.U. negotiators to agree on when jurisdiction in tort cases should exist).

44. Winfield, *supra* note 2, at 116.

45. 376 U.S. 254 (1964).

46. *Gutnick*, 210 C.L.R. at 653-54 (Callinan, J., concurring) (Austl.).