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## REDEEMING PEACEKEEPING: USING THE U.N. SECURITY COUNCIL TO INTERNATIONALIZE THE U.S. MILITARY BAN ON PROSTITUTION PATRONAGE

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### I. Introduction

At the beginning of 2005, roughly 250,000 American troops were deployed in almost 130 nations worldwide; if servicemembers stationed at permanent overseas garrisons in Germany, Japan, and elsewhere were added, the number of personnel abroad was on the order of 350,000.<sup>1</sup> An important benefit of having those troops forward-deployed is that they create a favorable impression of the United States through their commendable behavior. Activities such as patronage of prostitutes and establishments that facilitate human trafficking are detrimental to that image. While the frequency of military prostitution patronage might be gauged from the number and proximity of brothels in the area of a military base, the Department of Defense (DoD) recently criminalized prostitution patronage as an offense under the Uniform Code of Military Justice (UCMJ). The new policy was a step taken to reduce the demand for victims of human trafficking in accordance with international treaty commitments, and to avoid the embarrassing scandal of U.S. troops

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<sup>1</sup> See *Where Are the Legions, Global Deployments of US Forces*, GlobalSecurity.org, <http://www.globalsecurity.org/military/ops/global-deployments.htm> (last visited Mar. 10, 2009).

participating in human rights violations in the far corners of the world to which they carry the flag.

The United Nations (U.N.) and North Atlantic Treaty Organization (NATO), facing reports of forced prostitutes exploited by peacekeepers deployed under their banners, have struggled to prevent embarrassing recurrences. Peacekeeper use of prostitutes undermines the peacekeeping mission by flouting the rule of law, repeating the violations of the trafficking victims' human rights, and channeling cash to sources of the instability they are deployed to remedy. But compared to the United States, international organizations are hobbled in their attempts to enforce discipline in that they have no jurisdiction over the troops at their disposal. There were 83,000 uniformed servicemembers from 119 nations deployed supporting seventeen different peacekeeping missions around the world at the end of 2007.<sup>2</sup> Troop-contributing States retain a sovereign right to discipline themselves, leaving international organizations relatively powerless to prevent incidents of military misconduct that tarnish their reputations. That disability could be remedied by appropriate U.N. Security Council action.

Because the authority to set and enforce standards of conduct for troops currently resides with the sending States, the United States should introduce a Security Council resolution under U.N. Charter Chapter VII requiring contributor States to prohibit prostitution patronage by their armed forces. Chapter VII empowers the Security Council to bind Member States to act according to its requirements when it determines that a threat to international peace and security exists. Recent Security Council resolutions on terrorism and the proliferation of weapons of mass destruction have set precedent for the Security Council's power to require legislation by Members to combat general phenomena threatening the peace, rather than specific actors or transgressor States. Human trafficking is sufficiently destabilizing that Chapter VII action to prevent peacekeeper support for it is justified. Furthermore, a Resolution setting standards for peacekeepers would be an important step toward Security Council leadership of peacekeeping missions envisioned by the U.N. Charter but abdicated in practice.

Part II of this article begins with a survey of human trafficking generally before turning to its manifestation as sexual slavery. That will

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<sup>2</sup> See Background Note, U.N. Dep't of Public Information, U.N. Peacekeeping Operations, Dec. 31, 2007 (Feb. 2008).

include a discussion of how military patronage of prostitutes creates demand for trafficked women and affects security. The article will then review international law related to trafficking in persons, and U.S. implementation of it in Part III. This section will highlight the current relative powerlessness of international organizations to undertake an enforceable abolitionist policy such as that adopted by the United States. Part IV will then turn to the scope of Security Council authority, both as the U.N. Charter provides for it and as the Council has chosen to exercise it. Finally, it will conclude in Part V by arguing that the United States should introduce a Security Council resolution prohibiting peacekeeper prostitution patronage, drawing on the analysis of recent Security Council resolutions to remedy the institutional disabilities previously discussed. A Chapter VII resolution would require troop-contributing States to enforce prescribed norms of conduct, forcing those States to do what the U.N. itself cannot. This argument will be made, however, recognizing that there are significant political challenges to successful passage of such a resolution.

Before outlining the problem of trafficking in persons, however, some important aspects of this problem should be noted as beyond this study's scope. First, because this article proposes a course of action to give further effect to an existing U.S. policy on trafficking and prostitution, it accepts as a given that prostitution is a social ill. It therefore will not delve into the debate among activists as to whether the interests of prostitutes are better served by legalization or prohibition. Second, because this article deals with penalizing individual misconduct, this article will not discuss procurement-related issues. Although U.S. policy guidance deals extensively with regulating conduct of contractor employees, those provisions do not apply directly to the individual servicemember.

## II. Human Trafficking & Military Culpability

Slavery is a practice universally condemned and outlawed as *jus cogens*. Yet it exists today still, in nearly all parts of the world. The traffic in humans for purposes of exploiting coerced, unpaid labor feeds organized crime.<sup>3</sup> With a relatively low cost and high return,<sup>4</sup> it is now

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<sup>3</sup> See U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 5 (2007) [hereinafter 2007 TIP REPORT].

estimated to be the third most profitable international criminal enterprise, after arms and drugs.<sup>5</sup> Its destruction is a goal the international community often announces, but abolition has proven difficult to achieve.

The common denominator in slavery—what makes a slave a slave—is the use of fraud, force, or other coercion to exploit labor for a profit.<sup>6</sup> The International Labor Organization estimates that there are 12.3 million people enslaved globally.<sup>7</sup> A 2006 U.S.-sponsored research project approximated the number of persons trafficked across borders at 800,000, plus millions more trafficked within transnational borders.<sup>8</sup> Eighty percent of international trafficking victims are female, and fifty percent are underage; the majority of these are trafficked for commercial sexual exploitation.<sup>9</sup> From January 2000 to June 2003, over five thousand women were trafficked into southeast Europe.<sup>10</sup> Although discussions of trafficking of women and children often center on prostitution, these groups also form the majority of victims trafficked for non-sexual labor.<sup>11</sup>

While trafficking is sometimes confused with migration issues,<sup>12</sup> the push/pull factors that drive voluntary migration nevertheless influence the slave trade as well. The “pushes” include poverty, instability, lack of opportunity, the low status of females in some societies, and armed conflict.<sup>13</sup> The “pull” is the demand for cheap labor, whatever the industry: agriculture, textiles and garments, or sexual services.<sup>14</sup> While

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<sup>4</sup> See Jennifer L. Enck, Note, *The United Nations Convention Against Transnational Organized Crime: Is It All That It's Cracked Up to Be? Problems Posed by the Russian Mafia in the Trafficking of Humans*, 30 SYRACUSE J. INT'L L. & COM. 369, 374 (2003).

<sup>5</sup> See U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 14 (2004).

<sup>6</sup> See 2007 TIP REPORT, *supra* note 3, at 8.

<sup>7</sup> See Int'l Labor Org., Special Action Program to Combat Forced Labour, <http://www.ilo.org/sapfl/lang--en/index.htm> (last visited Mar. 10, 2009).

<sup>8</sup> See 2007 TIP REPORT, *supra* note 3, at 8.

<sup>9</sup> See *id.*

<sup>10</sup> See SARAH E. MENDELSON, BARRACKS & BROTHELS 8 (2005).

<sup>11</sup> See Kara Abramson, Note, *Beyond Consent, Toward Safeguarding Human Rights: Implementing the United Nations Trafficking Protocol*, 44 HARV. INT'L L.J. 473, 474 (2003).

<sup>12</sup> See 2007 TIP REPORT, *supra* note 3, at 30; see also REPORT OF SPECIAL RAPPORTEUR ON SALE OF CHILDREN, CHILD PROSTITUTION AND CHILD PORNOGRAPHY, U.N. DOC. E/CN.4/1999/71, ¶ 50 (Jan. 29, 1999) [hereinafter 1999 SALE OF CHILDREN REPORT].

<sup>13</sup> See 2007 TIP REPORT, *supra* note 3, at 35.

<sup>14</sup> See *id.*; 1999 SALE OF CHILDREN REPORT, *supra* note 12, at 49; Keith J. Allred, *Human Trafficking: Breaking the Military Link*, CONNECTIONS: THE Q.J., Winter 2005, at 63, 64.

globalization contributes to demand, the U.N. cautions against overlooking the impact of local demand.<sup>15</sup>

Slavery takes many forms. It includes practices such as debt bondage and involuntary servitude, commercial sexual exploitation, and exploitative labor conditions in private homes.<sup>16</sup> Children are pressed into service as child soldiers, as well as into combat support roles as camp cooks, couriers, and porters.<sup>17</sup> Authorities have found men and boys from Burma, Thailand, Ghana, and the Ukraine working as forced labor on the high seas on commercial fishing vessels.<sup>18</sup> Women have been trafficked into Lebanon and the Gulf States to work as domestics and prostitutes;<sup>19</sup> Lebanon has also been the destination for children trafficked to beg on the streets.<sup>20</sup> Depending on the culture and conditions, women are trafficked as forced brides to settle a debt, relieve their families' poverty, or display the groom's wealth.<sup>21</sup> Whatever its manifestation, violence and abuse underpin trafficking.<sup>22</sup>

Victims are brought into the traffickers' web by various means. Some begin as voluntary migrants; a favored tactic of Japanese organized crime, the Yakuza, is to prey on foreign workers who have overstayed or strayed beyond the limits of their work visas.<sup>23</sup> Traffickers are creative and ruthless in developing means to entrap their victims.<sup>24</sup> They often promise employment, education, or even marriage to lure their victims

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<sup>15</sup> See REPORT OF SPECIAL RAPporteur ON TRAFFICKING IN PERSONS, ESPECIALLY WOMEN & CHILDREN, U.N. DOC. E/CN.4/2006/62, ¶¶ 75, 77 (Feb. 20, 2006) [hereinafter 2006 UN TRAFFICKING REPORT].

<sup>16</sup> See 2007 TIP REPORT, *supra* note 3, at 8.

<sup>17</sup> See *id.* at 21.

<sup>18</sup> See *id.* at 9.

<sup>19</sup> See REPORT OF SPECIAL RAPporteur ON TRAFFICKING IN PERSONS, ESPECIALLY WOMEN & CHILDREN, ADDENDUM: MISSION TO BAHRAIN, OMAN & QATAR, U.N. DOC. A/HRC/4/23/ADD.2, ¶¶ 70–78 (Apr. 25, 2007) [hereinafter GULF STATES REPORT]; REPORT OF SPECIAL RAPporteur ON TRAFFICKING IN PERSONS, ESPECIALLY WOMEN & CHILDREN, ADDENDUM: MISSION TO LEBANON, U.N. DOC. E/CN.4/2006/62/ADD.3, ¶ 22 (Feb. 20, 2006) [hereinafter LEBANON REPORT].

<sup>20</sup> See LEBANON REPORT, *supra* note 19, ¶¶ 63–64.

<sup>21</sup> See REPORT OF THE SPECIAL RAPporteur ON HUMAN RIGHTS ASPECTS OF THE VICTIMS OF TRAFFICKING IN PERSONS, ESPECIALLY WOMEN & CHILDREN, U.N. DOC. A/HRC/4/23, ¶ 28 (Jan. 24, 2007) [hereinafter 2007 U.N. TRAFFICKING REPORT]. Forced marriage is distinguished from arranged marriage by the right to say no, even though the match is made by the family. A forced marriage is against the bride's consent. *Id.* ¶¶ 25–26.

<sup>22</sup> See 2007 TIP REPORT, *supra* note 3, at 33.

<sup>23</sup> See Yasuzo Kitamura, *Evolution of Antitrafficking in Persons Law & Practice in Japan: A Historical Perspective*, 14 TUL. J. INT'L & COMP. L. 331, 347–48 (2006).

<sup>24</sup> 2007 TIP REPORT, *supra* note 3, at 8.

into their network.<sup>25</sup> Once entrapped, a victim may be sold or transferred several times.<sup>26</sup>

In many countries with large populations of guest workers, trafficked victims initially were taken in with deceptive recruiting promises, only to find out that the worker-sponsorship program placed them in situations of indentured or involuntary servitude.<sup>27</sup> A U.N. study of three Gulf States provides a good example of the sponsorship system. A worker in a poor country, attracted by the prospect of better pay, pays a fee to a recruiting agency in the sending country.<sup>28</sup> An agency in the receiving country pays for a one-way ticket and processes all immigration and labor documents such as visas and work permits at the expense of the prospective employer, who will be the worker's sponsor.<sup>29</sup>

Once the worker arrives in the receiving country, he is presented with an employment contract, often in the language of the receiving country.<sup>30</sup> Regardless of whether he had previously signed a contract in the sending country, or whether the terms match, or even if he can understand the agreement, he is in no position to refuse or to report the abuse: his passport may already have been confiscated, he is indebted for his transportation there, and he relies upon the employer for an exit visa and return ticket.<sup>31</sup> He is entirely dependent upon the sponsoring employer for work and for the continued legality of his presence in the country.<sup>32</sup> With no viable recourse but submission, the guest worker is at the sponsoring employer's mercy. Although the system is regulated, with fines and imprisonment for violations,<sup>33</sup> enforcement is uneven.<sup>34</sup>

Sex trafficking is the largest subcategory of the trade.<sup>35</sup> The movement of young females from East Europe and former Soviet states for forced prostitution is the dominant pattern in southeast Europe.<sup>36</sup> An estimated ninety percent of the foreign prostitutes there were trafficked

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<sup>25</sup> See *id.*; LEBANON REPORT, *supra* note 19, ¶ 55.

<sup>26</sup> See MENDELSON, *supra* note 10, at 9.

<sup>27</sup> See GULF STATES REPORT, *supra* note 19, ¶ 7.

<sup>28</sup> See *id.* ¶ 54.

<sup>29</sup> See *id.* ¶ 55.

<sup>30</sup> See *id.* ¶ 56.

<sup>31</sup> See *id.* ¶¶ 56–57.

<sup>32</sup> See *id.* ¶ 60.

<sup>33</sup> See *id.* ¶ 53.

<sup>34</sup> See *id.* ¶ 60.

<sup>35</sup> See 2007 TIP REPORT, *supra* note 3, at 27.

<sup>36</sup> See MENDELSON, *supra* note 10, at 15.

into the region.<sup>37</sup> North Korean refugees in China are abducted and sold into prostitution or concubinage.<sup>38</sup> The demand for prostitutes is overwhelmingly from males,<sup>39</sup> although demand from females is not unheard of.<sup>40</sup> While the prostitution of children is commonly understood and condemned as exploitative,<sup>41</sup> there is no international legal regime to outlaw adult prostitution.<sup>42</sup> Nevertheless, in most situations the practice could properly be called trafficking,<sup>43</sup> and in any event, where prostitution is tolerated there is a measurable increase in trafficking activity.<sup>44</sup>

Thousands of Russian women find themselves trafficked into the Middle East, Asia, North America, and Europe.<sup>45</sup> Russian crime syndicates extend from agents in villages through regional “recruiters” to an extended, international web of traffickers.<sup>46</sup> The recruited women are offered jobs as models, dancers, or waitresses, and false passports are obtained if necessary through corrupt contacts in the Ministry of Foreign Affairs.<sup>47</sup> Only later do the women realize that they have been sold into slavery as prostitutes, and that they are expected to work off the cost of delivering them to their destination country through debt bondage.<sup>48</sup>

A common method of entry for trafficked women destined to be prostitutes is the misuse of artist or performer visas.<sup>49</sup> Once the victim is

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<sup>37</sup> See *id.* at 9.

<sup>38</sup> See Donna M. Hughes, “How Can I be Sold Like This?” *The Trafficking of North Korean Women Refugees*, NAT’L REV. ONLINE, July 19, 2005, available at [http://www.uri.edu/artsci/wms/hughes/trafficking\\_nk\\_refugees.pdf](http://www.uri.edu/artsci/wms/hughes/trafficking_nk_refugees.pdf).

<sup>39</sup> See REPORT OF SPECIAL RAPPORTEUR ON SALE OF CHILDREN, CHILD PROSTITUTION AND CHILD PORNOGRAPHY, U.N. DOC. E/CN.4/2006/67, ¶ 38 (Jan. 12, 2006) [hereinafter 2006 SALE OF CHILDREN REPORT].

<sup>40</sup> See 1999 SALE OF CHILDREN REPORT, *supra* note 12, ¶ 22 (describing sex tourism by women to Trinidad & Tobago for “beach boys” as young as fourteen).

<sup>41</sup> See 2006 SALE OF CHILDREN REPORT, *supra* note 39, ¶ 28.

<sup>42</sup> See 2006 UN TRAFFICKING REPORT, *supra* note 15, ¶ 41.

<sup>43</sup> See *id.* ¶ 42.

<sup>44</sup> See 2007 TIP REPORT, *supra* note 3, at 27.

<sup>45</sup> See Christopher M. Pilkerton, *Traffic Jam: Recommendations for Civil & Criminal Penalties to Curb the Recent Trafficking of Women from Post-Cold War Russia*, 6 MICH. J. GENDER & L. 221, 222 (1999).

<sup>46</sup> See *id.* at 228.

<sup>47</sup> See *id.*

<sup>48</sup> See *id.*; see also Donna M. Hughes, *Supplying Women for the Sex Industry: Trafficking from the Russian Federation*, in SEXUALITY AND GENDER IN POSTCOMMUNIST EASTERN EUROPE AND RUSSIA 209, 219 (A. Stulhofer et al. eds., 2005).

<sup>49</sup> See LEBANON REPORT, *supra* note 19, ¶¶ 53–56; GULF STATES REPORT, *supra* note 19, ¶ 76.

in the destination country, her documents are confiscated, leaving her unable to travel elsewhere or go to the authorities without being detained as an illegal migrant.<sup>50</sup> This coercion is in addition to the constant violence attendant upon them. A 2006 study of prostitutes trafficked into Europe found that ninety-five percent had been violently assaulted.<sup>51</sup> Trafficked women in southeast Europe tell of repeated rape at the hands of their captors, in order to establish dominance over them and break their will.<sup>52</sup> They are frequently moved (or sold) from place to place and country to country.<sup>53</sup>

In addition to violence, trafficked prostitutes suffer severe neglect. Few if any receive medical care.<sup>54</sup> The 2006 European study reported sixty percent of the women interviewed had infections, gastro-intestinal disorders, fatigue, and pain.<sup>55</sup> Mental health issues such as depression, anxiety, post-traumatic stress disorder, and dissociative and personality disorders were rife as well.<sup>56</sup> Although the hope of avoiding HIV infection partly drives the demand for child prostitutes,<sup>57</sup> estimates of HIV/AIDS infection rates among child prostitutes in Southeast Asia range from fifty to ninety percent.<sup>58</sup>

The plight of trafficked prostitutes is a slightly different, and in some ways more disturbing, violation of their human rights than normal labor trafficking. Whereas other slaves are trafficked for their work potential, the women and children forced into sexual slavery are there by virtue of being women and children.<sup>59</sup> A similarly nuanced distinction applies to the demand for prostitutes as well. For example, in the case of prawns harvested with trafficked labor, the market demand is not for the coerced labor but for the prawns. The labor is exploited to meet the demand for prawns.<sup>60</sup> By contrast, in the case of prostitutes, the demand is for the exploited, trafficked victim.<sup>61</sup> The purchaser of prostitution is both a

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<sup>50</sup> See GULF STATES REPORT, *supra* note 19, ¶ 78.

<sup>51</sup> See 2007 TIP REPORT, *supra* note 3, at 33.

<sup>52</sup> See MENDELSON, *supra* note 10, at 9.

<sup>53</sup> See *id.*; LEBANON REPORT, *supra* note 19, ¶ 54; GULF STATES REPORT, *supra* note 19, at 78.

<sup>54</sup> See MENDELSON, *supra* note 10, at 9.

<sup>55</sup> See 2007 TIP REPORT, *supra* note 3, at 33.

<sup>56</sup> See *id.*

<sup>57</sup> See 2006 SALE OF CHILDREN REPORT, *supra* note 39, ¶ 40.

<sup>58</sup> See 2007 TIP REPORT, *supra* note 3, at 35.

<sup>59</sup> See 2006 UN TRAFFICKING REPORT, *supra* note 15, ¶ 63.

<sup>60</sup> See *id.* ¶¶ 58–59.

<sup>61</sup> See *id.* ¶¶ 60, 63.



demand-contributor and a trafficker, by his receipt of the trafficked victim.<sup>62</sup> Although there are arguably prostitutes who are not trafficked, the purchaser is most likely unable to distinguish them.<sup>63</sup>

This inability to recognize trafficked prostitutes is at the heart of the problem of military prostitution patronage. Servicemembers who purchase sex do so unable to differentiate between the voluntary prostitute and the sex slave.<sup>64</sup> The sex slave's revenue then funds the activities contributing to the instability the servicemember is deployed to remedy.<sup>65</sup> The military prostitution patron has undermined his own mission.

Trafficked persons, particularly forced prostitutes, follow demand, and in post-conflict settings demand is often fueled by the introduction of peacekeeping troops.<sup>66</sup> Soldiers are sometimes directly involved in trafficking; in the Democratic Republic of the Congo and in Sudan, soldiers have been accused of abducting women for sexual slavery, and in Myanmar soldiers traffic Burmese women into forced prostitution in Thailand.<sup>67</sup> But more common is support for trafficking as a prostitution customer.<sup>68</sup>

Military servicemembers' support of local prostitution is well-documented. In 1946, the Allied occupational government in Japan banned licensed prostitution, but tolerated the continued private sex trade in part to ensure its availability to Allied troops.<sup>69</sup> British authorities in Belize designated which brothels their troops were permitted to attend.<sup>70</sup> There, as well as in brothels near American bases in the Philippines, Honduras, and pre-war Hawaii, prostitutes were required to submit to regular medical examinations conducted either by military medical personnel or by local authorities at the instigation of military

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<sup>62</sup> See *id.* ¶ 63.

<sup>63</sup> See *id.*

<sup>64</sup> See MENDELSON, *supra* note 10, at 29.

<sup>65</sup> See *id.* at 17.

<sup>66</sup> See *id.* at 1.

<sup>67</sup> See Connie de la Vega & Chelsea E. HaleyNelson, *The Role of Women in Peacekeeping & Peacemaking: Devising Solutions to the Demand Side of Trafficking*, 12 WM. & MARY J. WOMEN & L. 437, 448–49 (2006).

<sup>68</sup> See MENDELSON, *supra* note 10, at 3.

<sup>69</sup> See Kitamura, *supra* note 23, at 341.

<sup>70</sup> See Isabelle Talleyrand, Note, *Military Prostitution: How the Authorities Worldwide Aid & Abet International Trafficking in Women*, 27 SYRACUSE J. INT'L L. & COM. 151, 155 (2000).

commanders, in order to protect the troops' health.<sup>71</sup> Media allegations that U.S. servicemembers in South Korea were abetting trafficked forced prostitution prompted congressional hearings and a DoD Inspector General investigation.<sup>72</sup>

As with prostitution generally, military support stimulates demand for more prostitutes. The proximity of brothels to military installations is evidence of the link.<sup>73</sup> The number of trafficked women in West Timor jumped once a transnational administration was established in Timor Leste,<sup>74</sup> as it did in Thailand in the 1960s when Americans went there for "rest and relaxation" breaks from Vietnam.<sup>75</sup> In Bosnia, non-governmental organizations (NGOs) working with trafficking victims in 2003 said as many as forty percent of prostitution patrons were foreign, mostly from the NATO Stabilization Force.<sup>76</sup> Foreign customers were a lucrative revenue source: by one estimate they accounted for seventy percent of revenues because they were charged more than locals.<sup>77</sup> In Kosovo in 2000, a reported eighty percent of prostitution patrons were international.<sup>78</sup> Kosovar brothels tailored their names to the nationality of the local peacekeeping contingent.<sup>79</sup> And when the number of troops dropped, so did the number of women assisted by NGOs.<sup>80</sup>

Toleration of trafficked prostitution stems from different causes. Trafficked women may be mistaken for "regular prostitutes."<sup>81</sup> Some commanders are indifferent, arguing that boys will be boys.<sup>82</sup> In other instances, members of peacekeeping contingents are themselves involved

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<sup>71</sup> See *id.* at 154–56.

<sup>72</sup> See *Implementing the Department of Defense "Zero Tolerance" Policy with Regard to Trafficking Humans: Hearing Before the H. Comm. on Armed Servs. & the Comm'n on Security & Cooperation in Europe*, 108th Cong. (2004) (statement of Dep't of Defense Inspector Gen. Joseph E. Schmitz), available at <http://www.dodig.osd.mil/Inspections/IPO/combatinghuman.htm> [hereinafter Schmitz Statement].

<sup>73</sup> See MENDELSON, *supra* note 10, at 10.

<sup>74</sup> See de la Vega & HaleyNelson, *supra* note 67, at 453.

<sup>75</sup> See *id.* at 461.

<sup>76</sup> See MENDELSON, *supra* note 10, at 10.

<sup>77</sup> See REPORT OF SPECIAL RAPPORTEUR ON TRAFFICKING IN PERSONS, ESPECIALLY WOMEN & CHILDREN, ADDENDUM: MISSION TO BOSNIA & HERZEGOVINA, U.N. Doc. E/CN.4/2006/62/ADD.2, ¶ 6 (Nov. 30, 2005) [hereinafter BOSNIA REPORT].

<sup>78</sup> See MENDELSON, *supra* note 10, at 10.

<sup>79</sup> See *id.* at 11.

<sup>80</sup> See *id.*

<sup>81</sup> See *id.* at 54.

<sup>82</sup> See Sarah E. Mendelson, *U.S.-Russian Military Relations: Between Friend & Foe*, WASH. Q., Winter 2002, at 161, 167; see also Schmitz Statement, *supra* note 72, at 5.

in operating forced prostitution enterprises. NATO officers in Kosovo reported that Russian officers were potentially involved in managing brothels near Russian garrisons there.<sup>83</sup> United Nations civilian police believed that someone within the Russian military contingent was betraying their planned raids to the traffickers.<sup>84</sup> Similar allegations have been made against the Russian contingent in Eastern Slovenia.<sup>85</sup> United Nations peacekeepers in Cambodia, West Africa, and the Democratic Republic of the Congo have been accused of sexual exploitation and abuse.<sup>86</sup>

Military support of trafficking through prostitution has significantly unique implications. For one thing, misconduct is generally detrimental to mission accomplishment.<sup>87</sup> In many post-conflict areas, violence against women, such as systematic rape, forced impregnation, and forced prostitution, is used as a method of ethnic and sectarian warfare.<sup>88</sup> In those areas, purchased sex continues a pattern of trafficking and rape, since the women prostituted are not positioned to consent to their sale.<sup>89</sup> Additionally, acquiescence in troops' use of prostitutes sends a message that criminal conduct will be tolerated, undermining the very rule of law climate peacekeeping missions are meant to impose.<sup>90</sup> When peacekeepers are found complicit in sexual exploitation or abuse, the most common response is repatriation of the individual, reinforcing the impression of impunity locally.<sup>91</sup>

But aside from these factors, there is a more direct, operational impact on the mission when peacekeepers support traffickers. Organized crime often functions as a para-government, regulating criminal activity

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<sup>83</sup> See *id.* at 56.

<sup>84</sup> See MENDELSON, *supra* note 10, at 59. United Nations police suspected the Russian police contingent as well. See *id.*

<sup>85</sup> See Mendelson, *supra* note 82, at 168.

<sup>86</sup> See The Secretary-General, *A Comprehensive Strategy to Eliminate Future Sexual Exploitation and Abuse in United Nations Peacekeeping Operations*, delivered to the General Assembly, U.N. Doc. A/59/710, ¶ 3 (Mar. 24, 2005) (prepared by Zeid Ra'ad Zeid Al-Hussein) [hereinafter Zeid Report].

<sup>87</sup> See MENDELSON, *supra* note 10, at 14.

<sup>88</sup> See, e.g., Amy E. Ray, *The Shame of It: Gender-Based Terrorism in the Former Yugoslavia & the Failure of Human Rights Law to Comprehend the Injuries*, 46 AM. U. L. REV. 793 (1997).

<sup>89</sup> See MENDELSON, *supra* note 10, at 13.

<sup>90</sup> See *id.* at 17–18.

<sup>91</sup> See *id.* at 7.

and corrupting government officials.<sup>92</sup> Gangs trafficking women also traffic guns and drugs.<sup>93</sup> Patronizing prostitutes thus puts cash in the hands of parties with an interest in preventing the creation of strong governmental institutions.<sup>94</sup> These parties work at cross purposes with the peacekeepers themselves by violating the human rights of the trafficking victims and fostering instability.

Policy makers have caught on to the human rights implications and security consequences of tolerating military prostitution patronage. The following section will review efforts by the U.N., NATO, and United States to deprive traffickers of this revenue stream.

### III. Existing Legal Responses to Human Trafficking

Over the last century, as concern over human trafficking, particularly of women and children, has waxed and waned, the law has responded, although not necessarily with complete or even measurable success. This section will review the evolution of both international and U.S. domestic law on human trafficking, with a focus on the interaction between military misconduct and trafficked women.

#### A. International Law: Conventions and Organizations

##### 1. *Convention Law*

The international response to the trafficking plague has been described as coming in two waves.<sup>95</sup> The first responded to the perceived threat to Western women from the trade in “white slavery,” while the second arose with the emerging influence of human rights law, and particularly the women’s human rights movement, in the 1970s.<sup>96</sup> But in no agreement does the international community deal directly with military-related trafficking or call for a per se ban on prostitution.

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<sup>92</sup> See Pilkerton, *supra* note 45, at 224.

<sup>93</sup> See MENDELSON, *supra* note 10, at 14.

<sup>94</sup> See *id.* at 17.

<sup>95</sup> See Elizabeth M. Bruch, *Models Wanted: the Search for an Effective Response to Human Trafficking*, 40 STAN. J. INT’L L. 1, 6 (2004).

<sup>96</sup> See *id.*

The 1904 International Agreement for the Suppression of the White Slave Trade (White Slave Agreement)<sup>97</sup> by its title addressed only the plight of white women. Prompted by concerns over the sale of women into prostitution in Europe during difficult economic periods,<sup>98</sup> it referred explicitly to neither trafficking nor prostitution but to “the procuring of women or girls for immoral purposes abroad.”<sup>99</sup> The White Slave Agreement was aimed primarily at protecting potential victims, rather than punishing traffickers.<sup>100</sup> It was followed in 1910 by the International Convention for the Suppression of the White Slave Traffic,<sup>101</sup> which did provide for trafficker prosecution and punishment.<sup>102</sup>

When the League of Nations was created at the end of World War I, supervision of agreements regarding trafficking in persons was included in its mandate.<sup>103</sup> In execution of that responsibility, the League oversaw the conclusion of the Convention for the Suppression of Traffic in Women and Children<sup>104</sup> in 1921 and the International Convention for the Suppression of the Traffic in Women of Full Age<sup>105</sup> in 1933. Both treaties were amended by Protocol in 1947.<sup>106</sup>

Following World War II and the creation of the U.N., the General Assembly adopted the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (Trafficking

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<sup>97</sup> International Agreement for the Suppression of the White Slave Trade, May 18, 1904, 35 Stat. 1979, 1 L.N.T.S. 83 [hereinafter White Slave Agreement].

<sup>98</sup> See Stephanie Farior, *The International Law on Trafficking in Women and Children for Prostitution: Making It Live Up to Its Potential*, 10 HARV. HUM. RTS. J. 213, 216 (2004).

<sup>99</sup> White Slave Agreement, *supra* note 97, art. 1; see also Bruch, *supra* note 95, at 9.

<sup>100</sup> See Farior, *supra* note 98, at 216.

<sup>101</sup> International Convention for the Suppression of the White Slave Traffic, May 4, 1910, 3 L.N.T.S. 278.

<sup>102</sup> See *id.* arts. 1–3; Farior, *supra* note 98, at 216.

<sup>103</sup> See League of Nations Covenant art. 23, para. (c).

<sup>104</sup> Convention for the Suppression of Traffic in Women and Children, Sept. 30, 1921, 9 L.N.T.S. 415.

<sup>105</sup> See International Convention for the Suppression of the Traffic in Women of Full Age, Oct. 11, 1933, 150 L.N.T.S. 431.

<sup>106</sup> Protocol to Amend the Convention for the Suppression of Traffic in Women and Children and the International Convention for the Suppression of the Traffic in Women of Full Age, Nov. 12, 1947, 53 U.N.T.S. 13.

Convention).<sup>107</sup> It addressed prostitution mainly, treating trafficking as an adjunct evil, and served as a conglomeration of the preceding trafficking conventions, as well as a 1937 convention drafted by the League of Nations but never acted upon because of the war.<sup>108</sup> As did all the agreements it incorporated, the Trafficking Convention took a law enforcement approach to the trafficking-prostitution problem, emphasizing criminalization and punishment.<sup>109</sup>

It was in some ways innovative compared to its predecessors. Although weak, it did contain implementation and enforcement mechanisms.<sup>110</sup> Addressed to prostitution, it did not oppose it per se;<sup>111</sup> instead, it abolished brothels,<sup>112</sup> on the theory that they created demand for trafficked women.<sup>113</sup> It implied that trafficking was not limited to women, since it used gender-neutral language in the treaty's body, despite the title.<sup>114</sup> And it provided for "rehabilitation and social adjustment" of victims.<sup>115</sup> It also reiterated measures from previous agreements, such as the obligation to warn potential victims about the dangers of trafficking and assist in their return to their State of origin, and to supervise employment agencies and points of entry and departure.<sup>116</sup>

The Trafficking Convention, the most comprehensive and the last trafficking-specific multilateral treaty until the 1990s,<sup>117</sup> is nevertheless subject to criticism. Implementation and enforcement were limited to the requirement to report implementing legislation to the Secretary-General,

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<sup>107</sup> Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, Dec. 2, 1949, 96 U.N.T.S. 271 [hereinafter Trafficking Convention].

<sup>108</sup> See *id.* pmb.; see also Bruch, *supra* note 95, at 8–9; Farrior, *supra* note 98, at 217; Sasha L. Nel, *Victims of Human Trafficking: Are They Adequately Protected in the United States?*, 5 CHI.-KENT J. INT'L & COMP. L. 3, 12 (2005); Shelley Case Inglis, *Expanding International & National Protections Against Trafficking for Forced Labor Using a Human Rights Framework*, 7 BUFF. HUM. RTS. L. REV. 55, 56 (2001).

<sup>109</sup> See Bruch, *supra* note 95, at 11.

<sup>110</sup> Trafficking Convention, *supra* note 107, art. 21; see also Bruch, *supra* note 95, at 10; Farrior, *supra* note 98, at 217, 220.

<sup>111</sup> See Farrior, *supra* note 98, at 218.

<sup>112</sup> Trafficking Convention, *supra* note 107, art. 2.

<sup>113</sup> See Farrior, *supra* note 98, at 218.

<sup>114</sup> See Inglis, *supra* note 108, at 61.

<sup>115</sup> See Trafficking Convention, *supra* note 107, art. 16.

<sup>116</sup> *Id.* arts. 17–20; see also Bruch, *supra* note 95, at 9–10.

<sup>117</sup> See Bruch, *supra* note 95, at 10.

who published it to the other States Parties.<sup>118</sup> It created no body to supervise or verify implementation, or to suggest measures based on the reports.<sup>119</sup> It did not address human rights in any way,<sup>120</sup> although it did provide that alien victims would have the same national-law rights to be present at the prosecution of a described offense as those afforded citizens.<sup>121</sup>

It also suffered definitional problems by conflating trafficking and prostitution into one issue. Consequently, it had no effect on trafficking for purposes other than sexual exploitation,<sup>122</sup> and confused the issue of what was to be outlawed and punished.<sup>123</sup> Despite the gender-neutral language of the Trafficking Convention, the above agreements all focus solely on trafficking for sex purposes, ignoring other forms.

Finally, the first-generation treaties, culminating in the Trafficking Convention, were very deferential to domestic law.<sup>124</sup> Parties to the Trafficking Convention agree to punish pimps<sup>125</sup> and brothel owners,<sup>126</sup> but with respect to other parties to a prostitution transaction they commit only to punishment “[t]o the extent permitted by domestic law . . . .”<sup>127</sup> The Convention reflects a consensus to root out links in an international enterprise, specifically procurers, but not to require regulation of conduct, prostitution and its patronage, deemed an internal, domestic issue. This may be partly explained by the state of human rights law at the time, which was not yet a major field of international law,<sup>128</sup> but also reflects a lower level of comfort with intruding upon national sovereignty than later developed.

This first period also saw other treaties on slavery and labor practices adopted which, although not aimed at trafficking specifically, are

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<sup>118</sup> See Trafficking Convention, *supra* note 107, art. 21.

<sup>119</sup> See Fariior, *supra* note 98, at 220.

<sup>120</sup> See generally Bruch, *supra* note 95, at 10; Fariior, *supra* note 98, at 219–20; Nel, *supra* note 108, at 12–13.

<sup>121</sup> See Trafficking Convention, *supra* note 107, art. 5.

<sup>122</sup> See Bruch, *supra* note 95, at 11.

<sup>123</sup> See Nel, *supra* note 108, at 12.

<sup>124</sup> See Fariior, *supra* note 98, at 219–20.

<sup>125</sup> See Trafficking Convention, *supra* note 107, art. 1.

<sup>126</sup> See *id.* art. 2.

<sup>127</sup> *Id.* arts. 3–4.

<sup>128</sup> See Fariior, *supra* note 98, at 219–20.

relevant to the issue. The Slavery Convention of 1926<sup>129</sup> defined slavery in terms applicable to sex trafficking<sup>130</sup> and required States to abolish slavery,<sup>131</sup> prevent and suppress the slave trade,<sup>132</sup> and make implementation reports.<sup>133</sup> The 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery<sup>134</sup> expanded the 1926 Conventions requirements to practices such as selling women, bride price, exploiting children, debt bondage and serfdom.<sup>135</sup> Additionally, the International Labor Organization (ILO) adopted the Forced Labor Convention<sup>136</sup> in 1930 and the Abolition of Forced Labor Convention in 1957.<sup>137</sup> Both treaties define forced labor as “work or service . . . extracted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily,”<sup>138</sup> which could be applied to sex trafficking.<sup>139</sup>

There was little progress internationally on updating or improving the conventions related to trafficking for several decades. But in the 1970s, the issue regained prominence as human rights and particularly women’s human rights became important topics of international discussion.<sup>140</sup> The first international agreement of this second era was the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), concluded in 1979.<sup>141</sup> It required States Parties to take measures, including legislation, to suppress trafficking in

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<sup>129</sup> Slavery Convention of 1926, Sept. 25, 1926, 46 Stat. 2183, T.S. No. 778, 60 L.N.T.S. 253.

<sup>130</sup> *See id.* art. 1, § 1.

<sup>131</sup> *See id.* art. 2.

<sup>132</sup> *See id.* arts. 2–4.

<sup>133</sup> *See id.* art. 7; *see also* Farrior, *supra* note 98, at 221.

<sup>134</sup> 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 18 U.S.T. 3201, 266 U.N.T.S. 3.

<sup>135</sup> *See* Farrior, *supra* note 98, at 222; Linda Smith & Mohamed Mattar, *Global Challenges: Trafficking in Persons, Humanitarian Intervention, and Energy Policy: Creating International Consensus on Combating Trafficking in Persons: U.S. Policy, the Role of the U.N., and Global Responses and Challenges*, 28 FLETCHER J. WORLD AFF. 155, 157 (2004).

<sup>136</sup> Forced Labor Convention, June 28, 1930, 39 U.N.T.S. 55.

<sup>137</sup> Abolition of Forced Labor Convention, June 25, 1957, 320 U.N.T.S. 291.

<sup>138</sup> *See* Forced Labor Convention, *supra* note 136, art. 2(1).

<sup>139</sup> *See* Farrior, *supra* note 98, at 223; Bruch, *supra* note 95, at 24.

<sup>140</sup> *See* Bruch, *supra* note 95, at 12.

<sup>141</sup> Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.



women and the exploitation of prostitution.<sup>142</sup> Despite the prominent role of women's rights advocates in bringing the issue back to the fore, disagreement among these activists on the relationship between trafficking and prostitution delayed conclusion of an agreement.<sup>143</sup> In the end, CEDAW, like many of its predecessors, linked the two issues in a more or less conflating way.<sup>144</sup>

Human trafficking was included on the agendas of the World Conferences on Women in 1975, 1980, 1985, and 1995, and on that of the 1993 World Conference on Human Rights.<sup>145</sup> Despite that activity, the focus in treaty conclusion turned from protecting women to protecting children in the 1980s and 1990s. The Convention on the Rights of the Child<sup>146</sup> was signed in 1989 and required States Parties to prevent the abduction, sale, or trafficking of children for any purpose.<sup>147</sup> An Optional Protocol<sup>148</sup> was adopted by the General Assembly in 2000. While previously the ILO had been circumspect in addressing prostitution in its labor treaties, in 1999 it adopted the Convention to Eliminate the Worst Forms of Child Labor.<sup>149</sup> There, it prohibited all forms of slavery including the sale and trafficking of children, the use, procuring or offering of children for prostitution or production of pornography, the use of children for illicit activities, and work likely by its nature to harm the health, safety, or morals of children.<sup>150</sup> In addition

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<sup>142</sup> See *id.* art. 6; see also Bruch, *supra* note 95, at 12; Smith & Mattar, *supra* note 135, at 157.

<sup>143</sup> See Bruch, *supra* note 95, at 12. Feminist positions on prostitution are widely divergent. On one end of the spectrum are those who argue for its complete abolition, while others argue for legalization and regulation to protect the rights of prostitutes. Some even contend that prostitution empowers the prostitute by allowing her to take control of the commodification of sex. See Bruch, *supra* note 95, at 18–19; see also Karen Engle, *Liberal Internationalism, Feminism, and the Suppression of Critique: Contemporary Approaches to Global Order in the United States*, 46 HARV. INT'L L.J. 427, 435 (2005) (comparing the arguments of abolitionist feminists with those who are women should be free to commodify their bodies). This article explores furthering the U.S. abolitionist position, so a thorough comparison of these theories is beyond its scope.

<sup>144</sup> See Bruch, *supra* note 95, at 12.

<sup>145</sup> See *id.*

<sup>146</sup> Convention on the Rights of the Child, Nov. 20, 1989, S. TREATY DOC. NO. 103-21, 1577 U.N.T.S. 3.

<sup>147</sup> See *id.* art. 35; see also Smith & Mattar, *supra* note 135, at 157.

<sup>148</sup> Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, May 25, 2000, U.N. Doc. A/RES/54/263, T.I.A.S..

<sup>149</sup> Convention to Eliminate the Worst Forms of Child Labor, June 17, 1999, T.I.A.S., 38 I.L.M. 1207.

<sup>150</sup> See *id.* art. 3. "Child" is defined as anyone under age 18. *Id.* art. 2.

to requiring States Parties to take measures to prevent and punish these offenses, the Convention requires the creation of rehabilitation and social services for child victims, as well as free basic and vocational education and outreach to at-risk children.<sup>151</sup> With respect to children, at least, the ILO sidestepped the question of trafficking's interplay with prostitution and called for abolition.<sup>152</sup>

Regional human rights agreements also address trafficking. The European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>153</sup> prohibits slavery and forced labor.<sup>154</sup> The American Convention on Human Rights<sup>155</sup> explicitly prohibits trafficking in women in its prohibition of slavery.<sup>156</sup> Both conventions establish courts to hear complaints regarding failures to comply with their requirements.<sup>157</sup>

Similarly, the drafters of the International Criminal Court's Statute<sup>158</sup> brought human trafficking within the jurisdiction of the new international forum.<sup>159</sup> The list of offenses constituting crimes against humanity and war crimes included enslavement, sexual slavery, and enforced prostitution.<sup>160</sup> "Enslavement" is defined to include trafficking in persons, particularly women and children.<sup>161</sup> These provisions extend the jurisdiction of the ICC to acts beyond the Fourth Geneva Convention's requirement to protect women from attacks on their honor.<sup>162</sup>

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<sup>151</sup> See *id.* arts. 6–7.

<sup>152</sup> See Bruch, *supra* note 95, at 25.

<sup>153</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, C.E.T.S. 005, 213 U.N.T.S. 221 [hereinafter European Convention].

<sup>154</sup> See *id.* art. 4.

<sup>155</sup> American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. 36, 1144 U.N.T.S. 123 [hereinafter Inter-American Convention].

<sup>156</sup> See *id.* art. 6(1).

<sup>157</sup> See European Convention, *supra* note 153, arts. 19–51; Inter-American Convention, *supra* note 155, arts. 52–73.

<sup>158</sup> Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9\* [hereinafter Rome Statute].

<sup>159</sup> See generally Valerie Oosterveld, *Sexual Slavery & the International Criminal Court: Advancing International Law*, 25 MICH. J. INT'L L. 605 (2004).

<sup>160</sup> See Rome Statute, *supra* note 158, arts. 7(1), 8(2)(b)(xxiii).

<sup>161</sup> See *id.* art. 7(2)(c).

<sup>162</sup> See Convention (IV) Relative to the Protection of Civilian Persons in Time of War, art. 27, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

In 2000, the U.N. General Assembly adopted the Convention Against Transnational Organized Crime<sup>163</sup> and the Optional Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.<sup>164</sup> The Trafficking Protocol's three-fold goals are to prevent and combat trafficking, protect and assist the victims, and promote cooperation among States in furtherance of the first two goals.<sup>165</sup> Unlike its predecessors, it defines "trafficking in persons" and "exploitation" explicitly.<sup>166</sup> The purposes of exploitation for which a victim might be trafficked include the exploitation of prostitution as well as forced labor, slavery, servitude, or removal of organs.<sup>167</sup> The consent of the victim is irrelevant under the Trafficking Protocol.<sup>168</sup>

The Trafficking Protocol requires the criminalization under national law of the conduct described in the definitional provisions,<sup>169</sup> as well as more robust victim protection, rehabilitation, and assistance measures than had been called for in previous conventions, including potential rights to remain in the State rather than be repatriated.<sup>170</sup> The States Parties are also required to adopt comprehensive trafficking prevention programs, including legislative or other measures designed to discourage the demand for trafficked persons.<sup>171</sup> This demand-reduction provision possibly reflects the brothel abolition efforts of the 1949 Convention, but is much broader in its requirement and not limited to discouraging prostitution.

As an agreement ancillary to the Transnational Organized Crime convention, the Trafficking Protocol's approach naturally treats trafficking as a facet of organized crime.<sup>172</sup> It is explicitly a law enforcement-centric agreement, and comes down fairly strongly in the abolitionist camp on the question of how trafficking and prostitution are related. Nevertheless, it contains significant human rights considerations

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<sup>163</sup> Convention Against Transnational Organized Crime, Nov. 15, 2000, U.N. Doc. A/RES/55/383, T.I.A.S.

<sup>164</sup> Optional Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Nov. 15, 2000, T.I.A.S., U.N. Doc. A/RES/55/25 [hereinafter Trafficking Protocol].

<sup>165</sup> See *id.* art. 2; see also Nel, *supra* note 108, at 14.

<sup>166</sup> See Trafficking Protocol, *supra* note 164, art. 3(a).

<sup>167</sup> See *id.*

<sup>168</sup> See *id.* art. 3(b).

<sup>169</sup> See *id.* art. 5.

<sup>170</sup> See *id.* arts. 6–8.

<sup>171</sup> See *id.* art. 9.

<sup>172</sup> See Bruch, *supra* note 95, at 16.

compared to previous conventions, particularly on the issue of rehabilitation and repatriation.

None of the agreements deal specifically with military-related trafficking. Instead they are nearly all directed at punishing traffickers and discouraging their business, without reference to any specific recipient. Also, no treaty or protocol calls specifically for a ban on prostitution, although the Trafficking Protocol's definition of trafficking fairly encompasses most instances of prostitution.<sup>173</sup> But the Protocol does contain a significant innovation, the requirement to reduce demand, which can reasonably be read to require a prostitution ban and thus indirectly pierces the Parties' sovereignty over the issue.

## 2. *International Organizations*

### a. *U.N. Activities*

Although the Trafficking Protocol contains some human rights law elements, the real focus of human rights law activity has been within the U.N. itself rather than in the negotiation of treaties.<sup>174</sup> That work, however, is fragmented and spread across bureaucracies, reducing its effectiveness. The Secretariat and the General Assembly, working through the High Commissioner for Human Rights, have initiated trafficking measures, but coordination has been poor. Further, the Security Council has been conspicuously inactive in addressing allegations of trafficking offenses by U.N. personnel.

There are several trafficking-related bodies under the aegis of the High Commissioner for Human Rights with overlapping mandates. The High Commissioner created the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography in 1990.<sup>175</sup> The Children's Rapporteur's mandate is to investigate the exploitation of children around the world and report to the General Assembly and Commission on Human Rights, recommending means to protect children's rights.<sup>176</sup>

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<sup>173</sup> See text accompanying notes 43, 166–168.

<sup>174</sup> See Bruch, *supra* note 95, at 31.

<sup>175</sup> See Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography, <http://www2.ohchr.org/english/issues/children/rapporteur/index.htm> (last visited Mar. 9, 2009) [hereinafter Children's Rapporteur].

<sup>176</sup> See *id.*

The Special Rapporteur on Trafficking in Persons, Especially Women and Children was created by the High Commissioner in 2004.<sup>177</sup> Her mandate is to focus on the human rights aspects of trafficking and submit reports annually with recommended measures to uphold and protect victims' human rights to the Commission.<sup>178</sup> The Trafficking Rapporteur is charged with cooperating with the other special rapporteurs, particularly the Special Rapporteur on Violence Against Women, as well as other relevant U.N. bodies, regional organizations, and victims and their advocates, and to account for their contributions on the issue.<sup>179</sup> The Special Rapporteur on Violence Against Women, Its Causes and Consequences was created in 1994 with a mandate that included working with the other special rapporteurs to include in their annual reports allegations of human rights violations against women.<sup>180</sup> The Trafficking Rapporteur is also charged with "taking action" on human rights violations against trafficking victims.<sup>181</sup> Taking action, however, seems to be limited to contacting the relevant government to give notice of the allegation and to request information about steps taken to protect the concerned individuals.<sup>182</sup>

Separate from the special rapporteurs, the Committee on the Elimination of Discrimination Against Women is a body of experts created to monitor compliance with the CEDAW<sup>183</sup> by receiving regular reports from States Parties on their efforts to implement the Convention's rights protections.<sup>184</sup> The Working Group on Contemporary Forms of Slavery monitors and reports on slavery throughout the world and compliance with the anti-slavery conventions.<sup>185</sup>

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<sup>177</sup> See Special Rapporteur on Trafficking in Persons, Especially Women and Children, <http://www2.ohchr.org/english/issues/trafficking/index.htm> (last visited Mar. 25, 2009) [hereinafter Trafficking Rapporteur].

<sup>178</sup> See *id.*

<sup>179</sup> See *id.*

<sup>180</sup> See Special Rapporteur on Violence Against Women, Its Causes and Consequences, <http://www2.ohchr.org/english/issues/women/rapporteur> (last visited Mar. 25, 2009).

<sup>181</sup> See Trafficking Rapporteur, *supra* note 177.

<sup>182</sup> See Special Rapporteur on Trafficking in Persons, Especially Women and Children: Individual Complaints, <http://www2.ohchr.org/english/issues/trafficking/complaints.htm> (last visited Mar. 25, 2009).

<sup>183</sup> See *supra* notes 141–145 and accompanying text.

<sup>184</sup> See Committee on the Elimination of Discrimination Against Women, <http://www2.ohchr.org/english/bodies/cedaw/index.htm> (last visited Mar. 25, 2009).

<sup>185</sup> See Working Group on Contemporary Forms of Slavery, <http://www2.ohchr.org/english/issues/slavery/group.htm> (last visited Mar. 25, 2009).

Despite the requirement that these bodies work together, actual collaboration seems spotty. For instance, in 2004 the Trafficking Rapporteur, the Slavery Working Group, and two other bodies jointly released a statement announcing the Trafficking Rapporteur's mandate.<sup>186</sup> In 2006, the Trafficking and Children's Rapporteurs collaborated on their annual reports, but the extent of that collaboration is unclear, and they submitted separate reports.<sup>187</sup> But other than those examples, the U.N. human rights bureaucracy seems to approach its work in a way reflecting its fragmentary and topic-specific organization.

The U.N. itself was drawn directly into anti-trafficking issues by the revelation that members of U.N. peacekeeping missions were engaging in human trafficking, directly or by creating demand for prostitutes, in West Africa. The allegations included sexual exploitation by civilian members of the U.N. mission as well as NGO representatives.<sup>188</sup> In response, the Secretary-General promulgated a bulletin detailing standards of conduct for U.N. staff.<sup>189</sup> The Standards of Conduct Bulletin defines sexual abuse as "abuse of a position of vulnerability, differential power, or trust, for sexual purposes, including, but not limited to, profiting monetarily . . . from the sexual exploitation of another."<sup>190</sup> The bulletin goes on to prohibit, as a form of sexual exploitation, the exchange of money, employment, goods, or services for sex.<sup>191</sup>

The Standards of Conduct Bulletin is problematic in that it arguably applies only to civilian mission members. It refers throughout to the actions of "United Nations staff."<sup>192</sup> It states that U.N. forces operating under U.N. command and control are "prohibited from committing acts of sexual exploitation and sexual abuse."<sup>193</sup> But it then goes on to refer

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<sup>186</sup> See Press Release, High Comm'r for Hum. Rts, U.N. Human Rights Institutions Appeal to Countries to Eradicate All Forms of Slavery, <http://www2.ohchr.ch/hurricane/hurricane.nsf/view01/AE42DCED6834136DC1256F5D003E782C?opendocument> (last visited Mar. 25, 2009).

<sup>187</sup> See 2006 UN TRAFFICKING REPORT, *supra* note 15, ¶ 23.

<sup>188</sup> See The Secretary-General, *Investigation into Sexual Exploitation of Refugees by Aid Workers in West Africa*, ¶ 20, U.N. Doc. A/57/465 (Oct. 11, 2002).

<sup>189</sup> The Secretary-General, *Special Measures for Protection from Sexual Exploitation and Sexual Abuse*, U.N. Doc. ST/SGB/2003/13 (Oct. 9, 2003) [hereinafter Standards of Conduct Bulletin].

<sup>190</sup> *Id.* § 1.

<sup>191</sup> See *id.* § 3.1.

<sup>192</sup> *E.g.*, *id.* § 3.2(e), (f).

<sup>193</sup> *Id.* § 2.2.

the reader to the Secretary-General's bulletin on observance of international humanitarian law (IHL).<sup>194</sup> The IHL Bulletin does not contain the same preliminary statement that it was prompted by the West Africa controversy, but it was issued the same day as the Standards of Conduct Bulletin.<sup>195</sup> Although it does not specifically mention trafficking or prostitution, it prohibits any form of sexually humiliating or degrading treatment and enslavement.<sup>196</sup> It also requires the special protection of women and children from abuse and enforced prostitution.<sup>197</sup> Unlike the Standards of Conduct Bulletin, it does not contain any description of leadership responsibilities or referral of cases to national authorities.

In 2005, after revelations of extensive sexual abuse and exploitation by U.N. peacekeepers in the Democratic Republic of the Congo (DRC), Jordanian Prince Zeid Ra'ad Zeid Al-Hussein prepared a report on behalf of the Secretary-General detailing and making recommendations to curtail peacekeeper sexual exploitation and abuse.<sup>198</sup> The Zeid Report reviewed incidents of peacekeeper sexual misconduct in Bosnia-Herzegovina, Kosovo, Cambodia, Timor Leste, and West Africa<sup>199</sup> before recounting the Prince's observations when visiting the DRC.<sup>200</sup> There he saw evidence of indigenous women exchanging sex with peacekeepers for money, food or employment, as well as rape "disguised" as prostitution, in which a raped woman would then be given money to cover as payment.<sup>201</sup> The Prince commented that the misconduct was taking place despite the Secretary-General's 2003 Standards of Conduct Bulletin providing detailed policy guidance on unacceptable U.N. mission conduct,<sup>202</sup> highlighting the inadequacies of the U.N.'s measures then in place.<sup>203</sup> The Report describes the negative impact of such misconduct on the reputation and effectiveness of U.N. peacekeeping missions and its corrosive effect on the mission's relationship with the local populace, as well as the potential that it

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<sup>194</sup> See *id.*; see also The Secretary-General, *Observance by United Nations Forces of International Humanitarian Law*, U.N. Doc. ST/SGB/2003/13 (Oct. 9, 2003) [hereinafter IHL Bulletin].

<sup>195</sup> See IHL Bulletin, *supra* note 194.

<sup>196</sup> See *id.* § 7.2.

<sup>197</sup> See *id.* §§ 7.3–7.4.

<sup>198</sup> See Zeid Report, *supra* note 86.

<sup>199</sup> See *id.* ¶ 3.

<sup>200</sup> See *id.* ¶ 8.

<sup>201</sup> See *id.*

<sup>202</sup> See *id.* ¶ 4.

<sup>203</sup> See *id.* ¶ 8.

violated international humanitarian law, international human rights law, or both.<sup>204</sup>

The Report noted the difficulties in tackling misconduct by military members of national peacekeeping contingents. Military members are afforded privileges and immunities under the U.N.'s status of forces agreement (SOFA) with the host nation. Under the model SOFA, troop-contributing nations retain criminal and disciplinary jurisdiction over their soldiers, to the exclusion of the host nation.<sup>205</sup> The model SOFA endorsed by the Security Council included a note that any Memorandum of Understanding (MOU) between the troop-contributor and the Secretary-General should include assurances that jurisdiction will be properly exercised. But in practice the assurances are not provided.<sup>206</sup> The Report also pointed out that the Standards of Conduct Bulletin, which by its terms does not apply to national military contingents, was included in mission-specific guidelines provided to each troop contributor, but emphasized that they are guidelines only and not rules.<sup>207</sup> Additionally, the Report argued that the U.N. undermines its own message of zero-tolerance for peacekeeper sexual misconduct by then freely distributing condoms to peacekeepers as part of its HIV/AIDS awareness training.<sup>208</sup>

Prince Zeid made extensive recommendations in his report. For example, he suggested increasing the number of female peacekeepers, both to facilitate contacts with at-risk segments of the host nation's society as well as to change the climate within the peacekeeping forces.<sup>209</sup> He also pressed for better victim assistance, both emergency medical care and improved follow-on care, as well as identification of a source of funds for assistance payments to victims and to mothers of "peacekeeper babies."<sup>210</sup>

The Report detailed measures to increase discipline within the peacekeeping forces. Prince Zeid urged the General Assembly to make the Secretary-General's Bulletin on sexual exploitation and abuse a binding, uniform standard of conduct included in the MOU between the

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<sup>204</sup> *See id.* ¶ 10.

<sup>205</sup> *See id.* ¶ 18.

<sup>206</sup> *See id.* ¶ 78.

<sup>207</sup> *See id.* ¶ 20.

<sup>208</sup> *See id.* ¶ 44.

<sup>209</sup> *See id.* ¶ 43.

<sup>210</sup> *See id.* ¶¶ 52–56.



troop contributor and the U.N., rather than a guideline.<sup>211</sup> He also suggested that the General Assembly require the Secretary-General to obtain the enforcement assurances contemplated in the model MOU.<sup>212</sup> Additionally, he recommended adding a provision requiring that well-founded allegations of peacekeeper sexual misconduct be sent to national military prosecuting authorities for evaluation.<sup>213</sup> The troop-contributing State would then have to report back to the Secretary-General on the progress of the potential case, and if it was not prosecuted, provide a memo detailing the reasons.<sup>214</sup> The Report also urged steps to increase the accountability of unit and force commanders, enforced by the threat of repatriation for failure to cooperate with investigators or to enforce standards.<sup>215</sup> Prince Zeid reasoned that because the ultimate decision to prosecute remained with the participating State, these measures would strengthen the U.N.'s ability to maintain discipline and protect the integrity of its missions while still respecting participating States' sovereignty on issues of criminal enforcement of standards.<sup>216</sup> Finally, whenever possible, he urged that courts-martial be held in the host nation.<sup>217</sup>

The General Assembly quickly welcomed and endorsed the Zeid Report.<sup>218</sup> A draft MOU incorporating the Report's recommendation to make the Standards of Conduct Bulletin was prepared,<sup>219</sup> and the Secretary-General convened a group of legal experts to study how, inter alia, to make the Zeid recommendations binding on military contingents prior to an MOU's conclusion.<sup>220</sup> The Group of Experts Report suggested several potential ways to bind troop-contributing States to the Bulletin. It noted that prior to deployment, the U.N. has extensive contact with the contributing State; there are informal discussions prior

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<sup>211</sup> See *id.* ¶ 25.

<sup>212</sup> See *id.* ¶ 78.

<sup>213</sup> See *id.* ¶ 79.

<sup>214</sup> See *id.*

<sup>215</sup> See *id.* ¶¶ 57, 60–61.

<sup>216</sup> See *id.* ¶ 80.

<sup>217</sup> See *id.* ¶ 35.

<sup>218</sup> See G.A. Res. 59/300, ¶¶ 1-2, U.N. Doc. A/RES/59/300 (June 30, 2005).

<sup>219</sup> See The Secretary-General, *Revised Draft Model Memorandum of Understanding Between the United Nations and [Participating State] Contributing Resources to [the United Nations Peacekeeping Operation]*, U.N. Doc. A/61/494 (Oct. 3, 2006).

<sup>220</sup> See The Secretary-General, *Making Standards Contained in the Secretary-General's Bulletin Binding on Contingent Members and Standardizing the Norms of Conduct so that They are Applicable to All Categories of Peacekeeping Personnel*, U.N. Doc. A/61/645 (Dec. 18, 2006) [hereinafter Group of Experts report].

to a peacekeeping operation's authorization, and an invitation from the U.N. by *note verbale* to participate, followed by pre-deployment inspections.<sup>221</sup> At any time in that process, the U.N. could seek a commitment to the Bulletin, and could bring up the issue of training on the Bulletin during the pre-deployment inspection to emphasize its importance.<sup>222</sup>

The Report also discussed the head of mission's administrative authority over the entire peacekeeping contingent. The Group observed that while the Force commander could issue an order to implement the Bulletin, as had occurred in Liberia for example, he did not have the authority to enforce it directly; contingent commanders retained sole disciplinary power over their troops.<sup>223</sup> But while the troop-contributing State retained exclusive jurisdiction to criminally punish misconduct, the U.N. nevertheless retained responsibility for the operation itself and the good conduct of mission members.<sup>224</sup> To that end, the head of mission possessed the authority to order repatriation of any member, civilian or military, for misconduct or poor performance.<sup>225</sup> Indeed, 144 repatriation orders were issued between 1 January 2004 and 23 August 2006, including seven commanders.<sup>226</sup>

A third option considered that because the General Assembly had endorsed the Zeid Report, contributing States might be under some obligation to implement its recommendations through the issuance of orders from the contingent's chain of command.<sup>227</sup> An added benefit of this avenue was the flexibility to add prohibitions for activity not necessarily criminal, but undesirable in the context of the mission.<sup>228</sup> As in the Zeid Report, the Group of Experts called for reinstating the practice of obtaining assurances that troop-contributing States would exercise their jurisdiction when their troops failed to meet behavioral standards.<sup>229</sup>

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<sup>221</sup> See *id.* ¶¶ 12–13.

<sup>222</sup> See *id.* ¶¶ 13, 17.

<sup>223</sup> See *id.* ¶¶ 26–27.

<sup>224</sup> See *id.* ¶ 10.

<sup>225</sup> See *id.* ¶ 19.

<sup>226</sup> See *id.* ¶ 20.

<sup>227</sup> See *id.* ¶¶ 32, 34.

<sup>228</sup> See *id.* ¶ 35.

<sup>229</sup> See *id.* ¶ 38.

Finally, the Group discussed the possibility of Security Council action to implement the Standards of Conduct Bulletin. It noted that the Security Council had made reference to the Bulletin in recent resolutions renewing peacekeeping mandates, and had urged the Secretary-General and contributing States to take measures to prevent and if necessary punish military sexual misconduct.<sup>230</sup> But this language was merely hortatory, and only a decision under Chapter VII would bind members.<sup>231</sup> The Group doubted without elaboration the issue was sufficiently necessary to trigger the Council's authority to restore and maintain international peace and security.<sup>232</sup>

Finding a way to require that troops are held accountable was not the only difficulty in the U.N.'s program, however. Both the Secretary-General's Bulletin and the Zeid Report treated prostitution patronage by peacekeepers as a form of sexual exploitation. The Zeid Report pointed out that some troop-contributing nations do not prohibit prostitution, which creates one tension in enforcing a patronage prohibition. Another tension is reflected in the manner in which the U.N. counts incidents: the lack of consensus on the relationship between prostitution and trafficking. The 2004, 2005, and 2006 Secretary-General's Reports on special measures for protection from sexual exploitation and sexual abuse included data on the number of complaints lodged each year against peacekeeping missions.<sup>233</sup> Those tallies were broken down by peacekeeping segment (e.g., U.N. staff, civilian police, military) and type of offense. Within offenses, "exploitative sexual relationships," "sex with minors," and "sex with prostitutes" were separate categories.<sup>234</sup> Furthermore, the explanatory footnote for "exploitative sexual relationships" defined the offense as "exchanges of sexual favors for money, food, employment or other goods or services, excluding prostitution."<sup>235</sup> This suggests that prostitution patronage, while some

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<sup>230</sup> See *id.* ¶ 23; see, e.g., S.C. Res. 1784, ¶ 15, U.N. Doc. S/RES/1784 (Oct. 31, 2007) (requesting "the Secretary-General to . . . take the necessary measures to ensure full compliance . . . with the [U.N.] zero-tolerance policy on sexual exploitation and abuse and . . . [urging] troop-contributing countries to take appropriate preventive action").

<sup>231</sup> See Group of Experts report, *supra* note 220, ¶ 24.

<sup>232</sup> See *id.*

<sup>233</sup> See Secretary-General, *Report of the Secretary-General on Special Measures for Protection from Sexual Exploitation and Sexual Abuse, delivered to the General Assembly*, U.N. Doc. A/59/782 (Apr. 15, 2005) [hereinafter 2004 Report]; U.N. Doc. A/60/861 (May 24, 2006) [hereinafter 2005 Report]; U.N. Doc. A/61/957 (June 15, 2007) [hereinafter 2006 Report].

<sup>234</sup> See, e.g., 2006 Report, *supra* note 233, at 17.

<sup>235</sup> *Id.*

form of sexual misconduct, is somehow not the same as the conduct described in the Standards of Conduct Bulletin, such as sex exchanged for money or property.<sup>236</sup>

Despite the General Assembly's endorsement, the Zeid Report is mired in U.N. bureaucracy. The U.N. is discussing ways to incorporate the Standards of Conduct Bulletin into existing MOUs, while a revised model MOU is debated by a General Assembly Special Committee.<sup>237</sup> It faces serious institutional challenges as it tries to deal effectively with human trafficking. As an organization promoting anti-trafficking on its agenda, its own bureaucracy is hampering its efforts. Anti-trafficking policymaking is fragmented and lacks coordination. As the U.N. itself struggles to avoid being tarred by the stigma of creating demand for human trafficking, it is frustrated by its inability to fully control the most visible element of its peacekeeping mission—the military contingent. As of this writing, the U.N.'s performance can best be described as only minimally effective.

#### *b. NATO Activities*

No NATO official or staff member has been accused of sexual misconduct.<sup>238</sup> Nevertheless, peacekeeping forces in the former Yugoslavia created a demand for prostitutes that was met by brothels which sprang up almost immediately outside the peacekeepers' bases, and which closed when the bases were abandoned.<sup>239</sup> Many of the women working in those establishments were trafficked into Yugoslavia specifically to satisfy peacekeeper demand.<sup>240</sup>

Consequently, in October 2003, Norway and the United States pushed for adoption of a NATO policy on trafficking, particularly of

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<sup>236</sup> See Standards of Conduct Bulletin, *supra* note 189, § 3.2(c).

<sup>237</sup> See 2007 TIP Report, *supra* note 3, at 232; see also The Secretary-General, *Report of the Secretary-General, Implementation of the Recommendations of the Special Committee on Peacekeeping Operations*, ¶ 23, U.N. Doc. A/62/67/Add.1 (Dec. 28, 2007) (placing the Group of Experts Report on the 2008 agenda for further discussion); Nancie Carraway, *Human Rights and Existing Contradictions in Asia-Pacific Human Trafficking Politics and Discourse*, 14 TUL. J. INT'L & COMP. L. 295, 316 (2006) (criticizing the U.N. for lacking the political will to meaningfully address human trafficking).

<sup>238</sup> See 2007 TIP Report, *supra* note 3, at 233.

<sup>239</sup> See Keith J. Allred, *Combating Human Trafficking*, NATO REV., ¶ 6 (2006), <http://www.nato.int/docu/review/2006/issue2/english/analysis.html>.

<sup>240</sup> See *id.*

women and children.<sup>241</sup> In furtherance of that effort the two nations jointly hosted a conference of the NATO allies to discuss trafficking.<sup>242</sup> Their efforts resulted in the NATO Policy on Combating Trafficking in Human Beings (Policy),<sup>243</sup> adopted at the June 2004 Istanbul summit.<sup>244</sup> It established a zero-tolerance policy on trafficking by NATO personnel and staff.<sup>245</sup> Aimed at establishing standards of individual behavior, the policy required Members, among other things, to review national legislation and efforts to meet their obligations under the Trafficking Protocol, to ensure that all personnel receive trafficking awareness training, and to support host nation authorities in combating trafficking.<sup>246</sup> Its definitions of trafficking and exploitation mirrored those of the U.N. Secretary-General.<sup>247</sup> The Policy was recognition that trafficking, including patronage of prostitutes by NATO troops, undermines NATO's security and stability efforts by financing organized crime and other elements that flourish in the absence of security.<sup>248</sup>

As a result of the Policy, the NATO School developed three training programs targeted at different audiences among its students.<sup>249</sup> Anti-trafficking considerations are included in all operational plans.<sup>250</sup> Officials have been appointed within the NATO bureaucracy with oversight responsibility for implementing the Policy.<sup>251</sup> However, although it was expressly meant to change the behavior of individual NATO soldiers, the Policy did not establish or require the adoption of any punitive measures. Each Member remains responsible for disciplining its own troops,<sup>252</sup> but only Norway and the United States have affirmatively criminalized prostitution patronage.<sup>253</sup>

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<sup>241</sup> See R. Nicholas Burns & Kai Eide, *Mission for NATO: An Alliance Against the Traffic in Humans*, INT'L HERALD TRIB., Mar. 3, 2004, available at [http://www.iht.com/articles/2004/03/04/edburns\\_ed3\\_.php?page=1](http://www.iht.com/articles/2004/03/04/edburns_ed3_.php?page=1).

<sup>242</sup> See *id.*

<sup>243</sup> NATO, *Policy on Combating Trafficking in Human Beings*, NATO POLICY DOC. B-1110 (June 29, 2004) [hereinafter NATO Policy].

<sup>244</sup> See NATO, *Istanbul Summit Communiqué*, ¶ 30, June 28, 2004, available at <http://www.nato.int/docu/pr/2004/p04-096e.htm>.

<sup>245</sup> See NATO Policy, *supra* note 243, ¶ 1.

<sup>246</sup> See *id.* ¶ 5.

<sup>247</sup> See *id.* ¶ 3.

<sup>248</sup> See Allred, *supra* note 239, ¶ 18.

<sup>249</sup> See *id.* ¶ 17.

<sup>250</sup> See 2007 TIP REPORT, *supra* note 3, at 233.

<sup>251</sup> See *id.*

<sup>252</sup> See *id.*

<sup>253</sup> See Allred, *supra* note 239, ¶ 18.

Thus, like the U.N., NATO has set in place a program to address the challenge of military demand for trafficking that is little more than “moralization” on the issue.<sup>254</sup> Faced with the same challenge of balancing enforcement of troop discipline with the sovereignty of its Members, NATO is similarly hindered by its reliance on Members’ enforcement of its Policy.

#### B. U.S. Law

Long before the United States and Norway called on NATO to take action on trafficking, the United States was considering the security implications of transnational organized crime, including human trafficking. When President Clinton’s National Security Council (NSC) produced the International Crime Control Strategy (ICCS)<sup>255</sup> in 1998, trafficking in women and children was among the international criminal activities described as threats to global security and stability. But as a plan of action for tackling the spread of international organized crime, the ICCS instead focused mainly on financial crimes, drug-related crimes, and corruption.

Pursuant to the ICCS, an interagency working group produced the International Crime Threat Assessment<sup>256</sup> two years later. The NSC Threat Assessment was more explicit in describing the connection between international crimes, such as human trafficking, and security threats. It noted that transnational criminals would spare no expense to corrupt government and law enforcement officials in their areas of operation or transshipment.<sup>257</sup> It pointed out the frequency with which such criminals partnered with extremist groups such as the PKK in the Middle East and the FARC in Columbia.<sup>258</sup> Such terrorist groups without State sponsors looked to criminal groups for financial support as well as to secure supplies of weapons and other materials.<sup>259</sup> Thus, the

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<sup>254</sup> See NATO Parliamentary Assembly, Sub-Comm. on Democratic Governance, *The Fight Against Children Trafficking in Europe*, ¶ 38, 157 CCDG 04 E (Nov. 2004).

<sup>255</sup> U.S. Nat’l Sec. Council, Int’l Crime Control Strategy (1998), available at <http://clinton4.nara.gov/WH/EOP/NSC/html/documents/iccs-frn.html> [hereinafter ICCS].

<sup>256</sup> Nat’l Sec. Council, Int’l Crime Threat Assessment (Dec. 15, 2000), available at <http://clinton4.nara.gov/WH/EOP/NSC/html/documents/pub45270/pub45260into.html> [hereinafter NSC Threat Assessment].

<sup>257</sup> See *id.* at 9.

<sup>258</sup> See *id.* at 10.

<sup>259</sup> See *id.* at 17.

Threat Assessment labeled trafficking in women and children along with terrorism and drug- and weapons of mass destruction-smuggling as threats to U.S. and global security and stability.<sup>260</sup> The United States signed the Trafficking Protocol<sup>261</sup> in 2000<sup>262</sup> and passed the Trafficking Victims Protection Act.<sup>263</sup>

President Bush raised the policy priority of human trafficking. He created the Interagency Task Force to Monitor and Combat Trafficking in Persons<sup>264</sup> and published National Security Presidential Directive Twenty-Two (NSPD-22).<sup>265</sup> This directive declared human trafficking a “transnational threat”<sup>266</sup> and announced a policy based on an “abolitionist approach” to human trafficking.<sup>267</sup> An important facet of that approach was opposition to prostitution and any related activity, such as pandering and brothel operation, as inherently harmful and dehumanizing.<sup>268</sup> The Interagency Task Force would oversee the planning and implementation of programs supporting NSPD-22’s policy. The Task Force’s charter included developing a strategy for “active diplomatic engagement” and for increasing international cooperation.<sup>269</sup>

As part of its plan of action, NSPD-22 adopted a zero-tolerance policy for government employees who engage in human trafficking, and required all departments to develop policies to educate and, when necessary, punish employees.<sup>270</sup> In addition, the State Department was ordered to work in conjunction with other Executive agencies to develop priorities and objectives for working through international organizations, including the U.N., to combat trafficking.<sup>271</sup> Departmental implementation

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<sup>260</sup> See *id.* at 14.

<sup>261</sup> See *supra* notes 164–72 and accompanying text.

<sup>262</sup> See The Secretary-General, *The Status of Multilateral Treaties Deposited with the Secretary-General*, U.N. Doc. ST/LEG/SER/E/, available at [http://treaties.un.org/Pages/DB.aspx?path=DB/MTDSGStatus/pageIntro\\_en.xml](http://treaties.un.org/Pages/DB.aspx?path=DB/MTDSGStatus/pageIntro_en.xml) (last visited Mar. 30, 2009).

<sup>263</sup> 22 U.S.C. §§ 7101–7112 (2006).

<sup>264</sup> Exec. Order No. 13,257, 67 Fed. Reg. 7,259 (Feb. 19, 2002).

<sup>265</sup> Memorandum from The White House on the National Security Presidential Directive Regarding Trafficking in Persons (Dec. 16, 2002) [hereinafter NSPD-22].

<sup>266</sup> *Id.* at 1.

<sup>267</sup> See *id.* at 2.

<sup>268</sup> See *id.*

<sup>269</sup> *Id.* at 3.

<sup>270</sup> See *id.* at 4.

<sup>271</sup> See *id.* at 6.

was coordinated by the Task Force, which reported to the President through the Secretary of State.<sup>272</sup>

*1. Department of Defense Implementation: Awareness Training & Orders*

The Department of Defense's implementation of the President's policy was slow to start. Although NSPD-22 ordered expedited implementation of its policy, it was not until January 2004 that a DoD policy memo was promulgated. It provided that "trafficking in persons will not be facilitated in any way by the activities of our Servicemembers . . . . DoD opposes prostitution and any related activities that may contribute to the phenomenon of trafficking in persons as inherently harmful and dehumanizing."<sup>273</sup> The memo reminded commanders of their responsibility under the U.S. Code to inspect vigilantly their personnel in order to guard against "all dissolute and immoral practices, and to correct . . . all persons who are guilty of them."<sup>274</sup> It set out as implementation objectives the education of all servicemembers on trafficking and personal responsibilities, as well as increased command and military police vigilance to place off-limits those off-base establishments connected with trafficking.<sup>275</sup>

The policy memo was followed several months later by a memo from the Secretary of Defense. In it, the Secretary expressed his desire that commanders at all levels train their troops to understand and recognize trafficking, calling it a "serious crime."<sup>276</sup> He ordered commanders to place off-limits any establishment found to be involved in trafficking for sexual exploitation, and to make full use of all tools available, insisting, "No leader in this department should turn a blind eye to this issue."<sup>277</sup> A short time later, the DoD's trafficking-in-persons awareness training program was announced, with instructions to

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<sup>272</sup> See Exec. Order No. 13,257, 67 Fed. Reg. 7,259, § 3(f) (Feb. 19, 2002).

<sup>273</sup> Memorandum from the Deputy Sec'y of Def. Regarding Trafficking in Persons in the Department of Defense (Jan. 30, 2004).

<sup>274</sup> *Id.*

<sup>275</sup> See *id.*

<sup>276</sup> Memorandum from the Sec'y of Def. Regarding Trafficking in Persons (Sept. 16, 2004).

<sup>277</sup> See *id.*



supplement it appropriately for the cultural and legal environments in individual areas of operations.<sup>278</sup>

The DoD's implementation measures, while welcomed as a start, were subject to expert criticism. Dr. Sarah Mendelson, director of the Center for Strategic and International Studies' Human Rights and Security Initiative, testified before Congress about the shortcomings of DoD's approach.<sup>279</sup> After an extensive discussion of the deleterious effect of human trafficking on security operations, she criticized the DoD program as inadequate to raise awareness and correct misperceptions about the links among trafficking, prostitution and peacekeeping operations.<sup>280</sup> She described the indifference she found among U.S. and NATO officers in Bosnia and Kosovo, arguing that DoD must establish new cultural norms to succeed in combating trafficking.<sup>281</sup> Among the measures she promoted to that end was prosecution of troops who supported trafficking, although she did not call for the creation of any new offenses.<sup>282</sup>

The adequacy of the training program was also criticized within legal circles.<sup>283</sup> The training presentation was a PowerPoint slide show accessed through the Internet. A trainee would click through slides and print out a certificate to document the training's completion.<sup>284</sup> The program was thought unreliable; there was no way to guarantee that the trainee actually read or understood the slides.<sup>285</sup> It also failed to inform the trainee about potential legal liability associated with trafficking in its various forms, and particularly prostitution.<sup>286</sup>

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<sup>278</sup> Memorandum from the Under Sec'y of Def. Regarding Awareness Training for Combating Trafficking in Persons (Nov. 17, 2004).

<sup>279</sup> *Statement Before the H. Comm. on the Armed Servs., Implementation of DoD Policy with Regard to Trafficking in Humans*, 108th Cong. (2004) (statement of Sarah E. Mendelson), available at <http://www.csis.org/media/csis/congress/ts040921mendelson.pdf> [hereinafter Mendelson Statement].

<sup>280</sup> *See id.* at 6-7.

<sup>281</sup> *See id.* at 2-4.

<sup>282</sup> *See id.* at 7.

<sup>283</sup> *See Jorene Soto, "We're Here to Protect Democracy. We're Not Here to Practice It": the U.S. Military's Involvement in Trafficking in Persons and Suggestions for the Future*, 13 *CARDOZO J. L. & GENDER* 561 (2007).

<sup>284</sup> *See id.* at 572.

<sup>285</sup> *See id.* at 575.

<sup>286</sup> *See id.* at 574.

But commands around the world did not limit their anti-trafficking measures to the online training program.<sup>287</sup> United States Forces Korea supplemented it with awareness training focused on core values and “The Noncommissioned Officer’s Creed.”<sup>288</sup> It also provided each reporting servicemember with copies of NSPD-22, the Trafficking Victim’s Protection Act, and a “Human Trafficking Indicators” guidebook that included a list of off-limits establishments.<sup>289</sup> In Europe, U.S. European Command’s General Order One was amended to prohibit support of trafficking and indentured servitude through patronage of prostitution and establishments suspected of trafficking, and regular inspections for signs of pandering at rest and relaxation locations were instituted.<sup>290</sup> In the Middle East, the commander of Multi-National Force Iraq published an order on trafficking.<sup>291</sup>

A key, common element of these field programs is the issuance of an order prohibiting conduct. Such measures are enforced by punishing violations through UCMJ Article 92, Failure to Obey Order or Regulation.<sup>292</sup> Conviction under Article 92 carries a maximum penalty of two years’ confinement, forfeiture of all pay and allowances, and dishonorable discharge.<sup>293</sup> But in order to set a uniform, worldwide standard and make a strong public policy statement, the Department of Defense responded to NSPD-22 and congressional and media interest by defining a new offense under the UCMJ for prostitution patronage.

## 2. Department of Defense Implementation: Amendment of the UCMJ

Historically, it had been left up to commanders to determine whether prostitution patronage needed to be regulated: some commanders prohibited prostitution as well as various subterfuges like hiring “maids,” while others ignored the issue, if it was considered an issue at all.<sup>294</sup> But

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<sup>287</sup> See *Trafficking in Persons*, 109th Cong. (2006) (statement of Thomas F. Gimble), available at <http://www.dodig.osd.mil/Inspections/IPO/combatinghuman.htm> (last visited Apr. 12, 2008) [hereinafter Gimble Statement].

<sup>288</sup> See *id.* at 3.

<sup>289</sup> See *id.* at 4.

<sup>290</sup> See *id.* at 4–5.

<sup>291</sup> See *id.* at 8.

<sup>292</sup> 10 U.S.C. § 892 (2006); see also MANUAL FOR COURTS-MARTIAL, UNITED STATES, IV-23 to IV-25 (2008) [hereinafter MCM] (providing annotations).

<sup>293</sup> See MCM, *supra* note 292, at IV-23.

<sup>294</sup> See Soto, *supra* note 283, at 566.

that tradition of local control ran up against Congress and the President's anti-trafficking agenda.<sup>295</sup> By 2004, the DoD Inspector General gave his opinion that one of the root causes of human trafficking was the failure of leaders "to promulgate and enforce principle-based standards for subordinates who create the demand for prostitution generally, and for sex slavery specifically."<sup>296</sup> The issuance of prostitution prohibitions locally or for whole areas of responsibility, while enforceable, continued the piecemeal approach. Amending the UCMJ set a global policy standard for all commanders and at the same time supplied a ready enforcement mechanism.

Congress created the UCMJ as a separate body of criminal law to govern military personnel in light of a number of considerations. First, civilian criminal codes do not address offenses that are uniquely military, such as mutiny, disrespect, disobedience, and desertion.<sup>297</sup> Second, Congress recognized the need for a criminal justice system with a worldwide jurisdiction, in contrast to the limited geographic jurisdiction of the U.S. district courts.<sup>298</sup> Third, the UCMJ makes possible a system with the flexibility to investigate and try criminal offenses rapidly across the spectrum of conditions in which the military operates without compromising the mission or the rights of the accused.<sup>299</sup> The UCMJ is implemented through the Manual for Courts-Martial, which includes not only the substantive offenses themselves with commentary and sample charges, but also the procedural Rules for Courts-Martial and the Military Rules of Evidence.<sup>300</sup>

Part of the UCMJ's flexibility is the creation of the General Article, Article 134.<sup>301</sup> It permits the punishment of "all disorders and neglects to the prejudice of good order and discipline . . . [and] all conduct of a nature to bring discredit upon the armed forces . . . ."<sup>302</sup> Thus, acts that are not otherwise listed in the UCMJ are within a court-martial's jurisdiction if they directly prejudice good order and discipline (referred to as "clause one" offenses), or if they somehow bring the armed forces

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<sup>295</sup> See *id.* at 567.

<sup>296</sup> Schmitz Statement, *supra* note 72, at 4–5.

<sup>297</sup> See William A. Moorman, *Fifty Years of Military Justice: Does the Uniform Code of Military Justice Need to be Changed?*, 48 A.F. L. REV. 185, 190 (2000).

<sup>298</sup> See *id.*

<sup>299</sup> See *id.* at 191.

<sup>300</sup> See *id.* at 192; MCM, *supra* note 292, at i–xliv.

<sup>301</sup> 10 U.S.C. § 934 (2006).

<sup>302</sup> MCM, *supra* note 292, at IV-111.

into disrepute or lower the public's esteem of the armed forces (referred to as "clause two" offenses).<sup>303</sup> The two clauses are not mutually exclusive; a violation could both detract from good order and discipline and from the public's esteem of the armed forces.<sup>304</sup>

In 2004 the Department of Defense proposed amending the UCMJ to include an offense under Article 134 for patronizing a prostitute.<sup>305</sup> Although one of many proposed amendments in the required Federal Register notice, the majority of the comments received in response to the notice were related to the proposed prostitution offense.<sup>306</sup> Those commentators opposed questioned the need for such an offense and its impact on morale; others supported it as appropriate and long overdue.<sup>307</sup> The final amendment was promulgated in 2005.<sup>308</sup>

The new offense was an addition to the existing Article 134 prohibition of prostitution and pandering.<sup>309</sup> The elements of prostitution patronage are: that the accused had sexual intercourse with a person not the accused's spouse; that the act was in exchange for money or other compensation; that it was wrongful; and that it was prejudicial to good order and discipline *or* service-discrediting under the circumstances.<sup>310</sup> Prostitution patronage can thus be charged under either or both clauses Article 134.<sup>311</sup> The maximum authorized punishment is one year's confinement, forfeiture of all pay and allowances, and a dishonorable discharge.<sup>312</sup>

The amendment has been criticized as not going far enough to criminalize indirect support of human trafficking. First, the offense

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<sup>303</sup> See *id.* at IV-112.

<sup>304</sup> See *id.*; see also, e.g., *United States v. Holt*, 23 C.M.R. 81, 86 (C.M.A. 1957) ("We find in this case that the accused's behavior was not only prejudicial to good order and discipline, but it further reflected discredit upon the armed forces.").

<sup>305</sup> See Manual for Courts-Martial: Proposed Amendments, 69 Fed. Reg. 55,600, 55,603 (proposed Sept. 15, 2004) (to be codified in the Manual for Courts-Martial).

<sup>306</sup> See Manual for Courts-Martial: Proposed Amendments, 70 Fed. Reg. 1,877 (Jan. 11, 2005).

<sup>307</sup> See *id.*

<sup>308</sup> See Exec. Order No. 13,387, 70 Fed. Reg. 60,697 (Oct. 18, 2005).

<sup>309</sup> See Lieutenant Colonel Mark L. Johnson, *Forks in the Road: Recent Developments in Substantive Criminal Law*, ARMY LAW., June 2006, at 23, 25.

<sup>310</sup> See MCM, *supra* note 292, at IV-134.

<sup>311</sup> See *supra* text accompanying notes 303–304.

<sup>312</sup> See MCM, *supra* note 292, at IV-135; see also Johnson, *supra* note 309, at 25 (explaining the change).

criminalized prostitution patronage, not human trafficking, without making any connection or reference to trafficking.<sup>313</sup> The issue, according to this argument, is trafficking, specifically sexual slavery, not prostitution.<sup>314</sup> Second, it was argued the amendment should criminalize the trafficking aspects of prostitution in addition to patronage.<sup>315</sup> Patronage of a prostitute who was a trafficking victim could be conceived as a strict liability offense, with an increase in the authorized punishment.<sup>316</sup> Third, the amendment was criticized for being too lenient in its penalty.<sup>317</sup> It was argued that UCMJ punishments for trafficking-related prostitution should be in line with the Trafficking Victims Protection Act, which imposes, for example, a confinement sentence of twenty years to life for sex-trafficking of children.<sup>318</sup>

Although some comments pointed out that the original public notice offered no rationale for the amendment,<sup>319</sup> the Department of Defense touted it as a measure to combat human trafficking pursuant to its NSPD-22 responsibilities.<sup>320</sup> While it could be argued that a local order or service regulation prohibiting prostitution patronage would have been more effective, since a violation of UCMJ Article 92 carries a longer maximum confinement sentence,<sup>321</sup> the amendment nevertheless sent a strong signal of DoD's commitment to its anti-trafficking policy. In choosing to criminalize all prostitution, DoD was in accord with NSPD-

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<sup>313</sup> See Soto, *supra* note 283, at 575.

<sup>314</sup> See *id.*

<sup>315</sup> See *id.* at 576.

<sup>316</sup> See *id.*

<sup>317</sup> See *id.*

<sup>318</sup> See *id.*; 18 U.S.C. § 1591 (2006).

<sup>319</sup> See Manual for Courts-Martial: Proposed Amendments, 70 Fed. Reg. 1,877 (Jan. 1, 2007).

<sup>320</sup> See U.S. DEP'T OF DEF., INSPECTOR GEN. REP. NO. IE-2007-002, EVALUATION OF DOD EFFORTS TO COMBAT TRAFFICKING IN PERSONS 79 (Nov. 21, 2006).

<sup>321</sup> It is probably possible for a commander to issue a punitive order not to patronize a prostitute and then charge violations under Article 92 rather than Article 134. Case law suggests that where an unlawful act violates a lawful order as well as a defined Article 134 offense, the Government may choose between the two in charging, although alleging both is multiplicitous. See *United States v. Curry*, 35 M.J. 359, 360 (C.M.A. 1992). But a commander could issue an order placing known prostitution establishments off-limits; an accused who goes there and patronizes a prostitute could then be charged with violating Article 92 by violating the off-limits order as well as Article 134 for prostitution patronage. The command in that case would avoid multiplicity issues because proof of one charge does not necessarily require proof of the other. See *United States v. Gibson*, 11 M.J. 435, 437 (C.M.A. 1981).

22's condemnation of prostitution and all related practices.<sup>322</sup> Among NATO allies at least, only one other nation has taken such a step.<sup>323</sup>

Therein lie the challenges to the U.S. policy if it means to live up fully to NSPD-22's pronouncements. The United States rarely puts troops on the ground in a foreign country alone; whether introduced as part of a U.N. mission or with a less formal coalition, U.S. servicemembers serve alongside foreign troops in most overseas locations. But those foreigners are under their own chains of command and national laws. Any gains from the U.S. and Norwegian prohibitions on prostitution would be greatly watered down in the mix of forces from countries without such a hard line. The U.N. and NATO must rely entirely on the participating countries to implement and enforce their anti-trafficking policies. Moreover, responsibility to implement and monitor the U.N.'s policies is fragmented within the U.N. bureaucracy. For the United States to capitalize on its initiative, it must find a way to give these international organizations a means to bind multilateral participants to the anti-trafficking policies. Recalling the words of the DoD IG, leadership is required to combat trafficking effectively.<sup>324</sup> Particularly in the U.N., the United States can use its privileged position on the Security Council to force institutional change. The next section will explore a possible avenue for U.S. efforts.

#### IV. The Security Council

While the United States has instituted a firm, military-wide policy intended to reduce demand for victims of sex trafficking, other nations have not taken as aggressive a stance. The extent to which the United States may influence other nations' policies is limited. While there may be levers available in the form of security assistance programs,<sup>325</sup> those means would be ineffective in the case of nations that do not receive military aid.

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<sup>322</sup> Compare MCM, *supra* note 292, at IV-134, with NSPD-22, *supra* note 265, at 2.

<sup>323</sup> See *supra* text accompanying note 253. As of this writing, convictions for violating the new offense had not made their way through the military justice system such that a reasonable account of how often it had been successfully prosecuted could be made. If such a count were possible, however, it would fail to capture acquittals as well as offenses handled by lesser administrative measures or through non-judicial punishment under UCMJ Article 15. See MCM, *supra* note 292, R.C.M. 306(c).

<sup>324</sup> See Schmitz Statement, *supra* note 72.

<sup>325</sup> See NSPD-22, *supra* note 265, ¶ 5.

Faced with few unilateral choices, the United States nevertheless has the option of working through the U.N. Security Council to influence military policies of other nations. This section will examine the scope of authority the Security Council may exert over domestic military policies of Member States, the sources of that authority, and its limits.

#### A. The Security Council's Authority Under the U.N. Charter

Article 2 of the Charter of the United Nations (U.N. Charter) preserves the sovereignty of Member States over their purely domestic matters.<sup>326</sup> That protection has been interpreted to mean that intervention in a State's affairs is prohibited if the State has a sovereign right to proceed freely on a matter.<sup>327</sup> It not only prevents the interference of one Member in the domestic affairs of another, but also protects Members from interference by the U.N.<sup>328</sup> Article 2 thus seems to shape the U.N.'s response to threats to the peace by requiring a respect for Members' domestic jurisdiction.<sup>329</sup>

But that respect is subject to the authority given the Security Council to counter threats to international peace and security.<sup>330</sup> The Security Council's powers and its position within the U.N. and in relation to the Members are found in Article 24, which gives the Security Council primary responsibility for the maintenance of international peace and security.<sup>331</sup> It expresses the drafters' intent that the Council have the power to act promptly and effectively to maintain international peace and security.<sup>332</sup> It has been noted that "primary" implies that the Council shares responsibility for maintaining peace with some other body; indeed, taking the U.N. Charter as a whole, both the Council and the

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<sup>326</sup> See U.N. Charter art. 2, para. 7.

<sup>327</sup> See Ruth Gordon, *United Nations Intervention in Internal Conflicts: Iraq, Somalia, and Beyond*, 15 MICH. J. INT'L L. 519, 529 (1994).

<sup>328</sup> See Richard D. Glick, *Lip Service to the Law of War: Humanitarian Law and United Nations Armed Forces*, 17 MICH. J. INT'L L. 53, 64 (1995) (arguing that although the U.N. has a vertical relationship with States to regulate matters of international peace and security, it is bound by the same horizontal rules binding other members of the international community).

<sup>329</sup> See Gordon, *supra* note 327, at 576; see also KENNETH MANUSAMA, *THE UNITED NATIONS SECURITY COUNCIL IN THE POST-COLD WAR ERA* 117 (2006).

<sup>330</sup> See U.N. Charter art. 2, para. 7.

<sup>331</sup> See *id.* art. 24; see also 1 RUDOLPH BERNHARDT ET AL., *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 445 (Bruno Simma ed., 2d ed. 2002).

<sup>332</sup> See BERNHARDT ET AL., *supra* note 331, at 445.

General Assembly share some jurisdiction over this task.<sup>333</sup> Nevertheless, the power to take binding action is exclusive to the Council, making it superior to the other organs of the U.N. in matters related to keeping the peace; there are no checks and balances in the U.N. Charter when the Council acts under Chapter VII.<sup>334</sup> Thus the Council is properly viewed as the principal organ for the international community to act in the face of a threat to the peace.<sup>335</sup>

Chapter VII has internal limits that protect States' domestic sovereignty as well. Article 39 empowers the Council to determine when the peace is threatened, and to act in order to preserve or restore international peace and security.<sup>336</sup> By providing an exclusive list of three triggers to Chapter VII authority,<sup>337</sup> and limiting the Council to acting to preserve international peace, Article 39 confines the Council's authority.<sup>338</sup> Article 39 also prevents the Council from intruding into competencies assigned by the U.N. Charter's assignment to the other U.N. organs.<sup>339</sup> The U.N. Charter therefore strikes a balance between State sovereignty and the Security Council's authority. While Article 2's sovereignty protections and a State's domestic jurisdiction are qualified by Chapter VII, Article 39 in turn limits the Security Council to acting in the interests of international peace as opposed to domestic peace, and only when it determines the existence of a triggering condition.

Sovereignty considerations, however, seem the only internal check on the Council's Chapter VII powers. Article 39 leaves the determination of a threat to the peace, breach of the peace, or act of aggression entirely to the Council's discretion, limited only minimally by the necessity of overcoming the veto of one of the five permanent members.<sup>340</sup> This accords with the intent that the Council remain free to

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<sup>333</sup> Compare U.N. Charter arts. 11, 14 (granting the General Assembly authorities with respect to the maintenance of international peace and security), with U.N. Charter art. 24 (conferring primary responsibility for international peace and security on the Security Council).

<sup>334</sup> See BERNHARDT ET AL., *supra* note 331, at 446–48, 707.

<sup>335</sup> See Gareth Evans & Mohamed Sahnoun, *The Responsibility to Protect*, 81 FOREIGN AFF. 99, 106 (2002).

<sup>336</sup> See U.N. Charter art. 39.

<sup>337</sup> “The Security Council shall determine the existence of a threat to the peace, breach of the peace, or an act of aggression . . . .” *Id.*

<sup>338</sup> See ERIKA DE WET, THE CHAPTER VII POWERS OF THE UNITED NATIONS SECURITY COUNCIL 136–37 (2004).

<sup>339</sup> See *id.* at 137.

<sup>340</sup> See *id.* at 136.



act rapidly and effectively when a situation emerges.<sup>341</sup> Additionally, some International Court of Justice judges have from time to time endorsed the prerogative of the U.N.'s principal organs to interpret the U.N. Charter's powers expansively.<sup>342</sup>

Of the triggers, "threat to the peace" is the broadest and most potentially wide-ranging.<sup>343</sup> "Peace" in this context can be defined negatively as the absence of war, or positively, going beyond mere absence of war to improved economic, social, political, and environmental conditions and friendlier State-to-State relations.<sup>344</sup> Severe breaches of human rights are thought to be potential threats to the peace if their effects are felt internationally.<sup>345</sup> Indeed, it has been argued that the drafters meant the Council to play a significant human rights-protective role in situations involving threats to the peace.<sup>346</sup> Nevertheless, the stronger argument holds that the Security Council is intended only to enforce the peace and not the values of the international community.<sup>347</sup> Thus, for example, human rights violations short of genocide or ethnic cleansing are unlikely to justify Security Council intervention.<sup>348</sup> Because its task is to enforce the peace, it may not direct its actions against States that have yet to violate international law or that have only threatened a violation.<sup>349</sup>

The U.N. Charter's textual mechanism for enforcing the peace through military intervention has never been used.<sup>350</sup> The Members agree in Article 43 to make forces available to the Council for use in enforcing the peace.<sup>351</sup> Their availability, number, location, readiness, and employment are to be governed by agreements between the Council

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<sup>341</sup> See BERNHARDT ET AL., *supra* note 331, at 705.

<sup>342</sup> See John Quigley, *The "Privatization" of Security Council Enforcement Action: A Threat to Multilateralism*, 17 MICH. J. INT'L L. 249, 260 (1996); see also *Certain Expenses of the United Nations*, Advisory Opinion, 1962 I.C.J. 151, 168 (July 20) [hereinafter *Certain Expenses* case] ("As anticipated in 1945, therefore, each organ must, in the first place at least, determine its own jurisdiction.").

<sup>343</sup> See BERNHARDT ET AL., *supra* note 331, at 722; DE WET, *supra* note 338, at 138.

<sup>344</sup> See DE WET, *supra* note 338, at 138–39.

<sup>345</sup> See BERNHARDT ET AL., *supra* note 331, at 724.

<sup>346</sup> See Bertrand G. Ramcharan, *The Security Council and the Protection of Human Rights*, in RACISM AND HUMAN RIGHTS 16 (Raphael Walden ed., 2004).

<sup>347</sup> See BERNHARDT ET AL., *supra* note 331, at 725.

<sup>348</sup> See Evans & Sahnoun, *supra* note 335, at 104.

<sup>349</sup> See BERNHARDT ET AL., *supra* note 331, at 705.

<sup>350</sup> See *id.* at 763.

<sup>351</sup> See U.N. Charter art. 43, para. 1; *id.* art. 45.

and the contributing State.<sup>352</sup> Under these agreements, troop-contributing States should be responsible to the Council for the conduct of their troops.<sup>353</sup> By this arrangement, the U.N. may meet its responsibility for the conduct of its forces.<sup>354</sup> In practice, however, the Council has consistently exercised its Chapter VII powers by authorizing States to act instead of directing action by forces at its disposal.<sup>355</sup> Although unused, a mechanism nevertheless exists for the Council to exert control over the conduct of U.N.-participating military forces.

Structurally, then, the U.N. Charter provides the Security Council the authority to require Member States to take action or refrain from conduct as it decides when it determines that the requirement is necessary to preserve and maintain international peace and security. The Council itself is empowered to command forces in at least some form, although that U.N. Charter authority has never been exercised. The question remains whether the Security Council could use this power to require military forces operating under U.N. authority to ban prostitution patronage. The thesis of this article is that it can. To understand the reasoning, it is appropriate to turn in the next section to how the Council has exercised its authority.

#### B. The Security Council's Authority as Exercised

For the U.N.'s first forty years, Cold War rivalry and the veto powers of the opposing blocs precluded consensus on the implementation of Article 43.<sup>356</sup> In light of the East-West deadlock in the Security Council, the General Assembly stepped into the gap and passed the "Uniting for Peace" resolution,<sup>357</sup> asserting the authority to recommend peacekeeping missions to the Security Council when it was unable to act.<sup>358</sup> When the General Assembly then included the costs of peacekeeping operations in its assessments of members' dues, some members challenged the General Assembly's actions in the International Court of Justice (ICJ). Finding for the General Assembly in its *Certain Expenses* advisory opinion, the ICJ rejected the contention that the maintenance of peace and security

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<sup>352</sup> See *id.* art. 43, paras. 2–3.

<sup>353</sup> See Glick, *supra* note 328, at 99.

<sup>354</sup> See *id.* at 55.

<sup>355</sup> See MANUSAMA, *supra* note 329, at 202.

<sup>356</sup> See *id.*

<sup>357</sup> G.A. Res. 377 (V), U.N. Doc. A/RES/377(V) (Nov. 3, 1950).

<sup>358</sup> See JOSE E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS 126 (2005).

was entrusted solely to the Security Council.<sup>359</sup> It differentiated between coercive peace enforcement, which it said was solely within the purview of the Security Council, and peacekeeping.<sup>360</sup> Since peacekeeping missions are usually conducted with the consent of the country to which the peacekeepers are sent, such operations fall within the General Assembly's Article 11 powers.<sup>361</sup> Thus, as a result of Cold War politics, a practice was established whereby peacekeeping became entrusted to the General Assembly with some degree of Security Council oversight.

The Security Council's use of its Chapter VII powers has bloomed since the end of the Cold War, albeit with varying effectiveness.<sup>362</sup> Since the 11 September 2001 terrorist attacks, the Council has added breadth to its use of Chapter VII authority by requiring Members to enact domestic legislation at its direction. It has done this by first declaring forms of transnational criminal conduct—specifically, international terrorism and the smuggling of weapons of mass destruction—threats to international peace and security, but without targeting a specific country or crisis. In order to explore this approach, this section will compare representative pre-September 11th Resolutions with corresponding post-September 11th Resolutions. It will then look at how the Council has in practice used its authority over peacekeeping operations, using the example of HIV/AIDS awareness training for peacekeepers.

### 1. *International Terrorism*

Prior to the September 11th attacks, combating terrorism was primarily a General Assembly concern.<sup>363</sup> When the Council did take up international terrorism, it did so in response to specific incidents, and not necessarily using its coercive powers.<sup>364</sup> For example, responding to terrorist attacks on Pan American Flight 103 and Union de Transports Aériens Flight 772, the Council noted terrorism's "deleterious effect" on international relations and affirmed States' rights to protect their nationals from "acts of international terrorism that constitute threats to

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<sup>359</sup> See *Certain Expenses* case, *supra* note 342, at 165.

<sup>360</sup> See *id.* at 163–64.

<sup>361</sup> See *id.*

<sup>362</sup> See Quigley, *supra* note 342, at 249. See generally MANUSAMA, *supra* note 329, at 1–3 (commenting on the Security Council's increased use of its Chapter VII authority).

<sup>363</sup> See Eric Rosand, *Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight Against Terrorism*, 97 AM. J. INT'L L. 333, 333 (2003).

<sup>364</sup> See MANUSAMA, *supra* note 329, at 109–13.

international peace and security.”<sup>365</sup> But although the Council condemned the attacks, it merely deplored the Libyan government’s refusal to respond to requests for cooperation in assigning responsibility for the attacks.<sup>366</sup> It further requested that the Secretary-General seek Libya’s cooperation and urged States to encourage Libya to respond to requests for information, but took no coercive action.<sup>367</sup> In Resolution 731, then, the Council acknowledged that terrorism could threaten international peace and security but stopped short of labeling an international terrorist attack as a threat.<sup>368</sup>

Three months later, however, the Council determined that Libya’s recalcitrance was a threat to international peace and security and acted under Chapter VII.<sup>369</sup> Resolution 748 required Libya to comply with paragraph 3 of Resolution 731 by responding to requests for information from France, the United Kingdom, and the United States, and further required Libya to renounce terrorism promptly.<sup>370</sup> It then imposed a sanctions regime on Libya, and called upon non-member States to act in accordance with them.<sup>371</sup> But it is important that in this instance the Council’s coercive action was directed at Libya’s refusal to cooperate in tracking down the perpetrators, not the underlying attack itself.

The possibility that terrorism generally might be a threat to international peace and security was discussed in 1999. Several nations allowed that terrorism might threaten international peace and security if its effects were felt internationally.<sup>372</sup> Only Canada went so far as to state that it included terrorism in its definition of a threat to the peace.<sup>373</sup> But generally, Council Members took the position that the General Assembly was addressing international terrorism and thought the Council should encourage States to join anti-terrorism conventions.<sup>374</sup> In the end, the Council unanimously passed Resolution 1269, calling on States to

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<sup>365</sup> S.C. Res. 731, U.N. Doc. S/RES/731 (Jan. 21, 1992).

<sup>366</sup> *See id.* ¶¶ 1–2.

<sup>367</sup> *See id.* ¶¶ 3, 5.

<sup>368</sup> *See* MANUSAMA, *supra* note 329, at 110.

<sup>369</sup> *See* S.C. Res. 748, U.N. Doc. S/RES/748 (Mar. 31, 1992).

<sup>370</sup> *See id.* ¶¶ 1–2.

<sup>371</sup> *See id.* ¶¶ 3–7.

<sup>372</sup> *See, e.g.*, U.N. SCOR, 54th Sess., 4053d mtg. at 3 (Argentina), 5 (Slovenia), 6 (Canada), U.N. Doc. S/PV.4053 (Oct. 19, 1999); *see also* MANUSAMA, *supra* note 329, at 111.

<sup>373</sup> *See* UNSCOR, *supra* note 372, at 6.

<sup>374</sup> *See, e.g., id.* at 2 (Brazil), 6 (Netherlands), 8 (France).

join anti-terrorism conventions,<sup>375</sup> and expressing its readiness to act to counter terrorist threats to international peace and security.<sup>376</sup> However, it stopped short of actually deciding that international terrorism was a threat to the peace.

The tone of Security Council action changed dramatically after the September 11th attacks. The day after the attack, Resolution 1368 passed, declaring that the Council regarded the attacks “*like any act of international terrorism*, as a threat to international peace and security.”<sup>377</sup> The Council broke with past practice by speaking in broad terms against international terrorism while addressing a specific instance of it. Two weeks later it followed up by passing Resolution 1373.<sup>378</sup> Resolution 1373 was a dramatic break from the Council’s past treatment of terrorism.<sup>379</sup> Whereas pre-September 11th, the Council treated the phenomenon of terrorism as a General Assembly issue,<sup>380</sup> in 1373 the Council referred back to and reiterated 1368’s declaration of a threat to the peace, and imposed on Member States a comprehensive scheme to combat it. Resolution 1373 requires States to pass legislation criminalizing terrorist fundraising, to take a variety of steps to obstruct terrorist financing, to cooperate and exchange information, and to report their progress to a specially-created committee.<sup>381</sup> It particularly noted the connection between international terrorism and transnational organized crime in describing the scope of international cooperation it expected.<sup>382</sup> Further, it expressed its determination to ensure that its dictates were obeyed.<sup>383</sup>

Resolution 1373 works within a negative definition of peace, so its novelty is not so much related to the connection between a threat to the peace and the potential for international armed conflict to occur.<sup>384</sup> Rather, its innovation lies in going beyond calls for adherence to conventions and protocols, which would only bind their members, and instead creating a standard set of binding obligations on all U.N.

<sup>375</sup> See S.C. Res. 1269, ¶¶ 2, 4, U.N. Doc. S/RES/1269 (Oct. 19, 1999).

<sup>376</sup> See *id.* ¶ 5.

<sup>377</sup> S.C. Res. 1368, ¶ 1, U.N. Doc. S/RES/1368 (Sept. 12, 2001) (emphasis added).

<sup>378</sup> See S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

<sup>379</sup> See MANUSAMA, *supra* note 329, at 185.

<sup>380</sup> See Rosand, *supra* note 363, at 333.

<sup>381</sup> See S.C. Res. 1373, *supra* note 378, ¶¶ 1–2, 6; see also MANUSAMA, *supra* note 329, at 185; Rosand, *supra* note 363, at 334.

<sup>382</sup> See S.C. Res. 1373, *supra* note 378, ¶ 4.

<sup>383</sup> See *id.* ¶ 8.

<sup>384</sup> See DE WET, *supra* note 338, at 172.

members.<sup>385</sup> Resolution 1373 arguably “amounted to international legislation.”<sup>386</sup> It has been criticized as *ultra vires* because the U.N. Charter does not provide the Council authority to intrude on Members’ legislative initiatives.<sup>387</sup> At the same time, it did not go beyond measures already required or recommended by various conventions and General Assembly resolutions, possibly mitigating any over-reach.<sup>388</sup> In any event, no State has objected to 1373, setting the stage for a broader interpretation of the Council’s Chapter VII powers.<sup>389</sup> In the meantime, the finding that terrorism threatens international peace and security has been reiterated in Resolutions 1438,<sup>390</sup> 1440,<sup>391</sup> 1450,<sup>392</sup> 1530,<sup>393</sup> and 1611;<sup>394</sup> Resolution 1456<sup>395</sup> condemned terrorism in all its forms.<sup>396</sup> Resolution 1373 therefore stands as an example of the Security Council’s authority to order States to adopt domestic measures to counter a generalized threat to international peace and security.

## 2. Countering Weapons of Mass Destruction Proliferation

As with international terrorism, the Security Council’s approach to containing the proliferation of weapons of mass destruction (WMD) can be distinguished between pre- and post-September 11th. It is useful to compare the Council’s stances on North Korea’s threatened withdrawal from the nuclear non-proliferation regimes in 1993 and the nuclear weapons tests of India and Pakistan in May 1998, with its stance on the potential spread of WMD to terrorists and non-State actors in the early twenty-first century.

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<sup>385</sup> See Rosand, *supra* note 363, at 334.

<sup>386</sup> MANUSAMA, *supra* note 329, at 186.

<sup>387</sup> See BERNHARDT ET AL., *supra* note 331, at 709.

<sup>388</sup> See MANUSAMA, *supra* note 329, at 186.

<sup>389</sup> See BERNHARDT ET AL., *supra* note 331, at 709.

<sup>390</sup> S.C. Res. 1438, U.N. Doc. S/RES/1438 (Oct. 14, 2002) (regarding bomb attacks in Bali, Indonesia).

<sup>391</sup> S.C. Res. 1440, U.N. Doc. S/RES/1440 (Oct. 24, 2002) (regarding hostage-taking in Moscow).

<sup>392</sup> S.C. Res. 1450, U.N. Doc. S/RES/1450 (Dec. 13, 2002) (regarding bomb and missile attacks targeting Israelis in Kenya).

<sup>393</sup> S.C. Res. 1530, U.N. Doc. S/RES.1530 (Mar. 11, 2004) (regarding bomb attacks in Madrid, Spain).

<sup>394</sup> S.C. Res. 1611, U.N. Doc. S/RES/1611 (July 7, 2005) (regarding bomb attacks in London, United Kingdom).

<sup>395</sup> S.C. Res. 1456, U.N. Doc. S/RES/1456 (Jan. 20, 2003) (adopting a declaration on terrorism).

<sup>396</sup> See generally MANUSAMA, *supra* note 329, at 112.

North Korea joined the Treaty on the Nonproliferation of Nuclear Weapons<sup>397</sup> (NPT) as a non-nuclear weapons State in December 1985,<sup>398</sup> but delayed entering the required International Atomic Energy Agency (IAEA) safeguards agreement<sup>399</sup> until 30 January 1992.<sup>400</sup> North Korea sent the IAEA its initial nuclear activities disclosure report in May 1992.<sup>401</sup> The IAEA quickly found discrepancies indicating that more plutonium had been processed than North Korea admitted.<sup>402</sup> On 12 March 1993, North Korea announced its intent to withdraw from both the NPT and the Safeguards Agreement that had entered into force less than a year earlier.<sup>403</sup>

The Security Council responded to North Korea's threatened abrogation with Resolution 825.<sup>404</sup> The Resolution did not determine the existence of a threat to the peace, or even mention the Council's responsibility to safeguard the peace. Rather, it called upon North Korea to reconsider its withdrawal decision and honor its NPT obligations, and urged Members to encourage compliance.<sup>405</sup>

Neither India nor Pakistan is a party to the NPT.<sup>406</sup> India tested a nuclear device in 1974, but had refrained from further testing for over two decades. On 11 May 1998, it unexpectedly conducted underground

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<sup>397</sup> Treaty on the Nonproliferation of Nuclear Weapons, *opened for signature* July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161 [hereinafter NPT].

<sup>398</sup> See U.N. Office for Disarmament Affairs (UNODA), Weapons of Mass Destruction Branch, Status of Treaties, *available at* <http://disarmament.un.org/TreatyStatus.nsf> [hereinafter UNODA] (follow "Status of Treaties" hyperlink; then follow "View by country and treaty" hyperlink; then follow "next" hyperlink to Democratic People's Republic of Korea; then follow "NPT" hyperlink).

<sup>399</sup> See NPT, *supra* note 397, art. III; see also Eric Yong-Joong Lee, *The Six-Party Talks and the North Korean Nuclear Dispute Resolution Under the IAEA Safeguards Regime*, 5 ASIAN-PAC. L. & POL'Y J. 101, 104 (2004).

<sup>400</sup> See Int'l Atomic Energy Agency (IAEA), Agreement of 30 Jan 1992 Between the Gov't of the Democratic People's Republic of Korea and the IAEA for the Application of Safeguards in Connection with the Treaty on the Non-Proliferation of Nuclear Weapons, IAEA Doc. INFCIRC/403 (May 1992) [hereinafter Safeguards Agreement]; see also David E. Sanger, *North Korea Assembly Backs Atom Pact*, N.Y. TIMES, Apr. 10, 1992, at A3.

<sup>401</sup> See Lee, *supra* note 399, at 104.

<sup>402</sup> See *id.*

<sup>403</sup> See Douglas Jehl, *North Korea Says It Won't Pull Out of Arms Pact Now*, N.Y. TIMES, June 12, 1993, at 1; see also Lee, *supra* note 399, at 104.

<sup>404</sup> S.C. Res. 825, U.N. Doc. S/RES/825 (May 11, 1993).

<sup>405</sup> See *id.* ¶¶ 1–2, 4.

<sup>406</sup> See UNODA, *supra* note 398.

tests on three nuclear devices.<sup>407</sup> Threatened by the resurgent nuclear ambitions of its neighbor and long-time enemy, Pakistan ignored international pressure and conducted its own nuclear tests on 28 May 1998.<sup>408</sup> Within a week of the second test, the Security Council took up the matter and passed Resolution 1172.<sup>409</sup>

The Resolution declared the Council's awareness that it was primarily responsible for the maintenance of international peace and security, but stopped short of finding that a threat existed.<sup>410</sup> It demanded that the two nations refrain from further tests, and urged them to act with restraint, resume a dialogue to settle their issues, and join the non-proliferation regime.<sup>411</sup> But it did express the Council's readiness to consider how to ensure implementation of its measures;<sup>412</sup> read together with the preamble recitation regarding the Council's responsibility to maintain the peace, this was essentially a threat to escalate to Chapter VII measures if India and Pakistan proved recalcitrant, just as with Libya in the terrorism context.<sup>413</sup>

Six years later, the post-September 11th Security Council, faced with the scale and ambition of repeated acts of international terrorism, set out to shore up the non-proliferation regime to keep WMD from terrorists and other non-State actors with a resolution almost as strong as 1373. Resolution 1540<sup>414</sup> was also legislative in nature, but less intrusive than 1373.<sup>415</sup> It required States to adopt and enforce laws to prevent the transfer of WMD and associated delivery systems to non-State actors.<sup>416</sup> While Resolution 1540 did not refer to Resolution 1373, it nevertheless adopted a similar approach to preventing a general international phenomenon by binding Members to enact domestic legislation in order to prevent a threat to international peace and security.

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<sup>407</sup> See Jonathan Karp et al., *Chain Reaction: India's Nuclear Tests Trigger Global Fears for Trade & Safety*, WALL ST. J., May 12, 1998, at A1.

<sup>408</sup> See Jonathan Karp et al., *Pakistan Economy Faces Fallout of Bomb Test*, WALL ST. J., May 29, 1998, at A11.

<sup>409</sup> S.C. Res. 1172, U.N. Doc. S/RES/1172 (June 6, 1998).

<sup>410</sup> See *id.*

<sup>411</sup> See *id.* ¶¶ 3–5, 13–14.

<sup>412</sup> See *id.* ¶ 16.

<sup>413</sup> See *supra* text accompanying notes 365–371.

<sup>414</sup> S.C. Res. 1540, U.N. Doc. S/RES/1540 (Apr. 28, 2004).

<sup>415</sup> See MANUSAMA, *supra* note 329, at 187.

<sup>416</sup> See S.C. Res. 1540, *supra* note 414, ¶¶ 1–5; see also MANUSAMA, *supra* note 329, at 187–88.



### 3. HIV/AIDS & Peacekeeping Operations

With respect to its responsibility to oversee peacekeeping operations, the Security Council has been less ambitious. Although it has direct responsibilities over the conduct of peacekeepers under Article 43,<sup>417</sup> it instead has left this to the Secretary-General. The issue of the HIV/AIDS risk to peacekeepers is a useful example of both how the Security Council has backed away from a broader, positive definition of peace in its approach to maintaining international peace and security, and how it has left peacekeeping oversight to other bodies.

When the United States held the Security Council Presidency in 2000, then-Vice President Gore chaired a Council session at which the United States proposed “a new security agenda” which would include environmental issues, governmental corruption, and pandemics as international peace and security matters.<sup>418</sup> While the notion received some support from Members,<sup>419</sup> others expressed doubt and noted that the Security Council’s responsibility was to maintain international peace and security.<sup>420</sup> It was argued that the Security Council could contribute to combating AIDS by working to reduce particularly at-risk populations such as refugees and child soldiers.<sup>421</sup>

In the end, the Council was far less ambitious than Vice President Gore had urged, and adopted a Resolution expressing concern over the potential damage of HIV/AIDS to the health of international peacekeepers and requesting the Secretary-General to take steps to insure that deployed peacekeepers are trained in HIV/AIDS prevention.<sup>422</sup> During the discussion preceding the Resolution’s passage, several Members and invited attendees commented that HIV/AIDS was an issue best left to other U.N. organs such as the General Assembly and the Economic and Social Council despite its potential impact on peace and security.<sup>423</sup> This debate was followed up by Resolution 1318,<sup>424</sup> which

<sup>417</sup> See *supra* text accompanying notes 350–53.

<sup>418</sup> See U.N. SCOR, 55th Sess., 4087th mtg. at 3, U.N. Doc. S/PV.4087 (Jan. 10, 2000); see also DE WET, *supra* note 338, at 173.

<sup>419</sup> See, e.g., U.N. SCOR, *supra* note 418, at 17 (Sri Lanka).

<sup>420</sup> See *id.* at 13 (Namibia).

<sup>421</sup> See *id.*

<sup>422</sup> See S.C. Res. 1308, ¶¶ 1, 3, U.N. Doc. S/RES/1308 (July 17, 2000); see also DE WET, *supra* note 338, at 173.

<sup>423</sup> See U.N. SCOR, 55th Sess., 4172d mtg. at 10 (United Kingdom), 14 (Ukraine), 16 (Netherlands), 17 (Jamaica), 25 (Uganda), U.N. Doc. S/PV/4172 (July 17, 2000).

<sup>424</sup> S.C. Res. 1318, U.N. Doc. S/RES/1318 (Sept. 7, 2000).

adopted a declaration “on ensuring an effective role for the Security Council in the maintenance of international peace and security, particularly in Africa.”<sup>425</sup> Resolution 1327<sup>426</sup> was passed later in 2000, adopting the recommendations of the Panel on United Nations Peacekeeping Operations report,<sup>427</sup> which dealt primarily with issues such as the need to develop peacekeeping doctrine, provide a more reliable pool of forces, and define missions clearly.<sup>428</sup> The Council thus declined to define “peace” expansively in a positive sense, leaving intact its historic tying of peace to the absence of armed conflict.<sup>429</sup> But at the same time, it left itself open to accusations that it is not meeting its Chapter VII responsibilities with respect to supervising peacekeeping forces, calling for operations without any assurance that Members will actually participate,<sup>430</sup> and without directly controlling the conduct of operations or the peacekeepers.<sup>431</sup>

The Security Council, then, has well-established authority to direct Member States to take actions it deems necessary in order to maintain international peace and security. Chapter VII of the U.N. Charter places almost no restrictions on what the Council may order once it has determined that a threat to the peace exists, provided none of the Permanent Members vetoes it. In practice, the Council has already exercised that power to direct States’ efforts to combat generalized international phenomena that it has declared threatening, such as international terrorism and WMD proliferation. Additionally, the Council has the power to regulate directly the conduct of U.N. peacekeepers carrying out its mandate. Although it has yet to do so, preferring to leave that responsibility to the General Assembly and Secretary-General, it nevertheless can and should take up a role it was intended to fulfill.

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<sup>425</sup> *Id.*

<sup>426</sup> S.C. Res. 1327, at ¶ 1, U.N. Doc. S/RES/1327 (Nov. 13, 2000).

<sup>427</sup> The Secretary-General, *Report of the Panel on United Nations Peace Operations, delivered to the Security Council and General Assembly*, U.N. Doc. S/2000/809, A/55/305 (Aug. 21, 2000) [hereinafter *Peace Operations Panel Report*].

<sup>428</sup> *See id.* at 54–55.

<sup>429</sup> *See* DE WET, *supra* note 338, at 173–74.

<sup>430</sup> *See* Quigley, *supra* note 342, at 263.

<sup>431</sup> *See id.* at 264–65; Glick, *supra* note 328, at 54–55.

## V. Conclusion

Since the September 11th attacks, the Security Council has established for itself the power to compel Members to legislate against declared threats to international peace and security. Resolution 1373 required domestic measures in financial regulation and law enforcement,<sup>432</sup> while the Council mandated adoption of export controls and greater information sharing among Members with Resolution 1540.<sup>433</sup> By moving against international phenomena it decided were threats to international peace and security, the Council expanded its reach beyond matters related to recalcitrant States and flashpoint confrontations.

Human trafficking is a similarly nebulous transnational enterprise. Its incarnation as sexual slavery through forced prostitution is particularly repellant as a human rights violation and insidious because it is so easily overlooked as a victimless crime or voluntary activity. Nevertheless, it is a source of revenue for transnational criminal groups who thrive on instability and who are often tied to transnational terrorist groups such as the FARC.<sup>434</sup> Indeed, the Security Council noted in Resolution 1373 the close connection between terrorism and organized crime.<sup>435</sup> As a serious human rights violation and a resource for forces of instability, trafficking can and should be declared by the Council a threat to international peace and security, and countries contributing peacekeeping troops should be compelled to issue and enforce orders banning peacekeepers' patronage of prostitution.

Such a Resolution would only minimally expand the Council's Chapter VII powers. As noted, the Council has already recognized a connection between organized crime and terrorism in a Chapter VII Resolution, as the United States did under both the Clinton and Bush Administrations. Furthermore, a growing body of research demonstrates the adverse impact of forced prostitution in post-conflict settings. Unlike the case of HIV/AIDS infection among peacekeepers, which is but one aspect of a larger public health problem, patronage of forced prostitution works directly against accomplishing the peacekeeping mission by undermining the rule of law, funding the elements hostile to restoring

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<sup>432</sup> See *supra* text accompanying note 381.

<sup>433</sup> See *supra* text accompanying note 416.

<sup>434</sup> See *supra* text accompanying notes 258–259.

<sup>435</sup> See S.C. Res. 1373, *supra* note 378, ¶ 4.

order, and contributing to corruption and instability. Additionally, by limiting the Resolution's reach to peacekeepers, the Council would respect Member sovereignty over the conduct of its troops in garrison, apart from U.N. activities. Thus it would not transgress existing treaty law's tacit demarcation of prostitution generally as a matter of domestic State policy. As a matter of Council practice, the authority to issue a Resolution requiring action against such an enterprise has already been established.

Furthermore, peacekeeper involvement in sexual exploitation and abuse undermines the U.N.'s legitimacy as the guardian of international peace and security and a global advocate for human rights. Sexual misconduct by those serving under the U.N.'s colors is a scandal that requires direct redress by the Security Council as the only body that can act expeditiously, above the normal grind of U.N. bureaucratic study and consultation. Since the end of the Cold War, the Council has shown a renewed willingness to exercise its coercive powers. Passing a Resolution directly regulating peacekeeper conduct would be a step toward realization of its intended leadership role in using military force to guarantee the peace.

Prospects for actually passing the Resolution described are not good. First, the U.N. is struggling to obtain and keep the number of peacekeepers required for its existing missions.<sup>436</sup> Faced with a struggle to meet manpower requirements, an institutional reluctance to place greater demands on troop-contributors is understandable and predictable. In addition, resurgent political gamesmanship among the Permanent Security Council Members would probably play a role. The complicity of Russian military officers in forced prostitution<sup>437</sup> is symptomatic of larger problems of corruption. Many local police allegedly have ties to trafficking rings<sup>438</sup> and senior politicians are reportedly tied to organized crime.<sup>439</sup> At the same time, China has made accommodation of human rights abusers in pursuit of its strategic goals a notable aspect of its foreign policy.<sup>440</sup> Neither country can be expected to support a U.S.-led effort to combat sexual slavery.

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<sup>436</sup> See *Peace Operations Panel Report*, *supra* note 427, ¶¶ 102–18.

<sup>437</sup> See *supra* text accompanying notes 83–84.

<sup>438</sup> See Int'l Org. for Migration (IOM), *Trafficking for Sexual Exploitation: the Case of the Russian Federation* 37 (June 2002) (prepared by Donna M. Hughes).

<sup>439</sup> See *id.* at 57.

<sup>440</sup> See *A Ravenous Dragon: Special Report on China's Quest for Resources*, *ECONOMIST*, Mar. 15, 2008, at 14.

Nonetheless, the United States should pursue Council action. The UCMJ amendment has already made a strong statement of policy, and the United States has led the formation of human trafficking policy within NATO.<sup>441</sup> From its position as a Permanent Member of the Council and as the world's leading military power, the United States has a responsibility to set an example internationally. Introducing a Security Council Resolution to require Members to ban peacekeeper prostitution patronage is a logical next step to build upon the addition of a patronage offense under the UCMJ and to implement NSPD-22 fully.

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<sup>441</sup> *See supra* text accompanying notes 241–244.