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The ASEAN Enhanced Dispute Settlement Mechanism: Doing It the "ASEAN Way"

Joel Vander Kooi*

Introduction

In November 2004, the Association of Southeast Asian Nations (ASEAN) established its Enhanced Dispute Settlement Mechanism (EDSM).[1] The ASEAN states sought to improve upon their first Dispute Settlement Mechanism,[2] which had proven too weak to assure effective economic cooperation between them.[3] The ASEAN states have traditionally maintained such a strong commitment to national sovereignty that it has often obstructed their efforts at cooperation.[4]

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1. *See* ASEAN Protocol on Enhanced Dispute Settlement Mechanism, Nov. 29, 2004, *available at* http://www.aseansec.org/16754.htm (enumerating the provisions of the 2004 Protocol on Enhanced Dispute Settlement Mechanism (EDSM) replacing the 1996 Protocol on Dispute Settlement Mechanism (DSM)). *See generally* Alyssa Greenwald, Note, *The ASEAN-China Free Trade Area (ACFTA): A Legal Response to China's Economic Rise?*, 16 DUKE J. COMP. & INT'L L. 193, 207 (2006) (illustrating the differences and changes between ASEAN's 2004 EDSM Protocol and the 1996 DSM).

2. *See* R. James Ferguson, *ASEAN Concord II: Policy Prospects for Participant Regional "Development,"* 26 CONTEMP. SOUTHEAST ASIA 393, 401 (2004) (illustrating plans for a stronger ASEAN Dispute Settlement Mechanism (DSM) by implementing binding decisions in trade disputes); Greenwald, *supra* note 1, at 207 (noting that the 2004 ASEAN Protocol instituted changes to ASEAN's Appellate Body and created the "Consultation to Solve Trade and Investment Issues"); *see also* Miles Kahler, *Legalization as Strategy: The Asia-Pacific Case*, 54 INT'L ORG. 549, 565 (2000) (remarking that the basis for the ASEAN adoption of their first Dispute Settlement Mechanism was the desire to further the growth of economic exchange among ASEAN members).

3. *See* Markus Hund, *From 'Neighbourhood Watch Group' to Community?: The Case of ASEAN Institutions and the Pooling of Sovereignty*, 56 AUSTL. J. INT'L AFF. 99, 108 (2002) (reaffirming the ineffectiveness of the first Dispute Settlement Mechanism of 1996); Hidetaka Yoshimatsu, *Collective Action Problems and Regional Integration in ASEAN*, 28 CONTEMP. SOUTHEAST ASIA 115, 122 (2006) (providing how the first Dispute Settlement Mechanism (DSM) had no power to enforce its rulings against non-compliant member states of ASEAN); H.E. Ong Keng Yong, Sec'y-Gen. of ASEAN, *ASEAN and the 3 L's: Leaders, Laymen and Lawyers*, (March 2005), *available at* http://www.aseansec.org/17356.htm (explaining that the 1996 Protocol was ineffective because of its "excessive bureaucratic nature").

4. *See* Alan Dupont, Book Review, *Explaining ASEAN: Regionalism in Southeast Asia*, 25 CONTEMP. SOUTHEAST ASIA 157, 157 (2003) (emphasizing the underlying problem concerning the strong attachment of member states to national sovereignty); Peter Eng, *Transforming ASEAN*, 22 WASH. Q. 49, 64 (1999) (noting how some members of ASEAN have thought that it was not expected of them to cede national sovereignty to achieve integration); *see also* Shaun Narine, *State Sovereignty, Political Legitimacy and Regional Institutionalism in the Asia-Pacific*, 17 PAC. REV. 423, 424 (2004) (remarking the general sentiment that national sovereignty should not be 'pooled' but enhanced).

* **J.D., Valparaiso University School of Law. The author currently works in Employment Law Services at Mountain States Employers Council.** **He would like to thank Jin Baek, Sean Campbell, Sandra Moreno, and Derick Steele for comments on an earlier draft of this manuscript. The author would also like to thank Prof. Richard Stith for his comments and invaluable advice in this and other areas.**

The EDSM will require a degree of accountability of member states to one another, with a corresponding sacrifice of sovereignty by each member state.[5] Yet, the mechanism may ensure the effectiveness of ASEAN in removing trade barriers within and encouraging investment from without.[6] In keeping with ASEAN's commitment to state sovereignty, the powers of the EDSM are limited,[7] but this article will argue that ASEAN member states should further limit explicitly the powers of the EDSM in order to better protect their sovereignty.

Section I of this article discusses international regional cooperation. First, it examines the need for enforcement of compliance within international regional cooperative associations. It further examines the concepts of direct effect and supremacy, as they have been developed within the European Community. It then explores the concept of *stare decisis* and the role that it has begun to play within international legal mechanisms. Second, this section explores the extent of cooperation that has evolved within ASEAN, concluding with the establishment of the Enhanced Dispute Settlement Mechanism.

Section II analyzes the potential dangers of ASEAN's EDSM developing the powers to invalidate and create law. Finally, this section proposes specific limitations for the EDSM to protect member state sovereignty while further bolstering the effectiveness of the EDSM.

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5. *See* Hank Lim & Matthew Walls, *ASEAN After NAFTA: What's Next?*, 3 DIALOGUE & COOPERATION 91, 95–96 (2004) (stating that the EDSM will make member states more responsible via the imposition of sanctions and 'effective mechanisms'); Denis Hew, *Beware Trade Bloc Losing Momentum*, STRAITS TIMES (Sing.), Apr. 18, 2005 (commenting that ASEAN's EDSM, equipped with more effective powers to resolve regional disputes, will make member states more accountable); *see also* ASEAN Protocol on Enhanced Dispute Settlement Mechanism, *supra* note 1 (declaring that ASEAN member states must comply with recommendations of the Appellate Body or face possible suspension of concessions).

6. *See* Hadi Soesastro, *Accelerating ASEAN Economic Integration: Moving Beyond AFTA* 15–16 (Center for Strategic and Int'l Stud., Working Paper No. 091, 2005), *available at* http://www.csis.or.id/papers/wpe091 (outlining how the Enhanced Dispute Settlement Mechanism, if implemented with a "high degree of independence, credibility and transparency," could improve trade and investment); *see also* Lee Hsien Loong, Sing. Prime Minister, Keynote Address at the ASEAN 100 Leadership Forum in the Republic (Sept. 29, 2005) (commenting that ASEAN's Protocol can help to further closer economic integration by reducing direct competition among member states); R. Ravichandran, *ASEAN Summit Reflects Commitment for Peace, Stability and Prosperity*, MALAY. NAT'L NEWS AGENCY, Dec. 1, 2004 (discussing how the signing of numerous agreements at the 10th ASEAN Summit, including the Enhanced Dispute Settlement Mechanism (EDSM), show a promising commitment toward economic prosperity).

7. *See* Benny Teh Cheng Guan, *ASEAN'S Regional Integration Challenge: The ASEAN Process*, 20 COPHENHAGEN J. OF ASIAN STUD. 70, 85–86 (2004) (stating that adoption of 'institutions' or mechanisms for enhanced interaction is futile if ASEAN members are reluctant to pool sovereignty); *see also* Hiro Katsumata, *Reconstruction of Diplomatic Norms in Southeast Asia: The Case for Strict Adherence to the "ASEAN Way,"* 25 CONTEMP. SOUTHEAST ASIA 104, 112 (2003) (expressing that cooperation between ASEAN member states has been historically affected by large concerns about each other's national sovereignty); *ASEAN to Review 'Cherished' Noninterference Policy*, JAPAN ECON. NEWSWIRE, Dec. 13, 2005 (providing that since the adoption of EDSM, the mechanism has never been invoked to resolve regional disputes).

I. International Regional Cooperation

International regional cooperation has taken on great significance in recent decades.[8] To a large extent the objectives behind such cooperation are economic.[9] Such economic cooperation has taken many forms.[10] Bela Balassa has identified five such forms based on increasing degrees

8. *See* Yoshimatsu Hidetaka, *Political Leadership, Informality and Regional Integration in East Asia: The Evolution of ASEAN Plus Three*, 4 EUR. J. E. ASIAN STUD. 205, 205–06 (2005) (explaining that advances toward economic integration and cooperation gained momentum after the mid-1990s); *see also* Takashi Terada, *Constructing an 'East Asian' Concept and Growing Regional Identity: From EAEC to ASEAN+3*, 16 PAC. REV. 251, 273 (2003) (taking the 1997 financial crisis as an example of how East Asian countries have embarked to improve economic and political cooperation); Deborah A. Haas, Note, *Out of Others' Shadows: ASEAN Moves Toward Greater Regional Cooperation in the Face of the EC and NAFTA*, 9 AM. U. J. INT'L L. & POL'Y 809, 866 (1994) (discussing how ASEAN may look to model approaches of other international associations to pattern regional cooperation).

9. *See* David C. Stimson, *INTA and ASEAN or Around the World in a State-Free Haze*, 93 TRADEMARK REP. 105, 107–08 (2003) (discussing how ASEAN has recently focused a great deal more on economic cooperation tending toward regional economic cooperation and global trade liberalization); *see also* Hadi Soesastro, *An ASEAN Economic Community and ASEAN+3: How Do They Fit Together?* 1–10 (Australia-Japan Res. Ctr., Pacific Economic Papers, Paper No. 338, 2003) (providing that since the declaration of ASEAN Concord II (Bali Concord II), ASEAN has been pursuing an end goal of economic integration and inter-regional cooperation). *See generally* Lay Hong Tan, *Will ASEAN Economic Integration Progress Beyond a Free Trade Area?*, 53 INT'L & COMP. L. Q. 935, 935 (2004) (indicating how ASEAN was originally formed for primarily political reasons to secure the region's peace, stability and development).

10. *See* DENNIS HEW, ROADMAP TO AN ASEAN ECONOMIC COMMUNITY 63 (Institute of Southeast Asian Studies) (2005) (defining economic integration and discussing the institutional reforms to achieve ASEAN Economic Integration); ASIAN ECONOMIC COOPERATION IN THE NEW MILLENNIUM: CHINA'S ECONOMIC PRESENCE 130 (Heping Cao & Calla Wiemer eds., 2004) (noting the steps taken to achieve economic cooperation since 1992, including a tax reduction plan, economic reform and trade liberalization). *See generally* Press Release Bureau for Economic Integration, 10th ASEAN Summit; ASEAN Takes Bold Steps to Accelerate Integration of Priority Sectors, FTA Negotiations (January 2005), *available at* http://www.aseansec.org/aseanone/articles.211.pdf (describing the process of facilitating the integration of the initially identified eleven priority sectors to speed economic integration).

of integration[11] that include free trade areas, customs unions, common markets, economic unions, and complete economic integration of member states.[12]

The North American Free Trade Agreement (NAFTA) established a free trade area that encompasses Canada, the United States, and Mexico.[13] NAFTA's goal was to remove barriers to trade between the member states, so that goods and services may flow freely across their common borders.[14] The European Community (EC), however, has progressed far beyond a free

11. *See* BELA BALASSA, THE THEORY OF ECONOMIC INTEGRATION 1–2 (Richard D. Irwin, Inc., 1961) (defining economic integration as both a process and a state of affairs and that it can take several forms according to varying degrees of integration); *see also* PETER ROBSON, THE ECONOMICS OF INTERNATIONAL INTEGRATION 2 (Charles Carter ed., 1980) (identifying different forms of international economic integration and distinguishing them based on the treatment of tariffs). *See generally* Byung-Woon Lyou, *Building the Northeast Asian Community,* 11 IND. J. GLOBAL LEGAL STUD. 257, 269-70 (2004) (distinguishing free trade areas and customs unions with respect to the treatment of trade barriers with non-member nations, where in the former, separate national barriers against trade with the outside world remain, whereas with the latter, member nations adopt a common set of external barriers).

12. *See* BALASSA, *supra* note 11, at 14 (describing the treatment of tariffs and qualitative restrictions among free trade areas, customs unions and common markets and focusing on a common market where member states remove barriers to the movement of goods as well as barriers to economic factor movements); *see also* Masahiro Kawai, *Regional Economic Integration and Cooperation in East Asia* 12 (June 7, 2004) (unpublished working paper, prepared for presentation to the Experts' Seminar on the "Impact and Coherence of OECD Country Policies on Asian Developing Economies"), *available at* http://www.oecd.org/dataoecd/43/7/33628756.pdf (explaining the institutionalization of economic integration via formal institutional mechanisms for trade and investment facilitation, harmonization of rules, standards and procedures, and dispute settlements as a result of recognition of the deepening macroeconomic and financial interdependence of the region). *See generally* MIROSLAV N. JOVANOVIC, INTERNATIONAL ECONOMIC INTEGRATION: LIMITS AND PROSPECTS 1 (Routledge 1998) (1992) (discussing the importance of economic integration and citing the European Community as an example of successful integration).

13. *See* North American Free Trade Agreement, U.S.-Can.-Mex., pmbl., Dec. 17, 1992, 32 I.L.M. 289 (1993), *available at* http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=80#A101 (identifying the signatories to NAFTA as the United States, Canada and Mexico); *see also* United States Department of Agriculture, Fact Sheet: North American Free Trade Agreement (NAFTA), (March 2006), *available at* http://www.fas.usda.gov/info/factsheets/NAFTA.asp (describing the implementation and completion dates for NAFTA and the removal of trade and investment barriers among the United States, Canada and Mexico). *See generally* Noemi Gal-Or, *Private Party Direct Access: A Comparison of the NAFTA and the EU Disciplines,* 21 B.C. INT'L & COMP. L. REV. 1, 5–6 (1998) (asserting that the primary purpose of NAFTA is to assist the North American region, specifically the United States, Canada and Mexico, in becoming more economically competitive with the rest of the world through rules concerning trade, investment and the provision of services).

14. *See* North American Free Trade Agreement, U.S.-Can.-Mex., art. 102, ¶ 1, Dec. 17, 1992, 32 I.L.M. 289 (1993), *available at* http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=80#A101 (establishing the objectives of NAFTA's free trade area as the elimination of trade barriers, promotion of fair competition, substantial increase of investment opportunities and protection and enforcement of intellectual property rights among the territories of the parties); *see also* Frank J. Garcia, *"Americas Agreements"—An Interim Stage in Building the Free Trade Area of the Americas,* 35 COLUM. J. TRANSNAT'L L. 63, 71–72 (1997) (identifying that NAFTA established a free trade agreement and defining the free trade agreement as providing free circulation for goods and commodities through the elimination of tariffs and non-tariff barriers). *See generally In Miami*, *Freer Trade*, N.Y. TIMES, Dec. 12, 1994, at A18 (referring to the free trade zone created by NAFTA among the United States, Mexico, Canada and Chile).

trade area.[15] The member states have removed tariffs and other trade barriers between them to allow free movement of goods, and have also established common external trade policies.[16] They also have removed the barriers to free movement of labor and other market factors within the EC.[17] The EC has replaced most member state currencies with a single European currency, and has established several supranational institutions to ensure compliance among its members

15. *See* DEVELOPMENT ASSISTANCE COMMITTEE, ORGANIZATION FOR ECONOMIC CO-OPERATION & DEVELOPMENT, EUROPEAN COMMUNITY 21 (1998) (setting out the broad objectives of the European Community as fostering the sustainable economic and social development of developing countries, the smooth and gradual integration of developing countries into the world economy and the campaign against poverty in developing countries); *see also Economic and Monetary Union and the Euro*, EUROPE IN 12 LESSONS (2006), *available at* http://europa.eu/abc/12lessons/index7_en.htm (describing the single market and the economic and monetary union the European Community has formed and how it affects Europeans beyond trade, in fact, imparting a sense of identity to Europeans). *See generally* PETER ROBSON, THE ECONOMICS OF INTERNATIONAL INTEGRATION 2 (George Allan & Unwin Ltd.) (1980) (comparing free trade areas and customs unions with respect to the tariff-free movement of products in the area, and distinguishing free trade areas in that each country retains its own tariff against the rest of the world).

16. *See* Garcia, *supra* note 14, at 65–67 (recognizing NAFTA as establishing a free trade agreement and defining the free trade agreement as providing free circulation for goods and commodities through the elimination of tariffs and non-tariff barriers and suggesting that NAFTA can be the focal point for developing a Free Trade Area of the Americas). *See generally* Zakir Hafez, *Weak Discipline: GATT Article XXIV and the Emerging WTO Jurisprudence on RTAs,* 79 N. DAK. L. REV. 879, 886 (2003) (discussing the characteristics of a free trade area as the elimination of barriers to trade in goods among its members, where the members may retain all of their preexisting tariffs and other trade barriers in their trade relations with third-party countries); *The Single Market,* EUROPE IN 12 LESSONS (2006), *available at* http://europa.eu/abc/12lessons/index6_en.htm (describing the single market as the means to achieve harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, and an increase in the standard of living within member states).

17. *See* Treaty of Rome, tit. 3, Mar. 25, 1957, *available at* http://www.bmdf.co.uk/rometreaty.pdf (stating freedom of movement for workers shall be secured within the European Community and describing the rights contained within freedom of movement); *see also Free Movement of Workers and the Principle of Equal Treatment*, EUR. COMM'N (May 1, 2003), *available at* http://ec.europa.eu/employment_social/free_movement/index_en.htm (last visited Sept. 18, 2006) (describing freedom of movement within the European Community as including the right to look for another job, work, right to reside, right to remain and the right to equal treatment in another member state). *See generally* David Everett Marko, *A Critical Review of Market Access in Central and Eastern Europe: The European Community's Role,* 17 MD. J. INT'L L. & TRADE 1, 23 (1993) (noting that the EC has improved access to employment in the community, but subject to each member state's assessment of its own labor market).

with EC law.[18] The extent of cooperation in the EC has progressed to the point that member states are considering adopting a supranational European Community constitution.[19]

A. Enforcement of Compliance

International economic cooperation usually requires at least some mechanism for enforcing compliance.[20] The authority of that enforcement mechanism generally must coincide with the extent of cooperation sought.[21] For example, since a free trade area involves removing tariffs

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18. *See* Gal-Or, *supra* note 13, at 8–9 (acknowledging the European Community as an example of regional integration with centralized institutions, such that they are no longer a supranational organization but instead a unique legal system, a "new legal order" of Community law, separate and distinct from both the international and national legal tradition); *see also* ASIAN ECONOMIC COOPERATION IN THE NEW MILLENNIUM: CHINA'S ECONOMIC PRESENCE 128 (Heping Cao & Calla Wiemer eds., World Scientific Publishing Co. 2004) (describing the European Union as a successful example of regional economic cooperation, which developed from the simplest form of free trade area and customs union to an increasingly unified market to today's full economic and currency union). *See generally* Edmund L. Andrews, *Europeans Resolve to Embrace the Euro (as Soon as They Spend Their Old Bills)*, N.Y. TIMES, JAN. 2, 2002, at A8 (discussing the first day when the euro became the single currency of 12 European nations).

19. *See* Neil Walker, *Europe's Constitutional Momentum and the Search for Polity Legitimacy*, 3 INT'L J. CONST. L. 211, 232 (2005) (commenting that the principal of conferral in article I-11(1) of the proposed constitution may quiet debate about the Union's status as a federal state by affirming the importance of state identities and functions as well as recognizing the limits on the law of the European Union). *But see* Anthony Coughlan, *Five Steps to an EU Federation*, IRISH DEMOCRAT, May 17, 2005, *available at* http://www.irishdemocrat.co.uk/window-on-the-eu/five-steps-to-eu-citizenship (asserting that despite the inclusion of the conferral doctrine, supporters of the proposed constitution are ignoring that classic federal states were formed in this same way, the small political units joining together and transferring power to a superior). *See generally* Stephen C. Sieberson, *The Proposed European Union Constitution—Will it Eliminate the EU's Democratic Deficit?*, 10 COLUM. J. EUR. L. 173, 182–87 (2004) (explaining that the European Community currently possesses certain characteristics of a federal state, and if the draft constitution is accepted the debate over whether it is an international organization or, in fact, a federal state will continue).

20. *See* Emeka Duruigbo, *International Relations, Economics and Compliance with International Law: Harnessing Common Resources to Protect the Environment and Solve Global Problems*, 31 CAL. W. INT'L L.J. 177, 177–78 (2001) (suggesting that enforcement of and compliance with international accords is imperfect and that the problems will persist unless specific efforts are made to remedy the problems); *see also* Patricia Isela Hansen, *Antitrust in the Global Market: Rethinking "Reasonable Expectations,"* 72 S. CAL. L. REV. 1601, 1606–07 (1999) (explaining the process through which member nations of the General Agreement on Tariffs and Trade (GATT) are authorized to resolve disputes over one party's violation of an express treaty commitment); Ruth Okediji, *TRIP's Dispute Settlement and the Sources of (International) Copyright Law*, 49 J. COPYRIGHT SOC'Y U.S.A. 585, 587–88 (recognizing that the ineffectiveness of the original global arrangements for copyright protection was a result of the absence of an enforcement mechanism, while recognizing that compliance with international law is complex and requires the consideration of many factors).

21. *Compare* Frances E. Zollers, Sandra N. Hurd, & Peter Shears, *Product Safety in the United States and the European Community: A Comparative Approach*, 17 MD. J. INT'L L. & TRADE 177, 189–90 (1993) (positing that enforcement mechanisms of the product safety policy are weak because member states articulate and implement local policies and goals in order to account for the varying cultural norms of the member states), *and* David S. Huntington, *Settling Disputes under the North American Free Trade Agreement*, 34 HARV. INT'L L.J. 407, 409–10 (1993) (outlining the very broad framework for dispute resolution that was established in the General Agreement, indicating that beyond the ambiguous framework provided, the General Agreement has very little to say about the procedures or substantive legal standards to be employed by Contracting Parties in their role as "adjudicator" of disputes), *with* Louis F. Del Duca, *Teachings of the European Community Experience for Developing Regional Organizations,* 11 DICK. J. INT'L L. 485, 489 (1993) (explaining that the EC has reached a greater level of cooperation than other regional economic cooperative organizations because of its rulemaking procedures and highly structured dispute resolution mechanisms).

or other trade barriers within the area,[22] free trade agreements require enforcement only to the extent of ensuring that no member state establishes such barriers to trade with other member states.[23] Yet, a common market, in which states not only remove trade barriers between themselves but also barriers to movement of other market factors,[24] requires an enforcement mechanism that reaches the several additional areas of cooperation.[25] Total economic union requires

22. *See* BALASSA, *supra* note 11, at 2 (stating that a free trade area entails removing tariffs or other trade barriers); *see also* Sydney M. Cone, III, *The Promotion of Free-Trade Areas Viewed in Terms of Most-Favored-Nation Treatment and "Imperial Preference,"* 26 MICH. J. INT'L L. 563, 573 (2005) (defining an "Imperial Free Trade Area" as countries that eliminate trade barriers as between themselves, but not as against countries outside the Free Trade area). *But see* M. Ulric Killion, *Chinese Regionalism and the 2004 ASEAN-China Accord: The WTO and Legalized Trade Distortion*, 31 N.C. J. INT'L. L. & COM. REG. 1, 36–37 (2005) (remarking that inconsistencies between the GATT agreement and the WTO rules have resulted in the creation of free trade areas that do not conform to the requirements, and specifically resulting in the requirement that removal of the internal trade barriers become void).

23. *See* John Gladstone Mills III, *A Transnational Patent Convention for the Acquisition and Enforcement of International Rights,* 84 J. PAT. & TRADEMARK OFF. SOC'Y 83, 88 (2002) (acknowledging that the purpose of a free trade area is to facilitate trade between constituent territories and not raise barriers to the trade of other contracting parties with such territories); *see also* David P. Kelly, Note, *Trading Indigenous Rights: The NAFTA Side Agreements as an Impetus for Human Rights Enforcement,* 6 BUFF. HUM. RTS. L. REV. 113, 114 (2000) (noting that free trade is contingent upon participating nations acting reciprocally to implement its conditions); Jay V. Sagar, Note, *The Labor and Environment Chapters of the United States-Chile Free Trade Agreement: An Improvement over the Weak Enforcement Provisions of the NAFTA Side Agreements on Labor and the Environment?* 21 ARIZ. J. INT'L & COMP. L. 913, 914–15 (2004) (stating that the purpose of free trade agreements is to facilitate the movement of goods and services by eliminating tariffs, reducing non-tariff barriers, and providing member states with increased access to financial and service sectors).

24. *See* BALASSA, *supra* note 11, at 2 (explaining that a common market is a higher form of economic integration where not only trade restrictions but also restrictions on factor movements are abolished); *see also* Cherie O'Neal Taylor, *Dispute Resolution as a Catalyst for Economic Integration and an Agent for Deepening Integration: NAFTA and MERCUSOR?*, 17 NW. J. INT'L L. & BUS. 850, 866 (1996) (remarking that the economic integration goals of a common market are much more extensive than NAFTA's, requiring the elimination of all internal barriers to trade and adopting an external tariff, which eventually lead to common trade and commercial policies among member states). *See generally* BLACK'S LAW DICTIONARY 982 (7th ed. 1999) (defining a "common market" as an economic association formed by several nations to reduce or eliminate trade barriers among them, and to establish uniform trade barriers against nonmembers).

25. *See* Kimberly A. Butlak, *All's Fair in Love, War, and Taxes: Does the United States Promote Fair Tax Competition in a Global Marketplace Consistent with European Community and Organization for Economic Cooperation and Development Recommendations through Its Advance Ruling Program?*, 13 IND. INT'L & COMP. L. REV. 99, 130 (2002) (describing as an example which forms of aid are compatible with the European Community treaty and which are not, stressing that aid must not adversely affect trading conditions); *see also* Daniel J. Gifford, *Rhetoric and Reality in the Merger Standards of the United States, Canada, and the European Union,* 72 ANTITRUST L. J. 423, 456 (2005) (discussing the EU Merger Regulation that sets forth the enforcement mechanism for mergers to ensure that all mergers are compatible with the common market); Symposium, *Institutions for International Economic Integration: Constitutionalism and International Organizations*, 17 NW. J. INT'L L. & BUS. 398, 443 (1996) (stating that common market law in the European Community has established five "market freedoms" (goods, services, persons, capital and payments), which are now recognized as individual freedoms of the citizens of the European Community and enforced by the European Court).

such close and complete cooperation in so many areas that compliance enforcement demands a large degree of political integration of the member states.[26]

Compared to other free trade areas, NAFTA falls into the category of the least cooperation, while the European Community's total economic union represents the greatest.[27] As such, NAFTA's compliance enforcement mechanism consists merely of a system for establishing arbitral panels to settle disputes.[28] In contrast, the EC incorporates supranational bodies with the power to settle disputes and create additional rules for the Community.[29]

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26. *See* BALASSA, *supra* note 11, at 2 (explaining that total economic control presupposes the unification of monetary, fiscal, social, and countercyclical policies and requires setting up a supranational authority whose decisions are binding for the member states); Tan, *supra* note 9, at 944 (remarking that due to unification of monetary, fiscal, and countercyclical policies among members, a supranational authority is set up to bind the members to its decisions); *see also* Erika Gottfried, *MERCOSUR: A Tool to Further Women's Rights in the Member Nations*, 25 FORDHAM URB. L.J. 923, 938 n.117 (1998) (defining total economic integration as the unification of monetary, fiscal and social policies with the establishment of a supranational authority whose decisions are binding on all member states).

27. *See* Mel Kenny, *Globalization, Interlegality and Europeanized Contract Law,* 21 PENN ST. INT'L L. REV. 569, 569 (2003) (stating that while the European Community has played a major role in indicating the type of innovative cooperation necessary in regional integration, Mercosur, NAFTA and ASEAN represent weaker forms of regional cooperation); Jason R. Wolff, *Putting the Cart Before the Horse: Assessing Opportunities for Regional Integration in Latin America and the Caribbean,* 20 FLETCHER F. WORLD AFF. 103, 111 (1996) (noting that many regional integration arrangements among developing countries have been modeled on the European Community, but were unable to achieve the institutional effectiveness of the European Community). *But see* Sara Catherine Smith, Comment, *The Free Trade Area of the Americas: Is There Still a Place for the World Trade Organization?,* 13 TULSA J. COMP. & INT'L L. 321, 345–46 (2006) (remarking that NAFTA's success can be explained by the cooperation among members with economic and other reforms).

28. *See* North American Free Trade Agreement, U.S.-Can.-Mex., ch. 20, Dec. 17, 1992, 32 I.L.M. 605 (detailing the powers and functions of the organs responsible for dispute resolution and the procedure of dispute resolution, favoring fact-finding committees and alternative dispute resolution with the use of an arbitration panel as the ultimate recourse); *see also* Scott R. Jablonski, *NAFTA Chapter 11 Dispute Resolution and Mexico: A Healthy Mix of International Law, Economics and Politics*, 32 DENVER J. INT'L L. & POL'Y 475, 493 (2004) (outlining the basic framework of NAFTA's dispute resolution and the reasons for the use of alternative dispute resolution stemming from the differing legal traditions of the members). *See generally Contemporary Practice of the United States Relating to International Law: U.S.-Mexico Dispute on Cross-border Trucking*, 97 AM. J. INT'L L. 194, 194 (Sean D. Murphy ed., 2003) (illustrating a NAFTA Chapter 20 arbitration between the United States and Mexico over the United States' failure to remove restrictions on cross-border trucking in which the arbitration panel failed to provide any permanent enforceable resolution).

29. *See* DICK LEONARD, GUIDE TO THE EUROPEAN UNION 41–86 (7th ed. 2000) (explaining the role of each of the EU's main supranational institutions in shaping policy and settling disputes between member nations); *see* JONAS TALLBERG, EUROPEAN GOVERNANCE AND SUPRANATIONAL INSTITUTIONS: MAKING STATES COMPLY 9-11 (2003) (outlining the development of the enforcement mechanisms of the supranational institutions of the EU). *See generally* CLAUS-DIETER EHLERMAN, *Opening Speech at the IVth Erenstein Colloquium (1988)*, *in* 1 MAKING EUROPEAN POLICIES WORK: THE IMPLEMENTATION OF COMMUNITY LEGISLATION IN THE MEMBER STATES 150 (Heinrich Siedentopf & Jacques Ziller eds., 1988) (arguing that the future success of the EU depends on the supranational institutions further developing both centralized and decentralized control over non-compliance).

1. Direct Effect and Supremacy

The European Community's close cooperation has led to the establishment of institutional mechanisms[30] to promulgate uniform policy and ensure compliance by the member states.[31] One of the most important mechanisms that the EC has created for enforcing compliance is the European Court of Justice (ECJ).[32] The ECJ, in turn, has developed the concepts of direct effect and supremacy in the *Van Gend En Loos* decision of 1963,[33] and the *Costa* decision of 1964.[34]

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30. *See* JOHN PINDER, THE BUILDING OF THE EUROPEAN UNION 19-21 (3d ed. 1998) (outlining some of the steps that were taken to strengthen European institutions to foster the development of the EU); Jonas Tallberg, *Paths to Compliance: Enforcement, Management and the European Union*, 56 INT'L ORG. 609, 610 (2002) (discussing how the EU and its institutions utilize both centralized police patrol tactics and decentralized fire alarm tactics to enforce compliance); *see also* Louis F. Del Duca, *supra* note 21, at 489 (stating that the four main mechanisms within the EC structure are the Commission, the Council, the European Parliament, and the European Court of Justice).

31. *See* Anne-Marie Burley & Walter Mattli, *Europe Before the Court: A Political Theory of Legal Integration*, 47 INT'L ORG. 41, 43 (1993) (arguing that the legal groundwork laid down by the Court of Justice permitted the strengthening of the supranational bodies and promoted uniformity of policy). *See generally* George W. Downs, David M. Rocke & Peter N. Barsoom, *Is the Good News About Compliance Good News About Cooperation?*, 50 INT'L ORG. 379, 392 (1996) (categorizing increased interstate integration and cooperation as entailing increased enforcement of compliance); Ernest A. Young, *Protecting Member State Autonomy in the European Union: Some Cautionary Tales from American Federalism*, 77 N.Y.U. L. REV. 1612, 1625–33 (2002) (classifying the structure and government functions of the supranational European institutions as a mixed government with "codecision" procedure as opposed to the American federalist system where each institution has a virtual monopoly over a particular function).

32. *See* Jeffrey C. Cohen, *The European Preliminary Reference and U.S. Supreme Court Review of State Court Judgments: A Study in Comparative Judicial Federalism*, 44 AM. J. COMP. L. 421, 425 (1996) (describing the decision-making power of the Court of Justice for cases referred to it by a member state's court as similar to the American procedure of Supreme Court review and remand); *see also* Laurence R. Helfer & Ann-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 277 (1997) (arguing that allowing the European Court of Justice to directly deal with international players has created a European 'community of law'); James F. Pfander, *Member State Liability and Constitutional Change in the United States and Europe*, 51 AM. J. COMP. L. 237, 238–39 (2003) (stating that the Court of Justice has expanded its power to hear disputes by authorizing individuals to sue states within the particular member state's courts).

33. *See* Case 26/62, Van Gend En Loos v. Nederlandse Administratie der Balastingen, 1963 E.C.R. 1 (holding that member states' courts must enforce Community law). *See generally* Ilann Margalit Maazel, *What Is the European Union?,* 16 BYU J. PUB. L. 243, 252–53 (2002) (arguing that a direct relationship between individuals and national governments is the hallmark of a federalist system categorizing Europe as such after the *Van Gend* decision); Henry G. Schermers, *Comment on Weiler's The Transformation of Europe*, 100 YALE L.J. 2525, 2530-31 (1991) (arguing that the direct effect of Community law still has some gaps, most notably in the realm of human rights issues).

34. *See* Case 6/64, Flaminio Costa v. Ente Nazionale per l'Energia Eletrrica (ENEL), 1964 E.C.R. 585 (holding that in a conflict between Community law and the law of the member state, the Community law is supreme). *See generally* Patrick Del Duca & Duccio Mortillaro, *The Maturation of Italy's Response to European Community Law: Electric and Telecommunication Sectore Institutional Innovations*, 23 FORDHAM INT'L L.J. 536, 549–50 (2000) (explaining how it took 20 years for the Italian courts to reconcile themselves with the *Costa* decision, allowing limited acceptance of European Community law supremacy in 1984); Markus G. Puder, *Supremacy of the Law and Judicial Review in the European Union: Celebrating Marbury v. Madison with Costa v. ENEL,* 36 GEO. WASH. INT'L. L. REV. 567, 584–85 (2004) (comparing the *Costa* decision with Marbury v. Madison and categorizing Europe's doctrine of supremacy as a quasi-constitutional framework that binds states and individuals equally in the judicial process).

Direct effect may be defined as the capacity of a domestic court to apply EC law,[35] while supremacy refers to a court's ability to overrule domestic law on the basis of its incompatibility with EC law.[36] The establishment of these two principles by the ECJ meant that EC agreements applied directly within member states' legal systems and any domestic law found to be inconsistent with an agreement could be considered invalid.[37] Through the application of direct effect and supremacy, EC law is used to invalidate domestic law of member states thereby limiting the power of member states to violate the EC agreements.[38]

This process is simpler and more efficient than the process of making recommendations and assessing penalties against a non-complicit state, as previously provided in the EC trea-

35. *See* J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2413 (1991) (defining the doctrine of direct effect and discussing its role in creating a new European legal structure). *See generally* Eric F. Hinton, *Strengthening the Effectiveness of Community Law: Direct Effect, Articles 5 EC, and the European Court of Justice*, 31 N.Y.U. J. INT'L L. & POL. 307, 314–15 (1999) (stating that the doctrine of direct effect made it possible to enforce noncompliance because it resolved the question of an individual's right to use Community law and that ordinary international public law would have been ineffective); Symposium, *Comparative Visions of Global Public Order (Part 2): The Denationalization of Constitutional Law*, 47 HARV. INT'L L.J. 243, 257–58 (2006) (contending that the doctrines of direct effect and primacy are not merely hierarchical, but are examples of the commitment made by the member states to reconsider adjudication in the context of a transnational community).

36. *See* Bruno De Witte, *Direct Effect, Supremacy, and the Nature of the Legal Order*, *in* The Evolution Of EU Law 177 (Paul Craig & Gráinne de Burca eds., 1999) (defining the doctrine of supremacy as the capacity of the Community law to overrule contrary national norms in the domestic courts of the member states). *See generally* JOSEPHINE STEINER & LORNA WOODS, TEXTBOOK ON EC LAW 76-94 (6th ed. 1998) (describing how different member states have each reconciled themselves with the doctrine of supremacy by allowing it only when the law is directly effective); Eric Stein, *Lawyers, Judges, and the Making of a Transnational Constitution*, 75 AM. J. INT'L L. 1, 11–12 (1981) (describing the doctrine of supremacy where the Community laws have precedence over those of the member states and how the Community laws are integrated into the laws of the member states).

37. *See* Florian Sander, *Subsidiary Infringements Before the European Court of Justice: Futile Interference with Politics or a Substantial Step Towards EU Federalism?*, 12 COLUM. J. EUR. L. 517, 535 (2006) (stating that the European legal system's doctrines of direct effect and supremacy over member states' laws are "necessary and pivotal" elements of the legal substance of EU law); G. Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*, 44 DUKE L.J. 829, 918 (1995) (stating that where a provision of domestic law conflicts with any provision of the treaty, the ECJ has the power to invalidate it). *See generally* Donna Starr-Deelen & Bart Deelen, *The European Court of Justice as a Federator (Federalism and the European Union)*, 26 PUBLIUS 81, 84 (1996), *available at* WLNR 4195563 (realizing that the ECJ's establishment of the principle of direct effect made the EEC Treaty seem more like a constitution than an international convention).

38. *See* Paul Steven Dempsey, *European Aviation Regulation, Flying Through the Liberalization Labyrinth*, 15 B.C. INT'L & COMP. L. REV. 311, 328 (1992) (commenting on how the EEC Treaty trumps domestic law, forcing member states to bring domestic law into conformity with Community law and the decisions of the ECJ); *see* Stephan Enchelmaier, *Supremacy and Direct Effect of European Community Law Reconsidered, or the Use and Abuse of Political Science for Jurisprudence*, 23 OXFORD J. LEGAL STUD. 281, 290 (2003) (declaring that under the ECJ's doctrine of supremacy, European law is given more weight than national law whenever there is a conflict between the two); *see also* Barry Norman, *The European Constitution: A Requiem?*, 54 FREEMAN para. 12-13 (2004), *available at* 2004 WLNR 15155412 (illustrating that the ECJ's application of a supreme European law through which all member states are bound has resulted in the member states' fear that the creation of a central authority may "swallow up the member states").

ties.[39] In other words, if a member state enacts an economic policy that has the effect of favoring local goods over goods from other member states, the policy may simply be declared invalid to the extent that it has a discriminatory effect.[40] Thus, the problem is solved in a single step. The alternative would involve the initial step of the court declaring the policy to violate an international obligation.[41] The court would then have to take the additional step of recommending action for the offending state to take to comply with its obligation.[42] Next, the offending state would be required to take the affirmative step of changing its policy.[43] If the

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39. *See* Treaty Establishing the European Community, art. 228, Nov. 10, 1997, 1997 O.J. (C340) (forcing member states who are found to be in violation of the treaty to take the "necessary measures" required by the ECJ to bring their domestic policies back into compliance with the treaty); *see also* Luigi Malferrari, *The Functional Representation of the Individual's Interests Before the EC Courts: The Evolution of the Remedies System and the Pluralistic Deficit in the EC*, 12 IND. J. GLOBAL LEGAL STUD. 667, 676 (2005) (declaring that the ECJ can impose lump sum and daily penalties on member states when they fail to comply with an ECJ ruling requiring them to conform with Community law); Jonas Talberg, *Delegation to Supranational Institutions: Why, How and with What Consequences?*, 25 W. EUR. POL. para. 4, 15 (2002), *available at* 2002 WLNR 9123920 (stating that the ECJ is responsible for interpreting EU treaties and ensuring that member states apply EC law correctly, and further noting that in the case where a state is non-complicit the ECJ has the power to sanction national governments through economic penalties).

40. *See* Karen J. Atler, *The European Court's Political Power (European Court of Justice)*, 19 W. EUR. POL. para. 4 (1996) (acknowledging ECJ's authority to invalidate any national law or policy that conflicts with EC law); Norman, *supra* note 38 (suggesting that the ECJ has essentially usurped power intended to vest in the member states and therefore is not a reliable protector of the member states' economic rights and liberties). *See generally* Starr-Deelen & Deelen, *supra* note 37, at 83 (explaining the ECJ's promotion of "negative" integration in which they require the removal of barriers to trade that can obstruct economic integration).

41. *See, e.g.,* Luca Enriques, *EC Company Law Directives and Regulations: How Trivial Are They?*, 27 PA. J. INT'L ECON. L. 1, 1 (2006) (explaining that as a result of Germany's reluctance to comply with an ECJ ruling against them, the ECJ declared Germany in violation of its international obligations); *see also* Yvonne N. Gierczyk, *The Evolution of the European Legal System: The European Court of Justice's Role in the Harmonization of Laws,* 12 ILSA J. INT'L. & COMP. L. 153, 165 (2005) (describing the ECJ's precedent-based system of "integration by adjudication" as another way of imposing EC law in member states). *See generally* J. Steven Rich, Note, *Commercial Speech in the Law of the European Union: Lessons for the United States?*, 51 FED. COMM. L.J. 263, 266–67 (1998) (stating that the ECJ may declare member states' domestic laws invalid if they are in conflict with EC Treaties, and even if they do not make a formal declaration of a law's violation, the courts of a member state may not apply any law that is found by the ECJ to be in conflict with an EC Treaty).

42. *See* Rolf Wagenbaur, *How to Improve Compliance with European Community Legislation and the Judgments of the European Court of Justice,* 19 FORDHAM INT'L L. J. 936, 943 (1996) (acknowledging that a declaratory from the ECJ will suffice in cases where the ECJ allows an offending state discretion in remedying a violation). *See generally* Starr-Deelen & Deelen, *supra* note 37, at 83 (demonstrating the ECJ's promotion of "positive" integration through implementing de facto policies that have the effect of advancing integration in response to member states' inaction in doing so); FACT SHEET: EUROPEAN UNION PROFILE, U.S. FEDERAL NEWS, Oct. 4, 2005, para. 26 (stating that among other authorities delegated to it, the ECJ also has the power to require a member state to comply with its obligation to the EU).

43. *See* Simon Hix & Klaus H. Goetz, *Introduction: European Integration and National Political Systems,* 23 W. EUR. POL. ¶ 29 (stating that member states are sometimes forced to change their domestic policies to comply with European-wide norms); Brian S. Johnson, Note, *Ensuring Quality: Pursuing Implementation of the Equal Pay Principle via Institutions of the European Union, the North American Agreement on Labor Cooperation, and Corporate Codes of Conduct*, 38 VA. J. INT'L. L. 849, 976 (1998) (noting that an invalidation of a domestic law by the ECJ essentially forces the non-complicit state to change its domestic policy); *see also* Andrea K. Schneider, *Linkage as a Phenomenon: An Interdisciplinary Approach*, 19 U. PA. J. INT'L. ECON. L. 587, 612 (1998) (discussing the various international dispute resolution forums and noting that only the EU has risen to the level at which ECJ decisions are supreme over domestic laws).

state refused the court would have to take the additional step of assessing a penalty for the violation.[44] Through the process developed by the ECJ, this long process is considerably shortened and simplified.

The process of invalidation also provides a method for those within a state who oppose the state's economic policy to weaken the policy outside of the political process.[45] Such an opponent need only challenge the policy in a domestic court, which may send the question to the ECJ.[46] The ECJ may declare the policy invalid, and the domestic court is bound to follow the ECJ's determination.[47] Absent invalidation by the ECJ, the issue would return to the political arena as the state's government would have the option of choosing to pay penalties rather than change its policy.[48] Therefore, the application of the concepts of direct effect and supremacy

44. *See* Treaty Establishing the European Community, Dec. 24, 2002, 1, art. 228, *available at* http://eur-lex.europa.eu/en/treaties/dat/12002E/pdf/12002E_EN.pdf (providing the court's power to assess and hand down penalties for a member state's failure to comply with a court judgment); Steve Charnovitz, *Rethinking WTO Trade Sanctions*, 95 AM. J. INT'L L. 792, 825 (2001) (stating that a penalty payment can be imposed on a member state that fails to comply with a judgment of the ECJ); Christine O'Grady Putek, *Limited but Not Lost: A Comment on the ECJ's Golden Share Decisions*, 72 FORDHAM L. REV. 2219, 2280 (2004) (referring to the European Court of Justice's ability to impose fines on member states found in violation of an EC agreement).

45. *See* KAREN J. ALTER, ESTABLISHING THE SUPREMACY OF EUROPEAN LAW 224 (2001) (stating that, "[t]he European legal process is also becoming a toll for actors trying to influence the political process. . . . [P]rivate litigants appeal to the European legal system in the hopes that the ECJ will invalidate a national rule they do not like"); Gierczyk, *supra* note 41, at 176–77 (suggesting that Article 234 of the EC Treaty allows individuals a process by which they can oppose national law); *see also* John P. Fitzpatrick, *The Future of the North American Free Trade Agreement: A Comparative Analysis of the Role of Regional Economic Institutions and the Harmonization of Law in North America and Western Europe*, 19 HOUS. J. INT'L L. 1, 74–75 (1996) (establishing ECJ's jurisdiction over cases brought by private litigants).

46. *See* EC Treaty art. 234 (ruling that a member state's lower court may certify a question of EC law to the ECJ for determination); Fitzpatrick, *supra* note 45, at 74–75 (stating that "[q]uestions concerning Community law may be referred to the ECJ at the discretion of the national court"); *see also* Gierczyk, *supra* note 41, at 171 (arguing that allowing private parties to bring suits against member states in national courts undermines the sovereignty of member states); Mathew L. Schemmel & Bas De Regt, *The European Court of Justice and the Environmental Protection Policy of the European Community*, 17 B.C. INT'L & COMP. L. REV. 53, 80–81 (1994) (discussing a private party's ability to bring an action against a state in national court so that the policy might get reviewed by the ECJ); Michael J. Graetz & Alvin C. Warren, Jr., *Income Tax Discrimination and the Political and Economic Integration of Europe*, 115 YALE L.J. 1186, 1223–25 (2006) (exemplifying how private party suits sent to the ECJ for review can affect member state national policy).

47. *See* Sibrand Karel Martens, *Incorporating the European Convention: The Role of the Judiciary*, 1 EUR. HUM. RTS. L. REV. 5, 7 (1998) (reiterating the ECJ's holding that the EC Treaty created a legal order by which the ECJ rulings are supreme to all national rulings, even to member state constitutions); *see also* Frank Emmert, *Labor, Environmental Standards and World Trade Law*, 10 U.C. DAVIS J. INT'L & POL'Y 75, 109–10 (2003) (affirming that ECJ "law is directly applicable in the member states and enjoys supremacy over any conflicting rules of national law"). *See generally* Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 WM. & MARY L. REV. 1733, 1827–29 (2005) (indicating the member states' liability should it fail to oblige the rulings of the ECJ).

48. *See* Rebecca Means, *Kalanke v. Freie Hansestadt Bremen: The Significance of the Kalanke Decision on Future Positive Action Programs in the European Union*, 30 VAND. J. TRANSNAT'L L. 1087, 1108–09 (1997) (describing that ECJ rulings create precedent for which all member states must follow); *see also* Samantha Knights, *Religious Symbols in the Schools: Freedom of Religion, Minorities and Education*, 5 EUR. HUM. RTS. L. REV. 499, 499–500 (2005) (commenting that while they may vary in specifics, member states' policies are still bound by EC directives). *But cf.* Kevin Andrew Swartz, Note, *Powerful, Unique, and Anonymous: The European Court of Justice and Its Continuing Impact on the Formation of the European Community*, 3 S. CAL. INTERDISC. L.J. 687, 699–700 (1994) (detailing that even where the ECJ has found a policy invalid in one member-state, a different government would still have the option of seeking a preliminary ruling).

favor compliance even to the extent of sacrificing internal political processes of member states.[49] Not surprisingly, these concepts have proven very important in the context of ensuring compliance with EC law, and have gone far in promoting integration of the member states.[50]

2. *Stare Decisis*

Another principle often applied by courts to ensure uniformity of law is *stare decisis*.[51] Under this principle, once the courts deliberately examine and decide an issue, that issue is settled.[52] Thus, under *stare decisis*, a court's decision may bind all those who face the same issue in the future.[53] In this respect, the court is establishing law.[54] In fact, applying this principle gives

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49. *See* Means, *supra* note 48, at 1108–09 (presenting the doctrines of direct effect and supremacy and indicating how they are used by the ECJ to ensure uniformity and equality of law); *see also* J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2441 (1991) (suggesting that the supremacy exercised by the ECJ is more related to the conflicting competencies of the different courts and ECJ's use of supremacy holds that "Community competence will prevail"). *But see* Craig T. Smith & Thomas Fetzer, *The Uncertain Limits of the European Court of Justice's Authority: Economic Freedom Versus Human Dignity*, 10 COLUM. J. EUR. L. 445, 471 (2004) (arguing that ECJ's power may be superficial as member states' national courts can choose to render ECJ's rulings ineffective).

50. *See* ALTER, *supra* note 45, at 209–10 (remarking that national governments are more likely to comply with European law when national policy is subject to ECJ's judicial review); Patrick Fitzmaurice, *Attorney General V. X: A Lost Opportunity to Examine the Limits of European Integration*, 26 BROOK. J. INT'L L. 1723, 1731–33 (2001) (asserting that the ECJ has accelerated the process of integration through its declaration that Union law is superior to national law); *see also* dr jur Hjalte Rasmussen, *Towards a Normative Theory of Interpretation of Community Law*, 1992 U. CHI. LEGAL F. 135, 156–57 (1992) (remarking that the failure to promote integration through overriding legislature forced ECJ to push that objective through judicial decisions). *See generally* Dinah Shelton, *The Boundaries of Human Rights Jurisdiction in Europe*, 13 DUKE J. COMP. & INT'L L. 95, 111–12 (2003) (stressing that the ECJ's adoption of the principle of direct effect ensured that community law prevails over all the member states).

51. *See* BLACK'S LAW DICTIONARY, *supra* note 24 at 1414 (defining *stare decisis* as "[t]he doctrine of precedent, under which it is necessary for a court to follow earlier judicial decisions when the same points arise again in litigation"). *See generally* Thomas Healy, *Stare Decisis as a Constitutional Requirement*, 104 W. VA. L. REV. 43, 108–09 (2001) (discussing the effect of *stare decisis* on litigant's abilities to predict the outcome of suits and its importance in creating uniformity of law and ensuring that cases are decided fairly and equitably); Theodor Meron, *Revival of Customary Humanitarian Law*, 99 AM. J. INT'L L. 817, 819–20 (2005) (positing that some international courts and governments rely on past precedent creating an "informal *stare decisis* principle").

52. *See generally* Neal v. United States, 516 U.S. 284, 295 (1996) (recognizing that under the doctrine of *stare decisis*, the court considers its own prior rulings on statutory interpretation as "settled law"); Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 783 (1993) (explaining that under the principle of *stare decisis*, precedents function generally as "fixed points").

53. *See* 21 C.J.S. *Courts* § 140 (2006) (establishing that under the rule of *stare decisis*, once a principle of law has been settled by a number of court decisions, that principle becomes precedent and is generally binding on the courts); 20 AM. JUR. 2D *Courts* § 129 (2006) (explaining that under the doctrine of *stare decisis*, after a court decides on a principle of law to be applied to a specific fact pattern, it will adhere to that principle in all future cases where the fact pattern is substantially the same). *But see* Payne v. Tenn., 501 U.S. 808, 827–28 (1991) (noting that the principle of *stare decisis* is not "an inexorable command" that must be "mechanical[ly]" adhered to).

54. *See* BLACK'S LAW DICTIONARY, *supra* note 24 at 1195 (defining "precedent" as "the making of law by a court in recognizing and applying new rules while administering justice"); *see also* 21 C.J.S. *Courts* § 139 (2006) (defining precedent as "furnishing an . . . authority for an identical or similar case afterward arising on a similar question of law); Mortimer N. S. Sellers, *The Doctrine of Precedent in the United States of America*, 54 AM. J. COMP. L. 67, 68 (2006) (stating that under "the concept of precedent . . . judicial decisions have the force of law and must be respected" by litigants, the government, the public, lawyers, and typically the courts themselves as law).

rise to "case law," which refers to law that has been developed by the courts.[55] The legal systems that follow this principle are generally referred to as common law systems.[56] In contrast, civil law systems do not follow any strict form of the *stare decisis* principle.[57] Similarly, it is generally recognized that *stare decisis* does not apply within the context of international law.[58]

Some scholars have maintained that international legal bodies follow at least a kind of *de facto stare decisis*.[59] Others have denied that *de facto stare decisis* is at all *stare decisis*.[60] An example of this is illustrated with NAFTA; although the United States and Canada have traditions of recognizing the principle of *stare decisis*, NAFTA explicitly excludes *stare decisis* from its dispute

55. *See* S. Corp. v. United States, 690 F.2d 1368, 1369–70 (Fed. Cir. 1982) (recognizing an established body of case law as binding law); *see also* Sellers, *supra* note 54 (maintaining that common law establishes principles that courts apply in deciding cases). *See generally* Ernest G. Mayo, *Rhode Island's Reception of the Common Law*, 31 SUFFOLK U. L. REV. 609, 610 (1998) (asserting that although common law evolves through new case law, judges are not, in fact, making new law but instead, they are pronouncing what has always been law).

56. *See* Ewoud Hondious, *Precedent in East and West*, 23 PENN ST. INT'L L. REV. 532, 524–25 (2005) (maintaining that the principle of precedent, whereby judicial decisions are treated as authority in subsequent cases, is well established in common law systems); *see also* Karol A. Kepchar, *Protecting Trademarks: Common Law, Statutes and Treaties*, SL082 ALI-ABA 39, 42 (2006) (distinguishing common law countries from civil law countries in that unlike civil law countries, common law countries apply legal principles that arise from a series of individual cases); Peter J. Messite, *Common Law v. Civil Law Systems*, 4 USIA ISSUES OF DEMOCRACY, 24–28 (1999), *available at* http://usinfo.state.gov/journals/itdhr/0999/ijde/ ijde0999.pdf (explaining that historically, the common law system has been comprised of case law, or "judge-made" law).

57. *See* Kepchar, *supra* note 56 (stating that civil law systems apply legal codes as the law); Messite, *supra* note 56 (comparing common law systems, whose laws are created by judicial decisions, with civil law systems, which abide by rules set forth by comprehensive civil codes). *See generally* William Tetley, *Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)*, 60 LA. L. REV. 677, 683 (2000) (describing civil law as "highly systemized and structured").

58. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 103 cmt. b (1987) (referring to Article 59 of the Statute of International Court of Justice and stating that "there is no *stare decisis* in international law"); Dana T. Blackmore, *Eradicating the Long-Standing Existence of a No-Precedent Rule in International Trade Law—Looking Toward* Stare Decisis *in WTO Dispute Settlement*, 29 N.C. J. INT'L L. & COM. REG. 487, 498–99 (2004) (maintaining that there is general agreement that *stare decisis* does not apply to international law); *see also* Duncan French, *Treaty Interpretation and the Incorporation of Extraneous Legal Rules*, 55 INT'L & COMP. L.Q. 281, 306 (2006) (asserting that international law has difficulty applying uniform laws because of its "lack of *stare decisis*").

59. *See* Raj Bhala, *The Myth about Stare Decisis and International Trade Law (Part One of a Trilogy)*, 14 AM. U. INT'L L. REV. 845, 849–50 (1999) (maintaining that *de facto stare decisis* operates in international trade law); Yong K. Kim, *The Beginnings of the Rule of Law in the International Trade System Despite U.S. Constitutional Constraints*, 17 MICH. J. INT'L L. 967, 980 (1996) (acknowledging a certain degree of *de facto stare decisis* functioning in international dispute settlement procedures); *see also* José E. Alvarez, *The New Dispute Settlers: (Half) Truths and Consequences*, 38 TEX. INT'L L.J. 405, 406–07 (2003) (recognizing that *de facto stare decisis* currently exists despite express statutory provisions that reject the binding force of decisions made in international law);

60. *See* Blackmore, *supra* note 58, at 501–03 (arguing that although prior decisions made in international law are persuasive, *de facto stare decisis* is not *stare decisis* at all because no prior decision is binding on subsequent courts); *see also* Corus Staal BV v. U.S. Dep't of Commerce (Corus Staal I), 259 F. Supp. 2d 1253, 1264 n.17 (2003) (stating that although some recognize the existence of *de facto stare decisis*, decisions of international courts, in fact, have "no express legal effect beyond the boundaries of the particular case"); Raj Bhala, *The Power of the Past: Towards De Jure Stare Decisis in WTO Adjudication (Part Three of a Trilogy)*, 33 GEO. WASH. INT'L L. REV. 873, 879–880 (2001) (asserting the fear that international institutions will stray, with or without justification, from prior holdings because *de facto stare decisis* does not amount to a formal duty for international courts to rule in accordance with their prior decisions).

settlement regime, and states that decisions of panels are not binding on other panels.[61] Still, NAFTA panels often cite other panel decisions. It has been suggested that despite the explicit rejection of precedential value, the panels often adhere to a *de facto* principle of *stare decisis*.[62] Yet, these appeals to previous panel decisions for precedent often arise in the absence of other guidance on an issue.[63] Thus, this situation demonstrates the natural tendency of adjudicative bodies to refer to precedent for guidance and in an effort to maintain consistency. Even now, the NAFTA panels do not treat the prior decisions as absolutely binding.[64]

In contrast with NAFTA, a majority of states in the European Community maintain civil law systems.[65] Perhaps it was the relative lack of common law tradition that led the drafters of

61. *See* Symposium, *Trade Remedy Litigation—Choice of Forum and Choice of Law*, 18 ST. JOHN'S J. LEGAL COMMENT. 51, 56 (2003) (noting that decisions of NAFTA panels do not have any binding precedential effect); Kenneth J. Pippin, Note, *An Examination of the Developments in Chapter 19 Antidumping Decisions under the North American Free Trade Agreement (NAFTA): The Implications and Suggestions for Reform for the Next Century Based on the Experience of NAFTA after the First Five Years*, 21 MICH. J. INT'L L. 101, 117 (1999) (explaining that despite the lack of binding precedential authority, similar to common law courts, NAFTA panels often cite prior decisions when ruling on a case); *see also* North American Free Trade Agreement art. 1136(1), U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 605 (1993) (stating that, "[a]n award made by a Tribunal shall have no binding force except between the disputing parties and in respect of the particular case").

62. *See* Pippin, *supra* note 61 (noting that NAFTA panels often cite prior decisions, and attempt to agree with them or distinguish them, despite the absence of formal *stare decisis*); *see also* Binational Panel Review, *In re: Corrosion-Resistant Carbon Steel Flat Products from Canada*, 80, U.S.A.-CDA-98-1904-01 (Mar. 20, 2001) (stating that the panel reviewed the prior panel's decisions because it deserves deference, although the prior decision was not binding). *See generally* Jessica S. Wiltse, Comment, *An Investor-State Dispute Mechanism in the Free Trade Area of the Americas: Lessons from NAFTA Chapter 11*, 51 BUFF. L. REV. 1145, 1162–63 (2003) (suggesting that prior panel decisions will likely carry precedential value because most lawyers and arbitrators involved are trained in the common law tradition).

63. *See* Pippin, *supra* note 61, at 118 (positing that NAFTA panels will use prior decisions to fill legal vacuums); *see also* Binational Panel Review, *In re Certain Corrosion-Resistant Steel Sheet Products, Originating in or Exported from the United States of America,* 12–13, CDA-94-1904-04 (July 10, 1995) (displaying deference to another court's prior ruling on a specific matter); Binational Panel Review, *Review of the Final Determination of the Antidumping Investigation on Imports of High Fructose Corn Syrup, Originating from the United States of America*, 71, MEX-U.S.A.-98-1904-01 (Aug. 3, 2001) (suggesting that while prior decisions cannot be used as precedent, they can be used to help guide the court resolve specific issues).

64. *See* Pippin, *supra* note 61, at 119–20 (discussing the *Rolled Steel Plate* decision, in which that panel explicitly disagreed with a previous panel's decision on an issue); Binational Panel, *In re: Certain Durum Wheat and Hard Red Spring Wheat from Canada, Final Affirmative Countervailing Duty Determinations*, 33 n.45, U.S.A.-CDV-2003-1904-05 (Mar. 10, 2005) (stating that while U.S. Supreme Court rulings are binding precedent for a binational panel, a decision of the panel is not binding authority for future panels); *see also* Todd Weiler, *NAFTA Article 1105 and the Principles of International Economic Law*, 42 COLUM. J. TRANSNAT'L L. 35, 47 n.52 (2003) (noting that while panels will frequently reference prior decisions, to date prior decisions are not binding as a matter of precedent).

65. *See* James G. Apple & Robert P. Deyling, *A Primer on the Civil-Law System* 1 (1995), *available at* http://www.fjc.gov/library/fjc_catalog.nsf/DPublication?openform&parentunid=A18D33FC1E8F0EB085256CA30067C10B (indicating that the majority of European countries maintain a civil law system); *see also* James E. Archibald, *Pledges of Voluntary Contributions to the United Nations by Member States: Establishing and Enforcing Legal Obligations*, 36 GEO. WASH. INT'L L. REV. 317, 331 (2004) (maintaining that civil law systems are dominant in continental Europe). *See generally* Symposium, *Stepping Out of the European Shadow: Why Comparative Law in the United States Must Develop its Own Agenda*, 46 AM. J. COMP. L. 637, 641 (1998) (drawing comparisons between continental European civil law and Anglo-American common law).

the EC treaties to ignore the issue of the effect of precedent in their courts.[66] Perhaps it was assumed that the ECJ and member state courts would not follow a rule of *stare decisis*, or the drafters failed even to consider the possibility.

As with direct effect and supremacy, although the EC treaties are silent on the *stare decisis* issue, the principle appears to apply with regard to rulings of the ECJ.[67] The ECJ generally refers to its prior decisions and tends to decide cases consistent with them.[68] Also, when the ECJ decides a case in a manner seemingly inconsistent with its prior decisions, it generally distinguishes those decisions.[69] Most important, in the *CILFIT*[70] case, the ECJ held that the high court of a member state, which otherwise would be required to certify a question of EC law to the ECJ for its decision on the issue, could instead apply a previous ECJ decision on a similar

66. *See* O.F. Robinson, T.D. Fergus & W.M. Gordon, European Legal History 316 (Butterworths 3d ed. 2000) (maintaining that, in light of the legal traditions of the founding member states of the European Communities, it is not surprising that the European Court of Justice is formed in the civilian mold); *see also* T. C. Hartley, The Foundations of European Community Law 78 (Oxford University Press 5th ed. 2003) (suggesting that, in the past, the European Court of Justice may not have explicitly adopted case law as precedent because the court may have been influenced by the "Continental theory" that precedents are not binding law). *See generally* John H. Merryman, The Civil Law Tradition 22 (Stanford University Press 2d ed. 1985) (1969) (stating that the concept of *stare decisis* is explicitly rejected by countries with civil law systems because it is inconsistent with civil law theories of separation of powers).

67. *See* Gierczyk, *supra* note 41, at 163 (suggesting that the ECJ has expanded its power by applying a *stare decisis*-like principle); *see also* WILLIAM RAWLISON & MALACHY CORNWELL-KELLY, EUROPEAN COMMUNITY LAW 16–17 (Sweet & Maxwell 2d ed. 1994) (1990) (announcing that while there is no strict, binding principle of *stare decisis* similar to common law courts, the European Court will follow its precedent out of concern for legal certainty). *See generally* Brent Wible, "*De-Jeopardizing Justice": Domestic Prosecutions for International Crimes and Need for Transnational Convergence*, 31 DENV. J. INT'L L. & POL'Y 265, 268–69 (2002) (stating that historically the notion of *stare decisis* has been absent in international law because, given the traditional positivist framework, no decisions could be binding on parties without submitting to an international court's jurisdiction).

68. *See, e.g.,* Dimple D. Dhabalia, *The European Court of Justice: An Active Enforcer of Freedom, or a Passive Player in the EC Game?*, 27 DENV. J. INT'L L. & POL'Y 567, 573–74 (1999) (stating that the *Nold* decision established precedent in the European Court of Justice for human rights cases); *see* Laura Molinari, Note, *The Effect of the Kalanke Decision on the European Union: A Decision with Teeth, but Little Bite*, 71 ST. JOHN'S L. REV. 591, 603 (1997) (claiming that while there is no formal *stare decisis*, the European Court of Justice almost always follows its prior rulings); *see also* STEPHEN WEATHERILL & PAUL BEAUMONT, EC LAW: THE ESSENTIAL GUIDE TO THE LEGAL WORKINGS OF THE EUROPEAN COMMUNITY 158 (2d ed. 1993) (*citing* TIM KOOPMANS, STARE DECISIS IN EUROPEAN LAW IN ESSAYS IN EUROPEAN LAW AND INTEGRATION 17–18 (O'Keefe & Schermer eds., 1982)) (explaining that conditions to develop precedent for international law are that it is unwritten where the court functions as a unifying element in a legal system and there is a necessity in resorting to principles).

69. *See* WEATHERILL & BEAUMONT, *supra* note 68; STEINER & WOODS, *supra* note 36, at 26 (stating that while the European Court of Justice seeks to achieve consistent rulings, the court is free to deviate from its prior decisions). *See generally* Hartley, *supra* note 66 (1988) (suggesting that when the European Court of Justice does not follow precedent, rather than overruling decisions, it tends to ignore its prior decisions).

70. *See* Case 283/81, CILFIT v. Ministry of Health, 1982 E.C.R. 3415 (1982) (interpreting the third paragraph of Article 177 of the ECC Treaty to mean that "a court . . . is required, where a question of Community law is raised before it, to comply with its obligation to bring the matter before the Court of Justice, unless it has established that the question raised . . . has already been interpreted by the Court of Justice"); *see also* Gunnar Beck, *The U.K. Courts, the Common Law Approach and the Application of E.C. Law*, 24 PENN ST. INT'L L. REV. 629, 643 (2006) (discussing the court's ruling in Case 283/81, CILFIT v. Ministry of Health, 1982 E.C.R. 3415, and stating that "national courts may rely upon ECJ precedent even if the prior decision did not emerge from the same type of proceedings, and even though the questions at issue were not strictly identical, provided that the substance of the legal point has already been adjudicated in a prior ECJ decision"); Swartz, *supra* note 48, at 697 (discussing the holding of the CILFIT case, which stated that "any national court must be certain that the ECJ and other national courts would come to the same ruling").

issue.[71] Thus, it would seem the principle of *stare decisis* has developed within the EC to the extent that decisions of the ECJ are now considered to be an essential part of EC law that must be followed.[72] Recall that it was the court's own decisions that established the principles of direct effect and supremacy, now considered binding EC law.[73] In conclusion, the principle of binding precedent, or *stare decisis*, has developed within the EC to a significant degree despite the silence of the EC treaties on the subject.[74]

B. Association of Southeast Asian Nations (ASEAN)

1. Background

The Association of Southeast Asian Nations was formed in 1967 when the foreign ministers of Indonesia, Malaysia, the Philippines, Singapore, and Thailand signed the ASEAN Declaration in Bangkok ("Bangkok Declaration").[75] Since that time, Brunei Darussalam, Vietnam,

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71. *See* Case 283/81, CILFIT v. Ministry of Health, 1982 E.C.R. 3415 (1982) (providing the European Court of Justice's ruling on the obligation to reference a preliminary ruling which, according to the EEC Treaty, falls to the national courts and that those courts may rely upon ECJ precedent); *see also* Vivian Grosswald Curran, *Romantic Common Law, Enlightened Civil Law: Legal Uniformity and the Homogenization of the European Union,* 7 COLUM. J. EUR. L. 63, 73 (2001) (stating that decisions of certain European courts (namely Germany and Italy) defer to ECJ decisions in their ruling, and such deference constitutes binding precedents that are also applicable even to factually dissimilar future cases); Joined Cases 28-30/62, Da Costa v. Nederlandse Belastingsadministratie, 1963 E.C.R. 31 (1963) (discussing the ruling by the ECJ, which in effect initiated a system of precedent).

72. *See* PAUL CRAIG & GRAINNE DE BURCA, EU LAW: TEXT, CASES, AND MATERIALS 440, 450 (3rd ed. 2003) (noting that "by expanding the precedential impact of past decisions, the ECJ thereby increased the authoritative scope of its past rulings"); *see also* Peter L. Lindseth, *Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community*, 99 COLUM. L. REV. 628, 663–64 (1999) (stating that ECJ's interpretation of the community law mandates a particular decision and significantly limits the effect of the member state's law). *See generally* THE EVOLUTION OF EU LAW 344 (Paul Craig & Grainne de Burca eds., 1999) (stating the ECJ "turn[ed] the Treaties into the case law of the Treaties and identif[ied] that case law with the rule of law").

73. *See* European Union Preparatory Acts: Resolution on the Relationships Between International Law, Community Law and the Constitutional Law of the Member States, 1997 O.J. (C325) 26 (explaining that the "supremacy of Community law means that any national law which conflicts with Community law is inapplicable"); *see also* Gierczyk, *supra* note 41, at 167 (quoting Case 6/64, Flamininio Costa v. Ente Nazionale per I'Engeria Elettrica, 1964 E.C.R. I-585, in which the "ECJ handed down a landmark ruling which gave the laws of the EC supremacy over those of the member states"). *See generally* Case C-184/89, Nimz v. Freie und Hansestadt Hamburg, 1991 E.C.R. I-297 (asserting that national court called upon to apply provisions of Community law has a duty to give full effect to those provisions even when they conflict with international legislation).

74. *See* Beck, *supra* note 70, at 643 (discussing the court's ruling in Case 283/81, CILFIT v. Ministry of Health, 1982 E.C.R. 3415, and stating that national courts may rely on ECJ precedent provided that the substantive legal issue was adjudicated in a prior ECJ decision); *see also* Curran, *supra* note 71, at 72–73 (describing the role of the European Court of Justice as a source of legal authority in the European Union with an "increasingly common-law-like component of *stare decisis*"); Gierczyk, *supra* note 41, at 165 (indicating that through the "preliminary ruling procedure under Article 234, the ECJ has developed a precedent-based system achieving 'integration by adjudication'" and adding that even though *stare decisis* does not formally exist, it is increasingly recognized in the EC).

75. *See* The ASEAN Declaration, ¶ 1 (Bangkok 1967), *available at* http://www.aseansec.org/1212.htm (last visited Sept. 16, 2006) (listing the original five member countries who signed the 1967 declaration); *see also* THE ASIA-PACIFIC PROFILE 312–313 (Bernard Eccleston et al., eds., 1998) (providing the text of the ASEAN Declaration); Tan, *supra* note 9, at 935 (listing the five founding members of Indonesia, Malaysia, the Philippines, Singapore, and Thailand who signed the ASEAN Declaration on Aug. 8, 1967).

Laos, Burma, and Cambodia have joined, so that ASEAN now includes all ten countries of Southeast Asia.[76] In the Bangkok Declaration, the founding member states declared the purposes of ASEAN to include cooperation on issues of education, social and cultural development, technology, security and economic cooperation.[77] Also, based on the historical context, it seems clear that the founders of ASEAN had primarily political objectives in mind.[78] Despite this apparent desire for broad cooperation, the ASEAN states have jealously guarded their sovereignty, upholding noninterference and nonintervention as primary values of ASEAN diplomacy.[79]

The "ASEAN Way" is the title that has arose for the pattern of noninterfering, nonintervening diplomacy developed within ASEAN.[80] The ASEAN Way is based principally on the

76. *See* PAUL J. DAVIDSON, ASEAN: THE EVOLVING LEGAL FRAMEWORK FOR ECONOMIC COOPERATION, 14–15 (Times Acad. Press, 2002) (citing that the inclusion of the remaining countries of Southeast Asia into ASEAN took more than 30 years, with each country joining in the following order: Brunei Darussalam (1984), Vietnam (1995), Laos and Burma (1997), and Cambodia (1999)); *see also* Edward Tang, *ASEAN's Future Must Be Determined by Its People, Says Jaya*, STRAITS TIMES (Sing.), May 1, 1999, at 37 (discussing the complete participation of all 10 countries in Southeast Asia into ASEAN); Association of Southeast Asian Nations, *available at* http://www.aseansec.org/64.htm (last visited Sept. 16, 2006) (providing the dates of entry of the new member countries into ASEAN).

77. *See* The ASEAN Declaration, ¶ 1 (Bangkok 1967), *available at* http://www.aseansec.org/1212.htm (last visited Sept. 16, 2006) (stating that the aims and purposes of ASEAN are "[t]o accelerate the economic growth, social progress and cultural development in the region . . . promote regional peace and stability . . . provide assistance to each other in the form of training and research facilities in the educational, professional, technical and administrative sphere . . . ."); *see also* SHAUN NARINE, EXPLAINING ASEAN: REGIONALISM IN SOUTHEAST ASIA 12–13 (Lynne Rienner Publishers, Inc., 2002) (reiterating the purposes of ASEAN)*; see also* Declaration of ASEAN Concord ¶ 3–4 (Feb. 24, 1976), *available at* http://www.aseansec.org/5049.htm (last visited Sept. 16, 2006) (providing the text of the ASEAN declaration, and calling for active promotion, cooperation, and adoption of regional strategies for economic development).

78. *See* NARINE, *supra* note 77 (discussing that the greatest threats to the founding member states of ASEAN were internal insurgencies and foreign intervention, and that ASEAN sought to combat these through socioeconomic development, avoidance of intra-ASEAN competition, and cooperation in reducing the influence of external states); Tan, *supra* note 9, at 967 n.1 (highlighting that, "[t]he raison d'être of ASEAN was a political one, to secure the region's peace, stability, and development"); *see also* Association of Southeast Asian Nations, *available at* http://www.aseansec.org/64.htm (last visited Sept. 16, 2006) (detailing the fundamental principles; the political, social and economic objectives of ASEAN, among which are acceleration of the economic growth, social progress and cultural development in the region; the promotion of regional peace and stability; and the promotion of mutual respect for the independence and sovereignty of each member nation).

79. *See* Koh Kheng-Lian & Nicholas A. Robinson, *Strengthening Sustainable Development in Regional Inter-Governmental Governance: Lessons from the 'ASEAN Way,'* 6 SING. J. INT'L & COMP. L. 640, 642–43 (2002) (noting that 'ASEAN Way' stems from ASEAN member states existing under a unified structure that emphasizes cooperation and nonintervention); *see also* Robin Ramcharan, *ASEAN and Non-Interference: A Principle Maintained*, 22 CONTEMP. SE. ASIA 60, 60 (2000) (stating that ASEAN member states have retained primordial noninterference principles despite international criticism); Mark J. Valencia, *Malacca Strait: Clash or Sovereignty?*, JAKARTA POST, Nov. 8, 2004, at 7 (suggesting that historical advantages and noninterference principles entice new member states to zealously preserve their national sovereignty).

80. *See* Kheng-Lian & Robinson, *supra* note 79, at 642–43 (stating that the practice of regional collaboration without interference in the affairs of member states is known as the "ASEAN Way"); *see also* NARINE, *supra* note 77, at 31 (explaining the ASEAN preference for noninterference). *See generally* Lily Z. Rahim, *Economic Crisis and the Prospects for Democratisation in Southeast Asia*, 30 J. CONTEMP. ASIA 17, 37–8 (2000) (describing the basis of the "ASEAN Way" and noting that the principles have withstood immense scrutiny).

concepts of consultation and consensus.[81] This form of diplomacy has been quite effective in promoting a sense of community among states often facing violent conflicts.[82] It has maintained lines of communication and identified areas of agreement.[83] It has also succeeded in compartmentalizing disagreements to prevent areas of disagreement from stifling progress in areas of agreement.[84] Simultaneously, the ASEAN Way demonstrates the intense commitment within ASEAN to noninterference and nonintervention in the affairs of member states.[85] This exhibits the traditional lack of consensus and commitment necessary among member states to allow and sustain the strong obligations of close cooperation.[86]

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81. *See* NARINE, *supra* note 77, at 31 (explaining that an additional significant norm within the "ASEAN Way" is the preference for national implementation of cooperative arrangements rather than creation of supranational authorities); Kheng-Lian & Robinson, *supra* note 79, at 642–43 (stating that the ASEAN Way stems from consensus building among member states); *see also ASEAN to Issue Bali Concord II*, JAKARTA POST, Oct. 6, 2003, at 1 (emphasizing to ASEAN political leaders the importance to ASEAN political leaders of maintaining the principles of non-interference, cooperation, and consensus building).

82. *See* Association of Southeast Asian States: Bangkok Summit Declaration on the Progress of ASEAN, Vietnam's Membership, Greater Economic Cooperation & Closer Political Cooperation in International Fora, Dec. 15, 1995, 35 I.L.M. 1063, 1064 (summarizing the ASEAN member states agreement to preserve a "common spirit and sense of community" within the region); *see also Asian Chief Upbeat on Group's Unity Amid Quarrels*, ASIAN ECON. NEWS, Feb. 24, 2003, at 1 (noting that ASEAN maintains a unified and strong Asian community amid internal discourse). *But see* NARINE, *supra* note 77, at 33 (stating that the ASEAN Way may conflict with ASEAN efforts to promote a cooperative spirit among ASEAN states).

83. *See* NARINE, *supra* note 77, at 33 (affirming ASEAN's commitment towards cooperative relations); s*ee also* Sompong Sucharitkul, *ASEAN Partnership and Cooperation with Non-ASEAN Partners*, 1991 SING. J. LEGAL STUD. 562, 575 (1991) (demonstrating that ASEAN states have worked to develop greater communication with foreign nations). *See generally* Abdul Khalik, *RI Says Pyongyang Must Be Included in Korean Talks*, JAKARTA POST, July 27, 2006, at 10 (noting that communication among ASEAN member states has always been positive).

84. *See* NARINE, *supra* note 77, at 33 (discussing the ASEAN practice of disallowing disagreements to prevent cooperation); *see also* George O. White III, *Foreigners Beware? Investing in a Jungle with Many Predators: The ASEAN Investment Arena*, 37 TEX. INT'L. L.J. 157, 160–61 (2002) (suggesting that ASEAN has been successful due to its nonconfrontational style of diplomacy). *See generally* Gilbert Rozman, *Cultural Prerequisites of East Asian Regionalism in the Age of Globalization*, 37 KOREA OBSERVER 149, 150–51 (2006) (noting that the ASEAN Way allows ASEAN member states to bypass indecision on a particular issue to facilitate the resolution of other disagreements).

85. *See* White, *supra* note 84, at 160–61 (enumerating the fundamental principles of ASEAN diplomacy one of which is non-interference in the internal affairs of member states); *see also* Eric Altbach, *Growing Pains: ASEAN at 30*, JAPAN ECON. INST. REP., June 19, 1998, ¶ 4 (stating that ASEAN member states are committed to the "tenet" of noninterference with the affairs of other member states); David Martin Jones & Michael L. R. Smith, *ASEAN's Imitation Community*, 46 ORBIS 93, 93 (2002) (noting that the ASEAN Way is the procedural foundation for conflict management among ASEAN member states).

86. *See* NARINE, *supra* note 77, at 33 (averring that ASEAN member states are unable to share a common vision, and therefore unable to sustain strong "supranational" governance). *See generally ASEAN Leaders Committed to Enhancing Achievements, Say Megawati*, ANTARA, Oct. 7, 2003, at 1 (emphasizing the ASEAN leaders commitment to protect member states from outside interference).

The objective of the ASEAN member states is to cooperate on a broad range of issues. The states recently have worked toward the closest cooperation in the field of economics.[87] In this area, the states are working toward the type of cooperative scheme identified as a common market.[88] Such an arrangement would allow goods, investment, and labor to move freely between the ASEAN member states.[89] Additionally, the member states would likely work through ASEAN to negotiate trade agreements with outside states.[90] The goal would be two-fold. First, this arrangement would encourage internal foreign direct investment as it removes the barriers to investors from ASEAN states investing in other ASEAN states.[91] Second, and perhaps more important, this arrangement should stimulate external foreign direct investment within

87. *See* Tan, *supra* note 9, 938 (stating that various global economic developments of the 1990s, including the formation of regional trade blocs in Europe and North America, induced ASEAN to seek wider and deeper economic integration); *see also* Pamela C.M. Mar, *A Zone of Asian Monetary Stability*, 19 ASEAN ECON. BULL. 353, 353 (2002) (reviewing 19 TETSUJI MURASE, A ZONE OF ASIAN MONETARY STABILITY (2002)) (discussing how ASEAN's focus on fiscal and monetary issues has been overshadowed by economic integration and free trade interests); Press Release, U.S.-ASEAN Bus. Council, U.S. Business Community Encouraged by AEM Decision on Integration, Commends USTR on Energetic Engagement (Aug. 25, 2006), *available at* http://www.us-asean.org/Press_Releases/2006/aem.asp (noting that ASEAN follows up with member states to assure they have continued progress in economic integration initiatives).

88. *See* John Burton, *East Asia Summit Sidelined in the Battle of Region's Economic Blocs*, FIN. TIMES, Dec. 13, 2005, at 9 (noting that ASEAN member states are drafting a charter that may lead to the formation of an ASEAN common market); *see also Ministers Agree to Move Up ASEAN Common Market Timeframe*, ASIA PULSE, Oct. 7, 2003, at 1 (stating that ASEAN's plans to form a common market must be accelerated to promote economic growth); Leslie Lau, *ASEAN Aims to Set Up Single Market by 2015*, STRAITS TIMES (Sing.), Aug. 23, 2006, at 1 (quoting ASEAN ministers' declaration of support for the acceleration of ASEAN's plan to develop a common market).

89. *See* Declaration of ASEAN Concord II, Oct. 7, 2003, 43 I.L.M. 18, *available at* http://www.aseansec.org/15/60.htm (maintaining that the ASEAN Economic Community is the realization of an economic region in which there is a free flow of goods, services and investment and a freer flow of capital, and stating that "the ASEAN Economic Community shall establish ASEAN as a single market and production base, turning the diversity that characterizes the region into opportunities for business complementation making the ASEAN a more dynamic and stronger segment of the global supply chain"); *see also* Deborah A. Haas, *supra* note 8, at 830 (describing the various agreements ASEAN implemented to facilitate trade and create a common market, including the Common Effective Preferential Tariff (CEPT) scheme, which would create a Free Trade Area by reducing intra-ASEAN tariffs on all manufactured goods); *Overview: Association of Southeast Asian Nations*, *available at* http://www.aseansec.org/64.htm (last visited Sept. 5, 2006) (outlining the goals ASEAN has undertaken to facilitate a single market).

90. *See* Tan, *supra* note 9, at 949 (noting that at the Uruguay Round of GATT negotiations, representatives from ASEAN states presented a unified front, siding together even when some member states' interests were not involved); *see also* Simone Suelzer McCormick, *ASEM: A Promising Attempt to Overcome Protective Regionalism and Facilitate the Globalization of Trade*, 10 ANN. SURV. INT'L & COMP. L. 233, 233–34 (2004) (describing the ASEM, a forum intended to strengthen economic ties between ASEAN nations and the EU, which brings the ASEAN nations and the 25 European Union nations together for meetings pertaining to trade, security, and the environment); *ASEAN Cool to Japan's 16-way FTA, but Willing to Study Idea*, ASIAN ECON. NEWS, Aug. 28, 2006 ¶ 3 (reporting ASEAN's recent negotiations with Japan, China, and Korea in establishing a new Free Trade Agreement).

91. *See* Kristen Cunningham, Note, *Fallen Tiger: The Story of Thailand's Currency Devaluation in 1997*, 21 HOUS. J. INT'L L. 451, 455–56 (1999) (stating that one of the primary goals of the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area (CEPT-AFTA Agreement) was increasing trade among ASEAN nations by reducing tariffs); *see also ASEAN Backs Plan to Create Single Market by 2015,* ASIAN ECON. NEWS, Aug. 28, 2006 (citing Malaysian Prime Minister Abdullah Ahmad Badawi, who urged ASEAN nations to lower trade barriers and invest in other ASEAN states); *Southeast Asia: A Free Trade Area, available at* http://www.aseansec.org/viewpdf.asp?file/pdf/afta.pdf (last visited Sept. 6, 2006) (describing the Free Trade Area agreement ASEAN set up in order to facilitate trade between ASEAN countries).

ASEAN.[92] With the removal of internal barriers, outside investors may more easily take advantage of the diverse benefits of various ASEAN states.[93] Furthermore, ASEAN will be capable of negotiating much more favorable agreements with outside states than would any of the member states acting alone.[94] Thus, the common market arrangement will serve the interests of the ASEAN member states.[95] This arrangement will require greater cooperation than a free trade agreement like NAFTA, but the ASEAN states do not envision complete integration as with the European Community model.[96]

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92. *See* McCormick, *supra* note 90, at 236–37 (stating that through the ASEAN Free Trade Area and the ASEAN Investment Area, ASEAN has established strong ties with the European Union, which imported 61 billion euros from the ASEAN region, while it exported 42 billion euros to the ASEAN region in 2002); *see also ASEAN Expects Sustained Rise in Investment*, TAIPEI TIMES, Aug. 22, 2006, at 10 (reporting that foreign direct investment in the ASEAN region rose to $38 billion in 2006); *Setback for Free Trade*, ASIAN ECON. NEWS, Dec. 4, 2000, at 4–5 (arguing that the creation of a common market would encourage foreign investment in the region).

93. *See* Terence J. Lau, *Distinguishing Fiction from Reality: The ASEAN Free Trade Area and Implications for the Global Auto Indus.,* 31 DAYTON L. REV. 453, 461 (2006) (stating that the removal of trade barriers by the ASEAN Free Trade Agreement, made the ASEAN region more attractive to carmakers from South Korea and Europe, who are now looking to build factories in the region); *see also* White*, supra* note 84, at 162–71 (arguing that the development of the ASEAN Investment Area (AIA), which will lower barriers to the flow of capital, labor, and technology among the ASEAN nations, will foster incentives for foreign investors to invest in the ASEAN region); Shin-Yi Peng, Note, *Economic Relations between Taiwan and Southeast Asia: A Review of Taiwan's "Go South" Policy*, 16 WIS. INT'L L.J. 639, 647 (1998) (claiming that Taiwan's policy of investing in Southeast Asia is a response to free trade agreements, including ASEAN's economic integration policies).

94. *See* Singapore Declaration of 1992, Jan. 28, 1992, 31 I.L.M. 498 (proclaiming that ASEAN nations will seek to safeguard their interests by promoting an open international regime and stimulating economic cooperation in the region); *see also* George O. White III, Comment, *From Snowplows to Siopao—Trying to Compete in a Global Marketplace: The ASEAN Free Trade Area*, 8 TULSA J. COMP. & INT'L L. 177, 195 (2000) (stating that the ASEAN Free Trade Area formed because Southeast Asian countries needed a trade bloc in order to compete with China and other regional trading arrangements). *But see* Greenwald, *supra* note 1, at 211 (stating that following the Asian Financial Crisis in 1997, Singapore became frustrated by the pace of the ASEAN Free Trade Area, and began to seek out Free Trade Agreements with non-ASEAN nations).

95. *See* White, *supra* note 94, at 195–96 (stating that the creation of the common market through the ASEAN Free Trade Area was intended to accelerate ASEAN's economic growth, and that ASEAN expects "significant . . . gains from strengthened international competitiveness"). *But see* Greenwald, *supra* note 1, at 211 (describing the frustration of some ASEAN nations due to the slow pace of less developed countries' implementation of the AFTA, and explaining the trend of unsatisfied nations to seek alternative Free Trade Agreements). *See generally* Anthony Venables, *Regional Integration Agreements: A Force for Convergence or Divergence*?, THE WORLD BANK DEV. GROUP TRADE, Dec. 31, 1999, *available at* http://www.wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2000/01/15/000094946_99122905343030/Rendered/PDF/multi_page.pdf (arguing that free trade agreements between low-income countries are not as favorable as those between low-income and high-income countries).

96. *See* Peter Kenevan & Andrew Winden, *Recent Development: Flexible Free Trade: The ASEAN Free Trade Area,* 34 HARV. INT'L L.J. 224, 226 (1993) (stating that cooperation and agreement on plans for economic integration is difficult because the ASEAN nations vary greatly in economic development; are not dominated by any large economic power; and have to consider the interests of non-member investors, and arguing for that reason, ASEAN leaders drafted the ASEAN Free Trade AREA differently from NAFTA); *see also* Haas, *supra* note 8, at 65 (opining that ASEAN should create formal legal structures to serve its goal of heightened cooperation, and acknowledging that the growing differences between ASEAN and the EC make it difficult to use the EC as a model for this legal code); PETER LLOYD & PENNY SMITH, GLOBAL ECONOMIC CHALLENGES TO ASEAN INTEGRATION AND COMPETITIVENESS: A PROSPECTIVE LOOK, 85–94 (2004), *available at* http://www.ausaid .gov.au/publications/pdf/global_econ_challenge.pdf (arguing that ASEAN has adopted a demanding and far-reaching integration plan that is short of complete integration).

2. The Enhanced Dispute Settlement Mechanism

Due in part to ASEAN member states' commitment to noninterference and nonintervention, ASEAN experienced little progress over decades of work toward economic cooperation.[97] In light of this slow progress, there have been many calls for greater accountability through legal mechanisms within ASEAN.[98] The ASEAN states acknowledged this need and created a dispute settlement mechanism in November 1996.[99] The mechanism was patterned after the World Trade Organization's (WTO) dispute settlement arrangement.[100] However, the ASEAN Dispute Settlement Mechanism ("1996 DSM") introduced several unique provisions in keeping with the ASEAN Way.[101] For example, the first step in resolving a dispute was for the complaining party to seek consultations with the offending party to resolve the dispute amicably.[102]

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97. *See* Tan, *supra* note 9, at 949 (indicating that ASEAN emphasize sovereignty and non-interference among member nations, which has hindered progress since the Association's creation); *see also* Haas, *supra* note 8, at 11 (explaining that ASEAN did not have much economic success during its first 25 years and that "nationalistic tendencies" have contributed to the Association's difficulty in achieving its goals). *See generally* White, *supra* note 94, at 177, 181–84 (discussing the principles of ASEAN set forth in the Treaty of Amity and Cooperation and recognizing that ASEAN's early attempts at economic growth were generally unsuccessful).

98. *See* DAVIDSON, *supra* note 76, at 136; *see also* Tan, *supra* note 9, at 949 (explaining that it is necessary for supranational decision-making institutions to be independent of ASEAN for the nations to be held accountable for economic integration). *See generally* Rodolfo C. Severino, *Time for ASEAN to Integrate Its Economies*, ASIAN WALL ST. J., Sept. 1, 2003, at A7 (stating that "[a]ll studies so far agree that the integration of the regional economy requires an effective mechanism to monitor and ensure compliance and a credible and independent dispute-settlement mechanism . . . ").

99. *See* ASEAN Protocol on Enhanced Dispute Settlement Mechanism, *supra* note 1, art. 12 (codifying ASEAN's dispute settlement mechanism for economic cooperation); *see also* Jeffrey A. Kaplan, *ASEAN's Rubicon: A Dispute Settlement Mechanism for AFTA*, 14 UCLA PAC. BASIN L.J. 147, 151–52 (1996) (suggesting ASEAN officials' recognized they needed to create a dispute settlement mechanism); Greenwald, *supra* note 1, at 206 (explaining that ASEAN adopted the 1996 DSM following the 1995 Bangkok Summit).

100. *See* DAVIDSON, *supra* note 76, at 147; *see also* YAN LUO, DISPUTE SETTLEMENT IN THE PROPOSED EAST ASIA FREE TRADE AGREEMENT: WHAT WE CAN LEARN FROM THE EU AND THE NAFTA 1, 19 (2005), *available at* http://www.hss.ed.ac.uk/ila/iladocs/Session6Luo(revised).pdf (remarking that ASEAN heavily relied on the WTO's dispute settlement mechanism in creating 1996 DSM and there are parallel provisions in each); White, *supra* note 94, at 192–93 (stating that 1996 DSM was modeled after the WTO's dispute settlement mechanism).

101. *See* Paul J. Davidson, *The ASEAN Way and the Role of Law in ASEAN Economic Cooperation*, 8 SING. Y.B. OF INT'L L. 165, 174 (2004) [hereinafter *The ASEAN Way*] (detailing the system 1996 DSM established with various levels of decision-making and how it differs from the WTO's dispute settlement mechanism); *see also* White *supra* note 84, at 161 (describing the characteristics of the "ASEAN Way"). *See generally* ASEAN Protocol on Enhanced Dispute Settlement Mechanism, *supra* note 1, arts. 2–4 (illustrating ASEAN's emphasis on amicable resolutions, consensus, and nonconfrontation).

102. *See* ASEAN Protocol on Enhanced Dispute Settlement Mechanism, *supra* note 1, art. 2 (declaring that "[a]ny differences shall, as far as possible, be settled amicably between the member states"); *see also* William Onzivu, *Globalism, Regionalism, or Both: Health Policy and Regional Economic Integration in Developing Countries, an Evolution of a Legal Regime?*, 15 MINN. J. INT'L L. 111, 174–75 (2006) (explaining that prior to member nations invoking the dispute settlement mechanism, they first need to use consultations in an attempt to settle the matter amicably); Marie Wilson, *TRIPS Agreement Implications for Asean Protection of Computer Technology*, 4 ANN. SURV. INT'L & COMP. L. 18, 50 n.215 (1997) (describing the ASEAN framework is incorporating levels of consultation).

Also, the 1996 DSM encouraged using good offices, conciliation, or mediation to resolve a dispute.[103] Only after such informal processes had been exhausted should the parties resort to the more adjudicative panel process.[104]

The dispute settlement panel process also maintained several unique provisions tailored to the ASEAN Way. These included the ability of a simple majority in the Senior Economic Officials Meeting (SEOM) to overturn the role of the ASEAN Economic Ministers (AEM) as appellate body[105] and panel decisions.[106] Such provisions were presumably designed to avoid vesting too much power in the dispute settlement panels, as the ASEAN states have traditionally opposed creating powerful supranational structures.[107] Ultimately, these limits on the process severely weakened the dispute settlement mechanism.[108] The provisions not only decreased the possibility that any panel decision would be binding on the parties to a particular dispute, they also politicized the process by requiring representatives from each member state to vote on

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103. *See* ASEAN Protocol on Enhanced Dispute Settlement Mechanism, *supra* note 1, art. 3 (stating that "[m]ember states which are parties to a dispute may at any time agree to good offices, conciliation or mediation"); *see also* Rosalyn Higgins, *The ICJ, the ECJ, and the Integrity of International Law*, 52 INT'L & COMP. L.Q. 1, 15 (2003) (indicating that if the parties cannot resolve their dispute through consultations, the first steps in dispute settlement are good offices, conciliation or mediation); Onzivu, *supra* note 102, at 174–75 (emphasizing the procedure of 1996 DSM).

104. *See* ASEAN Protocol on Enhanced Dispute Settlement Mechanism, *supra* note 1, art. 4 (providing that "[i]f the consultations fail to settle a dispute within sixty [60] days . . . the matter shall be raised to the SEOM" and explaining that SEOM then had discretion to establish a panel or deal with the dispute itself in an additional effort at amicable resolution); *see also* Kaplan, *supra* note 99, at 191 (explaining that parties may bring their dispute to SEOM after 60 days if there has been no resolution); Greenwald, *supra* note 1, at 206–07 (indicating that disputing parties only raise their issues to SEOM as a last resort).

105. *See* ASEAN Protocol on Enhanced Dispute Settlement Mechanism, *supra* note 1, art. 8, at ¶ 2 (proclaiming that "[t]he decision of the AEM on the appeal shall be final and binding on all parties to the dispute"); s*ee also* DAVIDSON, *supra* note 76, at 136 (describing the procedures of the dispute settlement mechanism). *See generally* Nobuo Kiriyama, *Institutional Evolution in Economic Integration: A Contribution to Comparative Institutional Analysis for International Economic Organization*, 19 U. PA. J. INT'L ECON. L. 53, 94–95 (1998) (explaining that it is the function of AEM to conduct appellate review).

106. *See* ASEAN Protocol on Enhanced Dispute Settlement Mechanism, *supra* note 1, art. 7 (providing that SEOM is to consider the panel result, but can make a ruling on a simple majority); s*ee also* Joost Pauwelyn, *Going Global, Regional, or Both? Dispute Settlement in the Southern African Development Community (SADC) and Overlaps with the WTO and Other Jurisdictions*, 13 MINN. J. GLOBAL TRADE 231, 273–74 (2004) (explaining that parties may appeal the panel decisions of SEOM). *See generally* Kiriyama, *supra* note 105, at 94–95 (describing the structure of 1996 DSM where SEOM is permitted to make decisions based on panel reports and AEM can conduct appellate review).

107. *See* Tan, *supra* note 9, at 966 (proclaiming that ASEAN economic integration is "not about creating any supranational bodies with executive, legislative or judicial functions); *see also* Li-ann Thio, *Implementing Human Rights in ASEAN Countries: 'Promises to Keep and Miles to Go Before I Sleep,'* 2 YALE HUM. RTS. & DEV. L.J., 1, 61 (1999) (arguing that Paragraph 24 of the Bangkok Declaration of 1993, which reads, "[w]e welcome the important role played by national institutions in the genuine and constructive promotion of human rights, and believe that the conceptualization and eventual establishment of such institutions are best left for the States to decide," is proof of ASEAN countries' traditional distaste for supranational organizations). *See generally* Higgins, *supra* note 103, at 16 (comparing ASEAN's dispute resolution mechanism to that of the EU and NAFTA and recognizing that ASEAN has no supranational judicial body).

108. *See* Nobuo Kiriyama, *supra* note 105, at 94–95 (comparing the 1996 DSM to other dispute resolution mechanisms and recognizing potential issues with its implementation); *see also* Yong, *supra* note 3 (asserting that "the 1996 Protocol was perceived to be ineffective because of its excessive bureaucratic nature, and thus, it has never been invoked). *See generally The ASEAN Way*, *supra* note 101, at 173–74 (recognizing the need for an improved dispute settlement mechanism).

each panel decision in the SEOM or the AEM.[109] These weaknesses led ASEAN to establish a much stronger Enhanced Dispute Settlement Mechanism (EDSM) in November 2004.[110]

In keeping with the ASEAN Way, the EDSM maintains the requirement that disputing parties seek consultations with one another as the first step in resolving a dispute.[111] The EDSM maintains the 1996 DSM encouragement to parties to use good offices, conciliation, or mediation to resolve a dispute, and goes one step further in authorizing the ASEAN secretariat to step in and offer good offices, conciliation, or mediation at any time.[112] However, the EDSM significantly strengthens the more formal process.[113] In the event that consultations should fail to resolve a dispute amicably, the complaining party may raise the issue to the

109. *See The ASEAN Way*, *supra* note 101, at 173 (noting that the DSM leaves much discretion to its political entities, but arguing that the DSM represents a movement toward transparent dispute settlement in Southeast Asia); *see also* Greenwald, *supra* note 1, at 206–08 (highlighting the problematic provisions of the 1996 Protocol). *See generally* Tan, *supra* note 9, at 952–53 (suggesting that ASEAN member states harbor political sensitivities as a result of antagonism between some ASEAN member states and a history of solving political issues through diplomatic channels).

110. *See* ASEAN Protocol on Enhanced Dispute Settlement Mechanism, *supra* note 1; *see also* Bali Concord II, Oct. 7, 2003, 43 I.L.M. 18 (2004) (forming a High-Level Task Force on ASEAN Economic Integration that annexed recommendations calling for both a depoliticization of the dispute settlement process and a strengthening of the dispute settlement mechanism by amending it to ensure that panel and appellate body decisions would be binding on the parties to a dispute); Greenwald, *supra* note 1, at 209 (recognizing that the 2004 Protocol is a significant step toward the establishment of a DSM but also contending that it is too early to judge whether it will be more successful than the DSM created under the 1996 Protocol).

111. *See* ASEAN Protocol on Enhanced Dispute Settlement Mechanism, *supra* note 1, art. 3 (stating that member states should have adequate consultation and that any differences should be amicably resolved); s*ee also The ASEAN Way*, *supra* note 101, at 167 (discussing the ASEAN tradition of decision-making through discussion and consultation). *See generally* Yong, *supra* note 3 (explaining the values central to the "ASEAN Way").

112. *See* ASEAN Protocol on Enhanced Dispute Settlement Mechanism, *supra* note 1, art. 4 (indicating that the inclusion of the Secretariat in amicable settlement of disputes seems to replace the provision in the 1996 Dispute Settlement Mechanism allowing the SEOM to opt out of establishing a panel in favor of itself, seeking to facilitate amicable resolution of a dispute); *cf.* ASEAN Protocol on Enhanced Dispute Settlement Mechanism, art. 4, at ¶ 3 (Nov. 20, 1996), *available at* http://www.aseansec.org/16654.htm (establishing that if the SEOM desires, it may deal with a dispute to achieve an amicable settlement without appointing a panel); ASEAN Protocol on Enhanced Dispute Settlement Mechanism, art. 5, at ¶ 1 (Nov. 29, 2004), *available at* http://www.aseansec.org/16754.htm (proclaiming that the SEOM retains discretion to avoid establishing a panel, but it may do so only by consensus and it is given no role in informal settlement of the dispute. Since the Secretariat is much less of a political organ than the SEOM, this change is likely part of the depoliticization of the dispute settlement process). *See generally* B.G. Ramcharan, *The Good Offices of the United Nations Secretary General in the Field of Human Rights*, 76 AM. J. INT'L L. 130, 131–32 (1982) (discussing the history of using good offices as a method of settling international disputes).

113. *See* Greenwald, *supra* note 1, at 206-09 (recognizing how the 2004 Protocol strengthens the 1996 Protocol); *see also* Onzivu, *supra* note 102, at 175–76 (illustrating some of the key changes strengthening the dispute settlement mechanism); Yong, *supra* note 3 (highlighting the weaknesses of the 1996 Protocol on Dispute Settlement Mechanism).

SEOM.[114] The SEOM, in turn, will establish a panel to decide the dispute.[115] The panel will make an objective assessment of the dispute to determine whether a particular agreement has been violated.[116] The panel must then report its findings and recommendations to the SEOM, which must adopt the panel report unless the members decide by consensus to reject the report or one of the parties appeals the panel's decision.[117]

The EDSM also established a separate, neutral[118] Appellate Body, the members of which are to be appointed by the AEM to serve four-year terms.[119] If a party to a dispute appeals a

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114. *See* ASEAN Protocol on Enhanced Dispute Settlement Mechanism, *supra* note 1, art. 3 (addressing the need for member states to afford adequate time for consultations before involving the SEOM); *see also* ASEAN Protocol on Enhanced Dispute Settlement Mechanism, *supra* note 1, art. 4, at ¶ 1 (providing member states the opportunity to request review by a SEOM panel upon terminating good offices, conciliation, or mediation). *See generally* Onzivu, *supra* note 102, at 175–76 (describing the process of appealing to SEOM).

115. *See* ASEAN Protocol on Enhanced Dispute Settlement Mechanism, *supra* note 1, art. 5, at ¶ 1 (establishing that the SEOM may choose to reject the request to establish a panel only by consensus); *see also* ASEAN Protocol on Enhanced Dispute Settlement Mechanism, *supra* note 1, art. 5, at ¶ 2 (mandating that the panel must be established within 45 days of the request, either by the SEOM or by circulation); ASEAN Protocol on Enhanced Dispute Settlement Mechanism, *supra* note 1, art. 8 (detailing panel procedures).

116. The task of interpreting the ASEAN agreement at issue in a case is necessarily given to a panel. Furthermore, such a panel will find itself interpreting the law of a member state anytime a complaint is based on an allegation that the state law violates an ASEAN agreement. *See* ASEAN Protocol on Enhanced Dispute Settlement Mechanism, *supra* note 1, art. 7 (explaining that "[t]he function of the panel is to make an objective assessment of the dispute before it, [including an examination of the facts of the case and the applicability of and conformity with the sections of the Agreement or any covered agreements] and its findings and recommendations in relation to the case"); *see also* Onzivu, *supra* note 102, at 175 (recognizing that the duty of the panel established by the SEOM is to make findings regarding a dispute brought before it); Greenwald, *supra* note 1, at 207 (asserting that the purpose of the panel established by SEOM is to objectively assess the disputes brought before it).

117. *See* ASEAN Protocol on Enhanced Dispute Settlement Mechanism, *supra* note 1, art. 9 (establishing the requirement of the SEOM to adopt a panel report within 30 days, unless a party to the dispute has appealed the decision, or the SEOM unanimously decides not to adopt the report); *see also* Onzivu, *supra* note 102, at 175 (noting that the parties to a dispute can appeal any ruling made by the SEOM if done within thirty days of the decision); *Recommendations of the High-Level Task Force on ASEAN Economic Integration,* §14 (iv), *available at* http://www.aseansec.org/hltf.htm (last visited Oct. 15, 2006) (affirming that all decisions made by the Senior Economic Officials Meeting [SEOM] must be unanimous).

118. *See* ASEAN Protocol on Enhanced Dispute Settlement Mechanism, *supra* note 1, art. 12, at ¶ 3 (announcing that the members of the Appellate Body are to be unaffiliated with any government, and no member may consider a dispute that would create a conflict of interest for that member); *see also* Greenwald, *supra* note 1, at 207 (stating that the officials tasked with settling disputes under the Enhanced Dispute Settlement Mechanism are not associated with any government and therefore are more neutral); *ASEAN Economic Ministers Ink Dispute Mediation Protocol*, JAPAN ECON. NEWSWIRE, Nov. 20, 1996, at 1 (pointing out that under the original Dispute Settlement Mechanism the ASEAN Economic Ministers' Meeting, a partial judicial body stood as the appellate review body).

119. *See* ASEAN Protocol on Enhanced Dispute Settlement Mechanism, *supra* note 1, art. 12, at ¶ 1–2 (stating that each member of the ASEAN Economic Ministers Appellate Body shall serve a four-year term)*; see also* Kiriyama, *supra* note 105, at 67–68 (noting the lack of a panel review procedure in the original Dispute Settlement Mechanism); Denis Hew, *Economic Integration in East Asia: An ASEAN Perspective*, in UNISCI Discussion Papers Nr. 11, 49, 52 n.6 (Antonio Marquina ed., 2006), *available at* http://www.ucm.es/info/unisci/UNISCI11Hew.pdf (emphasizing the depoliticization of the Dispute Settlement Mechanism through the appointment of well qualified, independent experts to the appellate panel).

panel decision, three of the seven members of the Appellate Body will sit to consider the appeal.[120] The Appellate Body must report its decision to the SEOM, and again, the SEOM must adopt the decision unless the members decide by consensus to reject it.[121]

These changes from the 1996 DSM greatly strengthened the EDSM.[122] The requirement of consensus within the SEOM to reject a panel or Appellate Body report effectively assures that the reports will be binding on the parties.[123] This effective removal of the SEOM from dispute settlement decisions and the replacement of the AEM as the Appellate Body with a separate and neutral body also depoliticizes the dispute settlement process.[124]

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120. *See* ASEAN Protocol on Enhanced Dispute Settlement Mechanism, *supra* note 1, art. 12, at ¶ 1 (indicating that the Appellate Body is comprised of seven members, with three of those members serving on a case); *see also ASEAN Free Trade Agreement and Violent Conflicts in Southeast Asia*, § 3.2 (2005), *available at* http://www.idrc.ca/uploads/user-S/11480606771Asia_Regional.doc (noting that under the 1996 protocol amending the Dispute Settlement Mechanism, the SEOM could, if it wished, establish a three-member panel to mediate disputes). *See generally* Narongchai Akrasanee & Jutamas Arunanondchai, *Institutional Reforms to Achieve ASEAN Economic Integration*, *in* ROADMAP TO AN ASEAN ECONOMIC COMMUNITY 63, at 67 (Denis Hew ed., 2005) (asserting that the need for an independent appeals panel to resolve disputes stems from the tendency of the ASEAN Economic Ministers to accommodate the political interests of the member states).

121. *See* ASEAN Protocol on Enhanced Dispute Settlement Mechanism, *supra* note 1, art. 12, at ¶ 13 (stating that the Senior Economic Officials Meeting must adopt the Appellate Body's report within 30 days of receiving it unless the SEOM members unanimously decide not to adopt the report). *See generally* U.N. CONF. ON TRADE & DEV. [UNCTAD], *Dispute Settlement: State-State*, UNCTAD Series on Issues in International Investment Agreements at 44 (2003), *available at* http://www.unctad.org/en/docs/iteiit20031_en.pdf (asserting the role of SEOM under the Dispute Settlement Mechanism as the ultimate dispute settler, a role that was changed by the Enhanced Dispute Settlement Mechanism); Lawan Thanadsillapakul, *Open Regionalism and Deeper Integration: The Implementation of ASEAN Investment Area (AIA) and ASEAN Free Trade Area (AFTA), available at* http://www.dundee.ac.uk/cepmlp/journal/html/vol6/article6-16a.html (last visited Sept. 17, 2006) (recognizing that under the Dispute Settlement Mechanism all decisions made regarding disputes must be reported to the SEOM which, in turn, will then rule on the dispute).

122. *See* Denis Hew, *Towards an ASEAN Charter: Regional Economic Integration*, *in* FRAMING THE ASEAN CHARTER: AN ISEAS PERSPECTIVE 33, 37 (Rodolpho C. Severino ed., 2005) (remarking that the Enhanced Dispute Settlement Mechanism seeks to address the problems found in the Dispute Settlement Mechanism). *See generally* Association of Southeast Asian Nations (ASEAN): Declaration of ASEAN Concord II (Bali Concord II), Oct. 7, 2003, 43 I.L.M. 18, 21 (expressing the need for improvement of the ASEAN Dispute Settlement Mechanism); Yong, *supra* note 3, at ¶ 37 (attributing the ineffectiveness of the Dispute Settlement Mechanism to its bureaucratic nature).

123. *See* ASEAN Protocol on Enhanced Dispute Settlement Mechanism, *supra* note 1, art. 9, at ¶1 (stating that the EDSM provides that SEOM representatives from the states that are parties to a dispute "may be present" for the SEOM deliberations on whether to adopt the panel report for that dispute); *see also* Pauwelyn, *supra* note 106, at 273 (affirming that final decision of the ASEAN Economic Ministers is final and binding on all parties). *See generally* Association of Southeast Asian Nations (ASEAN): Declaration of ASEAN Concord II (Bali Concord II), Oct. 7, 2003, 43 I.L.M. 18, 19 (indicating that the cooperation and solidarity that would result from the consensus of independent mediators in a dispute is required for sustainable economic development).

124. *See* Denis Hew, *Introduction: Roadmap to an ASEAN Economic Community*, *in* ROADMAP TO AN ASEAN ECONOMIC COMMUNITY 1, 12 n.4 (Denis Hew ed., 2005) (positing that an appellate body under the Enhanced Dispute Settlement Mechanism would depoliticize the outcome of disputes); *see also* Narongchai Akrasanee & Jutamas Arunanondchai, *Institutional Reforms to Achieve ASEAN Economic Integration*, *in* ROADMAP TO AN ASEAN ECONOMIC COMMUNITY 63, 67 (Denis Hew ed., 2005) (finding that the process for dispute resolution put into effect by the Enhanced Dispute Settlement Mechanism reduces political influence on economic matters); Yong, *supra* note 3, at ¶ 37 (establishing that the aim of the Enhanced Dispute Settlement Mechanism is to settle trade and economic disputes objectively).

In giving the power to decide disputes to independent bodies and binding their decisions on the parties, the EDSM is a much stronger and potentially more effective dispute settlement mechanism.[125] As such, the EDSM has a much greater potential for ensuring that member states fulfill their obligations under ASEAN agreements.[126] Internal trade barriers may be more effectively removed and establishing a uniform external trade policy will be possible.[127] In the absence of trade barriers, both internal and external foreign direct investment should increase.[128] With a stronger mechanism in place to ensure stability of the ASEAN agreements, confidence of foreign investors also should increase.[129] Ultimately, the EDSM may fill the role

125. *See* Haas, *supra* note 8, at 839 (asserting that the pre-2004 mechanism for resolving disputes lacked the detail necessary for effective results, and the vague and undefined measures provided little direct guidance to the parties); *see also* Kristin L. Oelstrom, *A Treaty for the Future: The Dispute Settlement Mechanisms of the NAFTA*, 25 LAW & POL'Y INT'L BUS. 783, 787 (1994) (discussing how NAFTA's more rigid general dispute settlement system not only resolves disputes but also acts as a dispute avoidance mechanism); *cf.* Myung Hoon Choo, *Dispute Settlement Mechanisms of Regional Economic Arrangements and Their Effects on the World Trade Organization* 13 TEMP. INT'L & COMP. L.J. 253, 271 (1999) (asserting that the WTO moved from a power-oriented to a rule-oriented system by empowering a dispute settlement mechanism with more teeth, which was accomplished through the introduction of the Appellate Body, adoption of a reverse consensus process of panel/appellate body decisions, and the strengthening of the enforcement mechanism).

126. *Cf.* Lorraine C. Cardenas & Arpaporn Buranakanits, *The Role of APEC in the Achievement of Regional Cooperation in Southeast Asia*, 5 ANN. SURV. INT'L & COMP. L. 49, 78 (1999) (depicting the pre-EDSM ASEAN system as evolutionary, cautious and conservative, resting upon consensus-building and peer pressure, and operating at a pace determined by the slowest member); Wilson, *supra* note 102, at 21 (stating that ASEAN intellectual property laws struggled to keep pace with rapidly changing technology in the 1990s, indicating a need for EDSM). *But see* McCormick, *supra* note 90, at 245 (discussing ASEAN's use of a consensus, or cooperation-based approach, that does not seek to implement rigid rules or systems on its members or trading partners, inferring that attempting to bind decisions to parties may not be effective).

127. *See* Pearlie M.C. Koh, *Enhancing Economic Cooperation: A Regional Arbitration Centre for ASEAN?,* 49 INT'L & COMP. L. Q., 390, 391–92 (2000) (noting that Singapore Prime Minister Goh Chok Tong stated that reductions in tariff and non-tariff measures would commit ASEAN to open its markets sector by sector, which would attract investment); *see also* White, *supra* note 94, at 195 (asserting that stricter trade guidelines will strengthen the collective bargaining power of the member states against such powerful trade regimes as the EU and NAFTA). *See generally* Nsongurua J. Udombana, *How Should We Live? Globalization and the New Partnership for Africa's Development*, 20 B.U. INT'L L.J. 293 n.30 (2002) (remarking that because of a lack of a viable or effective single political structure in the Asian region, integration has remained fragmented).

128. *See* Horacio A. Grigera Naon, *Symposium: Free Trade Areas: The Challenge and Promise of Fair vs. Free Trade Panel V: Regionalism and the Transfer of Sovereignty*, 27 LAW & POL'Y INT'L BUS. 1073, 1088 (1996) (noting that Framework Agreement of ASEAN free trade area sought to remove tariff and non-tariff barriers to prevent impediment of investment flow); *see also* Kuala Lumpur, *Step Up Intra-ASEAN Investments, Says Rafidah*, Malay. Econ. News, Aug. 21, 2006 (reporting that following the implementation of the EDSM foreign direct investments rose by 48% in 2005). *But see* Tan, *supra* note 9, at 962 (predicting that non-tariff trading barriers would remain high for the foreseeable future).

129. *See* Kaplan, *supra* note 99, at 189 (stating that providing a dispute settlement mechanism, ASEAN will secure the Asian Free Trade Area as an effective free trade area in which the ASEAN private sector and foreign investors will feel encouraged in their trading activities). *See generally* Onzivu, *supra* note 102, at 111 (noting that regional economic integration organizations have become pivotal tools in the promotion of international investment); Greenwald, *supra* note 1, at 207 (noting that one of the changes of the 2004 Protocol was the creation of the 'Consultation to Solve Trade and Investment Issues,' to handle complaints of private sector investors).

of enforcing compliance to the extent necessary to ensure the effectiveness of ASEAN in attaining its member states' economic goals.[130] Despite its positive aspects, the EDSM is not perfect.

II. Dangers of the ASEAN EDSM

There are dangers inherent within the ASEAN EDSM.[131] Unless they are remedied, ASEAN member states will face a serious risk of confronting a choice between sacrificing much more sovereignty than initially intended and failure of the EDSM.[132] Needless to say, failure of the EDSM would be a serious setback to the ASEAN as an organ of regional cooperation.[133] The dangers currently inherent in the EDSM lie in the possibility of the EDSM panels and

130. *See* Greenwald, *supra* note 1, at 207–08 (remarking that there is a problem of members being unable to settle disputes, leading to a loss of economic opportunity); *see also ASEAN Summit, 2005: Striding Toward Single Market*, THAI PRESS, Dec. 12, 2005 (arguing that ASEAN is moving towards its states' ultimate goal of becoming a single economic community, improving its dispute settlement mechanism). *But see* Greenwald, *supra* note 1, at 207 (noting that it remains to be seen whether EDSM will prove strong enough to support effective international cooperation).

131. *See* Higgins, *supra* note 103, at 15 (arguing that there is no point in urging a particular type of court upon a regional system where the culture and current political ethos is against a real integration with the impact upon sovereignty which that entails); *see also* Tan, *supra* note 9, at 952 (arguing that if ASEAN develops a legal regime, the community rules have to be neutral to avoid impinging on cultural sensitivities of the member states); Collective Action Problems and Regional Integration in ASEAN; Association of Southeast Asian Nations, CONTEMP. S.E. ASIA, Apr. 1, 2006 (noting that the members' vital interest has been maintaining domestic cohesion, and relinquishing sovereignty to a supranational body has been regarded as jeopardizing this vital interest).

132. *See* Alan Khee-Jin Tan, *The ASEAN Agreement on Transboundary Haze Pollution: Prospects for Compliance and Effectiveness in Post-Suharto Indonesia*, 13 N.Y.U. ENVTL. L.J. 647, 649 (2005) (noting that the member states typically have an 'allergy to state accountability,' implying that in their agreements they only intend to sacrifice minimal sovereignty); *see also* Roda Mushkat, *Globalization and the International Environmental Legal Response: The Asian Context*, 4 ASIAN-PAC. L. & POL'Y J. 49, 76 n.172 (*citing* ASEAN Secretary-General Rodolfo C. Severino, *The Three Ages of ASEAN, Address at the ARCO Forum of Public Affairs*, Kennedy School of Government, Harvard University (Oct. 3, 2002), *available at* http:// www.aseansec.org/12310.htm (last visited September 19, 2006). "[C]loser regional integration would require stronger regional institutions with greater authority than the ASEAN Secretariat is currently allowed to wield—more binding economic agreements, the standardization of products and of safety and environmental requirements, the coordination of national policies, the authority to ensure compliance with such agreements and measures, the power to adjudicate disputes. This would mean voluntarily ceding a measure of sovereignty for regional purposes."). *See generally ASEAN Summit Reflects Commitment for Peace, Stability, and Prosperity,* MALAY. NAT'L NEWS AGENCY, Dec. 1, 2004 (remarking that whatever initiatives taken or programs adopted, the leaders and the countries they represent have taken into consideration the fast changing geopolitics of the region as well as the world, which in many ways continue to shape ASEAN's interest in trade, investment and security matters, inferring that they will make necessary sacrifices of sovereignty).

133. *See* Kaplan, *supra* note 99, at 189 (concluding that a transparent dispute settlement mechanism is needed for fostering regional cooperation); *see also* Haas, *supra* note 8, at 67 (1994) (maintaining that "ASEAN must actively strive to implement a successful economic framework and a harmonized legal institution" in moving toward greater regional cooperation); Hew, *supra* note 5 (declaring that a lack of resources will render the dispute settlement mechanism ineffective and cause disputes among member states).

Appellate Body usurping legal functions of member states.[134] Unless expressly limited, the EDSM may develop powers of invalidating existing law and creating new law.

A. Invalidating Law

Courts and other legal dispute settlement mechanisms are charged with reviewing various sources of law.[135] The laws must be reviewed before a determination may be made as to whether one of the parties to the dispute has violated the law.[136] In settling disputes, recourse is often taken to interpret laws in such a way that the challenged action does not conflict with the law.[137] If a panel or the Appellate Body should face domestic law of a member state that violates an ASEAN agreement, that panel or Appellate Body may be tempted to interpret either the agreement or the domestic law in such a way as to avoid conflict.[138] This will be the simplest way to avoid direct confrontation. In the case of a blatant clash between a domestic measure and an ASEAN agreement, this approach will lead the panel or Appellate Body to narrowly interpret the agreement or domestic law to remove the inconsistency.[139] In such a situation, the

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134. *See* ASEAN Protocol on Enhanced Dispute Settlement Mechanism, *supra* note 1, at ¶ 1 (recommending the establishment of the EDSM as a stronger more adjudicative mechanism and the creation of an ASEAN Compliance Body, which would possess adjudicative powers); *see also* Yong, *supra* note 3 (discussing the creation of the EDSM and ASEAN Compliance Body as part of establishing a "rules-based ASEAN Community" that would provide for stronger, legally binding mechanisms in ensuring member compliance with ASEAN agreements). *See generally* Greenwald, *supra* note 1, at 208 (remarking that appellate review is carried out not by government officials but by experts).

135. *See* Catherine Curtiss & Kathryn Cameron Atkinson, *United States-Latin American Trade Laws*, 21 N.C. J. INT'L L. & COM. REG. 111, 143 (1995) (discussing NAFTA's dispute settlement mechanism review of amendments and case law); *see also* Alan B. Morrison, *Appointments Clause Problems in the Dispute Resolution Provisions of the United States-Canada Free Trade Agreement*, 49 WASH. & LEE L. REV. 1299, 1308 n.26 (1992) (outlining the FTA's review of law by panels and dispute settlement mechanisms); Ernst-Ulrich Petersmann, *Justice as Conflict Resolution: Proliferation, Fragmentation, and Decentralization of Dispute Settlement in International Trade*, 27 U. PA. J. INT'L ECON. L. 273, 300 (2006) (stating that independent judges make decisions based on due process and substantive rules).

136. *See, e.g.,* Morgan Frohman, *Is Section 201 of the Trade Act of 1974 Consistent with the World Trade Organization Agreement on Safeguards?*, 17 N.Y. INT'L L. REV. 127, 127 (2004) (demonstrating that the WTO's dispute settlement mechanism review determined that the United States had violated internal obligations); David M. Parks, *GATT and the Environment: Reconciling Liberal Trade Policies With Environmental Preservation*, 15 UCLA J. ENVTL. L. & POL'Y 151, 184 (1996–1997) (providing that the WTO's Appellate Body function is to review law); *see* Wesley Kobylak, *What Are Protected Activities of Miners under § 105(C)(1) of the Federal Mine Safety and Health Act of 1977* (30 U.S.C.A. § 815(C)(1)), 67 A.L.R. FED. 554 (finding that "a court must . . . carefully review the case to determine whether there has been a violation").

137. *See* John J. Flynn, "*Making Law" and "Finding Facts"—Unavoidable Duties of an Independent Judiciary*, 18 UTAH B.J. 6, 9 (2005) (noting that conflicts in law must be resolved in order to settle the dispute); *see also* Robert E. Scott & Paul B. Stephan, *Self-Enforcing International Agreements and the Limits of Coercion*, 2004 WIS. L. REV. 551, 612 (2004) (stating that there are various ways to resolve conflicts in law, including interpreting the relevant law in different ways). *See generally* Pauwelyn, *supra* note 106, at 273–74 (detailing the panel judicial appeals process regarding disputes).

138. *See* Kiriyama, *supra* note 105, at 67 (stating that the appellate review "enhances the credibility of the law and reduces uncertainty"). *See generally* Yong, *supra* note 3 (discussing the role of the Appellate Body and who is eligible to sit on the panel).

139. *See* ASEAN Protocol on Enhanced Dispute Settlement Mechanism, *supra* note 1, art. VII & art. XII, ¶ 6 (discussing the protocol to resolve disputes between domestic laws and ASEAN agreements by a panel and by appellate review). *See generally* Kaplan, *supra* note 99, at 189 (explaining the general trend among international organizations in developing dispute settlement mechanisms).

panel or Appellate Body would effectively be invalidating the agreement or domestic law insofar as there is conflict.[140] If the panel or Appellate Body should limit the agreement, the agreement will obviously be weakened.[141] In this case, the EDSM will fail in its purpose of strengthening ASEAN and making its cooperative efforts more effective.[142] If the panel or Appellate Body should limit domestic law that violates an agreement, it will begin to usurp the lawmaking power of the member state.[143]

The ASEAN EDSM contains no provisions concerning the effect of panel or Appellate Body decisions.[144] The EDSM simply stipulates that failure to comply with such decisions is punishable by compensation owed to the offended state or retaliatory action by that state.[145] In

140. *See, e.g.,* Eli M. Salzberger & Stefan Voigt, *Economic Analysis of Constitutional Law: On Constitutional Processes and the Delegation of Power, with Special Emphasis on Israel and Central and Eastern Europe*, 3 THEORETICAL INQUIRIES IN LAW 207, 255 (2002) (illustrating how the Czech Republic's constitutional court invalidates domestic laws that contradict international agreements); Hristo D. Dimitrov, Note, *The Bulgarian Constitutional Court and Its Interpretive Jurisdiction,* 37 COLUM. J. TRANSNAT'L L. 459, 505 n.82 (1999) (explaining how Hungary's Constitutional Court invalidates domestic laws that conflict with international law); *Analysis—China, U.S. Clash over Intellectual Property Rights,* ASIA PULSE, Apr. 21, 2006 (discussing how China applies an international treaty that is in conflict with a Chinese domestic law).

141. *See, e.g.,* Dale E. McNiel, *The First Case under the WTO's Sanitary and Phytosanitary Agreement: The European Union's Hormone Ban*, 39 VA. J. INT'L L. 89, 134 (1998) (recognizing how an appellate battle weakened the provisions of an agreement). *But see* Joseph Robert Berger, Note, *Unilateral Trade Measures to Conserve the World's Living Resources: An Environmental Breakthrough for the GATT in the WTO Sea Turtle Case,* 24 COLUM. J. ENVTL. L. 355, 371 (1999) (explaining how an Appellate Body's report did not suggest weakening laws).

142. *See* Greenwald, *supra* note 1, at 206–07 (explaining how the purpose of the agreement is to strengthen the mechanism for settling disputes in the area). *See generally* Chen Huifen, *ASEAN Economic Integration to Get a Boost at Summit,* BUS. TIMES SING., Nov. 20, 2004, at A1 (commenting that the purpose of the 2004 agreement is to "strengthen ASEAN's commitment to a speedy resolution of disputes"); Yoshimatsu, *supra* note 3, at 115 (acknowledging that ASEAN leaders believed the 2004 agreement would strengthen the ASEAN institutional mechanisms).

143. *See* Katharine F. Braid & Robert V. Horte, *Sovereignty and Federalism: The Canadian Perspective,* 20 CAN.-U.S. L.J. 319, 323 (1994) (negotiators and tribunals threaten to usurp the traditional decision-making role of the sovereign state). *See generally* Association of Southeast Asian Nations, ASEAN Security Community, ¶¶ 7–12, *available at* http://www.aseansec.org/64.htm (last visited Oct. 15, 2006) (detailing the member states' pledge to peacefully resolve all intra-regional disputes, which might also lead to infringement of a state's law-making ability).

144. *But see* ASEAN Protocol on Enhanced Dispute Settlement Mechanism, *supra* note 1, art. 15, at ¶ 4 (outlining how the agreement provides for progress reports on implementing the panel and Appellate Body's reports). *See generally* Onzivu, *supra* note 102, at 174–76 (2006) (detailing the procedures of ASEAN's enhanced dispute settlement mechanism); Yong, *supra* note 3 (explaining the current attempts to make the decisions of the panels and Appellate Body legally binding).

145. *See* ASEAN Protocol on Enhanced Dispute Settlement Mechanism, *supra* note 1, art. 16 (indicating that recommendations not adopted by the Enhanced Dispute Settlement Mechanism panel and the Appellate Body will result in compensation paid to the aggrieved party and suspension of concessions for the wrongful party); *see also* ASSOC. OF SE. NATIONS ANN. REP. 2004–2005, at 34 (2005), *available at* http://www.aseansec.org/ar05.htm (informing that the recommendations of the panel and Appellate Body reports must be adopted within 60 days of the decision); Onzivu, *supra* note 102, at 176 (reiterating the punishment for failure to comply with the panel and Appellate Body's recommendations).

article 14, the Protocol states that neither a panel nor the Appellate Body may add to nor diminish the rights and obligations provided in the covered agreements.[146] This limitation may be a response to the development of the principle of supremacy in the European Community.[147] The power to diminish or add to the rights provided in the agreements, however, is not essential to developing the power to invalidate existing law.[148] Though clearly intended to limit the effects of panel and Appellate Body decisions, the Protocol never specifically addresses the issue of whether the decisions may invalidate member state law.[149]

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146. *See* ASEAN Protocol on Enhanced Dispute Settlement Mechanism, *supra* note 1, art. 14, ¶ 2 (stating that the Protocol explicitly states that the panel and the Appellate Body cannot add to or diminish the rights and obligations provided in agreements); *see also* ASEAN, Agreement on Dispute Settlement Mechanism of the Framework Agreement on Comprehensive Economic Cooperation Between the People's Republic of China and the Association of Southeast Asian Nations, art. 8, ¶ 1, Nov. 4, 2002, *available at* http://www.intereconomiclaw.com/english/article.asp?id=80 (outlining how the arbitral tribunal cannot add to or diminish the rights provided in the ASEAN-China agreement); *cf.* Joost Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go?,* 95 AM. J. INT'L L. 535, 564 (2001) (assessing how the World Trade Organization's dispute settlement agreement provides for protecting the rights and obligations of parties to an agreement).

147. *Compare* ASEAN Protocol on Enhanced Dispute Settlement Mechanism, *supra* note 1, art. 14, ¶ 2 (denying a panel or Appellate Body the right to add or diminish the rights and obligations of the treaty), *with* Daniel J. Meltzer, *Member State Liability in Europe and the United States*, 4 INT'L J. CONST. L. 39, 50 (2006) (noting that the European Court of Justice has found the European Union to have agreed to supranational judicial supervision). *See generally* Michael Zürn, *Political Systems in the Postnational Constellation: Societal Denationalization and Multilevel Governance, in* GLOBAL GOVERNANCE AND THE UNITED NATIONS SYSTEM 48, 66 (Volker Rittberger ed., 2001) (recognizing the supranational institutions of the European Union, including the European Court of Justice).

148. *See* Case C-240/98, Oceano Grupo Editorial SA v. Rocio Murciano Quintero, 2000 E.C.R. I-4941 ¶ 56 n.16 (arguing that while a national court cannot place itself in the authority of the legislature it can invalidate national rules that are contrary to Community law due to the principle of primacy); *see also* Case 6/64, Costa v. E.N.E.L., 1964 E.C.R. 1141, ¶ 3 (holding Community Law supreme to National Law in the European Union despite limited abilities under treaties). *See generally* ASEAN Protocol on Enhanced Dispute Settlement Mechanism, *supra* note 1, art. 14, ¶¶ 1–2 (denying the ability to add to or diminish the rights and obligations under the agreement).

149. *Compare* ASEAN Protocol on Enhanced Dispute Settlement Mechanism, *supra* note 1 (lacking specific instructions regarding whether panel or Appellate Body decisions may invalidate member state law) *with* Onzivu, *supra* note 102, at 174, 176 (expressing that the jurisdiction provisions of the Protocol are broad and that there are serious consequences for non-compliance with the panel or Appellate Body). *See generally* ASEAN Protocol on Enhanced Dispute Settlement Mechanism, *supra* note 1, art. 14, ¶¶ 1–2 (limiting the function of the Appellate Body to making suggestions to member states on how to implement measures in conformity with the agreement and denying its ability to add to or diminish the rights and obligations under the agreement).

Similarly, none of the treaties of the EC prior to 1963 mentioned any principles related to direct effect or supremacy.[150] The European Court of Justice developed the principles.[151] Prior to these decisions, no one seemed to consider direct effect and supremacy of EC law to be a possibility.[152] Now, the principles are considered essential characteristics of EC law.[153] Despite the absence of direct effect and supremacy in the treaties of the EC and the fact that Europeans did not anticipate their development, the ECJ may effectively invalidate the laws of member states when they conflict with EC agreements.[154] In the same way, the ASEAN member states could eventually find their laws invalidated under the EDSM.[155]

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150. *See* De Witte, *supra* note 36, at 178 (acknowledging that none of the European Community treaties prior to 1963 discussed supremacy or direct effect); *see also* Jeffrey L. Dunoff, *Constitutional Conceits: The WTO's 'Constitution' and the Discipline of International Law*, 17 EUR. J. INT'L L. 647, 655 (2006) (acknowledging that the principles of direct effect and supremacy were judicially created instead of established by treaty). *See generally* Carla A. Varner, Note, *The Effectiveness of European Community Law with Specific Regard to Directives: The Critical Step Not Taken by the European Court of Justice*, 22 MICH. J. INT'L L. 457, 457–58 (2001) (explaining the history of the principle of direct effect in the European Community).

151. *See, e.g.,* Case 14/68, Wilhelm v. Bundeskartellamt, 1969 E.C.R. 1, ¶ 1 (establishing the supremacy of community law doctrine); *see* Elizabeth F. Defeis, *A Constitution for the European Union? A Transatlantic Perspective*, 19 TEMP. INT'L & COMP. L.J. 351, 378 (2005) (noting European Court of Justice's creation of the supremacy of community law doctrine in 1964); Alexander Orakhelashvili, *The Idea of European International Law*, 17 EUR. J. INT'L L. 315, 345 (2006) (crediting European Court of Justice with the creation of the supremacy of Community law doctrine).

152. *See* Case 26/62, NV Algemene Transport v. Netherlands Inland Revenue Administration, 1963 E.C.R. 3, ¶ 1 (establishing direct effects in European Community Law); *see also* De Witte, *supra* note 36, at 178 (suggesting that European legal analysts ignored the issue prior to these decisions).

153. *See* Case C-5/94, The Queen v. Ministry of Agric., Fisheries and Food *ex parte* Lomas Ltd., 1996 E.C.R. I-2553 ¶ 332 n.122 (noting that the supremacy of European Community law is well established jurisprudence of the European Court of Justice); *see also* Case C-377/89, Cotter v. Minister for Soc. Welfare, 1991 E.C.R. I-11, ¶ 34 (referencing the rule of supremacy of Community law as a general principle of jurisprudence); Case C-50/96, Deutsche Telekom AG v. Schroder, 2000 E.C.R. I-743, ¶¶ 35, 63 (treating principle of supremacy as general principle of jurisprudence).

154. *See* Rafael Leal-Arcas, *The EU Institutions and Their Modus Operandi in the World Trading System*, 12 COLUM. J. EUR. L. 125, 157–58 (2005) (explaining that the European Court of Justice's jurisdiction may be implied in situations where it is needed to avoid inconsistency between law of individual European states and treaties among European states); *see also* Case 294/83, Parti ecologiste "Les Verts" v. Parliament, 1986 E.C.R. 1339, ¶ 23 (asserting that European Economic Community is "a Community based on the rule of law," and that the European Court of Justice has the authority to review measures adopted by member states for conformity with European Economic Community Treaty); Case 22-70, Commission v. Council, 1971 E.C.R. 263, ¶¶ 6–17 (holding that the European Court of Justice has the authority to nullify European Community member states' agreements with any third party if such agreements do not conform to the common scheme of European Economic Community Treaty).

155. *See* ASEAN Protocol on Enhanced Dispute Settlement Mechanism, *supra* note 1, arts. 14–15, Nov. 29, 2004, *available at* http://www.aseansec.org/16754.htm (last visited Sept. 6, 2006) (stating that prompt compliance with the Protocol is an obligation of all ASEAN member states); Kiriyama, *supra* note 105, at 95 (suggesting the possibility that ASEAN can adopt frameworks of other international free trade agreements that allow international treaties to prevail over domestic policies); *see also* Qingjiang Kong, *China's WTO Accession and The ASEAN-China Free Trade Area: The Perspective of a Chinese Lawyer*, 7 J. INT'L ECON. L. 839, 859 (2004) (arguing that ASEAN and ACFTA member states should emulate European Community member states in allowing international treaties to prevail over domestic policies).

B. Creating Law

Just as the Protocol fails to address the possibility of invalidation of member state law, it does not specifically mention the issue of precedent.[156] If a decision by a panel or the Appellate Body were meant to bind future decisions on the same issue, the concept of *stare decisis* would begin to apply.[157] While it is generally recognized that *stare decisis* does not apply within the context of international law,[158] international legal bodies, such as NAFTA dispute settlement panels, may follow a kind of *de facto stare decisis*.[159] Within the EC, a form of *stare decisis* has developed to the extent that decisions of the ECJ are considered an important source of binding law.[160] Significantly, this development has occurred despite the silence of the EC treaties regarding the precedential effect of the ECJ's decisions.[161]

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156. *See* Declaration of ASEAN Concord II (Bali Concord II), sec. B, ¶ 3, Oct. 7, 2003, *available at* http://www.aseansec.org/15159.htm (recommending a strengthened dispute settlement mechanism to ensure "legally binding resolution of any economic disputes," but failing to clarify whether *stare decisis* should be a part of the strengthened dispute settlement mechanism); *see also* Yong, *supra* note 3 (specifying that findings and opinions should be issued for each dispute filed, but failing to explore the precedential value of such findings and opinions). *See generally* Kiriyama, *supra* note 105, at 69 (describing that many international free trade agreements specify the binding effect of dispute resolution on a particular controversy, but mentioning the decision's effect on future similar disputes).

157. *See* Samsel v. Wheeler Transport Services, Inc., 789 P.2d 541, 554 (Kan. 1990) (explaining that under *stare decisis* an appellate court's ruling on a case is followed by courts of lower rank when deciding future similar cases); *see also* 5 Am. Jur. 2d *Appellate Review* § 599 (2006) (informing that under *stare decisis* doctrine, once a point of law has been decided by an appellate court, the ruling has to be followed by the same court and its lower courts in subsequent cases).

158. *See* Bhala, *supra* note 59, at 863 (explaining that *stare decisis* has been rejected in international law for policy reasons); *see also* Blackmore, *supra* note 58, at 498–99 (noting that decisions by international courts are not sources of law); John Ragosta, Navin Joneja, & Mikhail Zeldovich, *WTO Dispute Settlement: The System Is Flawed and Must Be Fixed*, 37 INT'L LAW 697, 706 (2003) (stating that *stare decisis* has not been an accepted doctrine in the arena of international law).

159. *See* Bhala, *supra* note 60, at 879 (asserting that even though decisions by international courts were not legally binding, they had been allocated significant precedential value); *see* Raj Bhala, *supra* note 59, at 938 (arguing that WTO adjudication has been characterized by *de facto stare decisis*); *see also* Blackmore, *supra* note 58, at 501 (recognizing that many scholars believed in the existence of *de facto stare decisis* in international law).

160. *See, e.g.*, Case 66/80, SpA Int'l Chem. Corp. v. Amministrazione delle Finanze dello Stato, 1981 E.C.R. 1191, ¶ 18 (declaring that the rationale of a previous case could explain the holding of the present case); Cohen, *supra* note 32, at 425 (comparing the binding effects of decisions by European Court of Justice on EC member states with the binding effects of decisions by U.S. Courts in the United States); *see also* Gierczyk, *supra* note 41, at 158 (suggesting that because the European Court of Justice is empowered to interpret issues concerning European Community laws, courts in EC member states tend to follow ECJ's interpretations when ruling on subsequent cases despite the absence of an official *stare decisis* doctrine in international law).

161. *See* Gierczyk, *supra* note 41, at 158 (stating that courts within European Community member states usually follow European Court of Justice rulings when deciding on subsequent cases despite the absence of an official *stare decisis* doctrine in the European Community); Markus G. Puder, *Beer Wars—A Case Study: Is the Emerging European Private Law Civil or Common or Mixed or Sui Generis?,* 20 TUL. EURO. CIV. L.F. 37, 49 (2005) (reporting that many European countries quoted European Court of Justice's previous judgments, even though the European Community does not officially subscribe to *stare decisis* doctrine). *See generally* Markus G. Puder, *Phantom Menace or New Hope: Member State Public Tort Liability After the Double-Bladed Light Saber Duel Between the European Court of Justice and the German Bundes Gerichtsh of in Brasserie Du Pecheur "Wie Das Pier Summer vie Winter Auf Dem Land Sol Geschenkt und Praeun Werden,"* 33 VAND. J. TRANSNAT'L L. 311, 319 (2000) (suggesting that parties should follow European Court of Justice's prior decisions when involved in similar disputes).

Similarly, the ASEAN EDSM is silent on the issue of *stare decisis*.[162] This is especially critical since some of the legal systems of the ASEAN member states treat court decisions as binding law.[163] As the NAFTA panels' tendency to cite to previous decisions illustrates, dispute settlement bodies are naturally inclined to refer to previous decisions to maintain consistency.[164] As such, it is tempting for such panels to develop a system of *stare decisis*.[165] NAFTA has prevented a strict system of *stare decisis* from developing by specifically prohibiting it.[166] Similarly, ASEAN members should explicitly prohibit application of *stare decisis* within the EDSM.[167] Otherwise, as in the EC, they may find that the principle of binding precedent has

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162. *See* ASEAN Protocol on Enhanced Dispute Resolution Mechanism, *supra* note 1, art. 7 (restricting the EDRM panels to examinations of the facts and relevant agreements, omitting any use of precedent); *see also* Stuart G. Gross, Note, *Inordinate Chill: BITS, Non-NAFTA MITS, and Host-State Regulatory Freedom—An Indonesian Case Study*, 24 MICH. J. INT'L L. 893, 954 (2003) (hypothesizing on the relationship between ASEAN's lack of *stare decisis* and its multilateral trade agreements). *See generally* NSK Ltd. v. United States, 346 F. Supp. 2d 1312, 1322 n.8 (Ct. Int'l Trade 2004) (clarifying that WTO adjudications, upon which the ASEAN EDRM is modeled, have no binding effect in U.S. courts, nor within the WTO adjudicatory system itself).

163. *See* Metramac Corp. Sdn. Bhd. v. Fawziah Holdings Sdn. Bhd., [2006] 4 M.L.J. 113, 132 (Malay.) (quoting Lord Gardiner to stress the use of precedent as an "indispensable foundation" for the Malaysian legal system); *see also* Haas, *supra* note 8, at 63 (noting the contrasting civil and common law systems of ASEAN nations as a barrier to developing a comprehensive legal system); White, *supra* note 94, at 192 (remarking that Brunei, Malaysia, and Singapore have common law legal systems, while a number of other ASEAN states maintain systems that resemble hybrids of common law and civil law systems).

164. *See* Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, 29, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (Oct. 4, 1996) (acknowledging the role of adopted WTO panel and Appellate Body reports in maintaining consistency); *see also* David Palmeter & Petros C. Mavroidis, *The WTO Legal System: Sources of Law*, 92 AM. J. INT'L L. 398, 400–01 (1998) (explaining the use of past panel decisions as non-binding precedent in the WTO dispute panels and Appellate Body); Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 AM. J. INT'L L. 247, 254 (2004) (discussing the use of Appellate Body precedent in WTO dispute settlement despite the WTO's policy to the contrary).

165. *See* Raj Bhala, *The Precedent Setters: De Facto Stare Decisis in WTO Adjudication (Part Two of a Trilogy)*, 9 J. TRANSNAT'L L. & POL'Y 1, 4 (1999) (arguing that there is a system of *de facto stare decisis* in WTO adjudications); *see also* Andreas F. Lowenfield, *International Arbitration: Scapegoat or Solution?: Opening Remarks*, 13 AM. REV. INT'L ARB. 1, 4 (2002) (assessing the prevalent use of precedent in Chapter 11 NAFTA disputes and the long-lasting effect that such use can have on member states); J.C. Thomas, Response, *A Reply to Professor Brower*, 40 COLUM. J. TRANSNAT'L L. 433, 462 (2002) (predicting the ease with which a system of *de facto stare decisis* would emerge in NAFTA tribunal jurisprudence).

166. *See* North American Free Trade Agreement, U.S.-Can.-Mex., arts. 1131, 1136, Dec. 17, 1992, 1992 WL 812394 (stating that NAFTA arbitration will be guided by NAFTA rules and relevant international law, and that any arbitration decision will be binding solely on the parties to the arbitration); Paul S. Berman, *From International Law to Law and Globalization*, 43 COLUM. J. TRANSNAT'L L. 485, 535 (2005) (pointing out that under Chapter 11, NAFTA panels are neither bound by precedent nor authorized to create binding precedent); *see also* William S. Dodge, International Decision, Waste Management, Inc. v. Mexico, 95 AM. J. INT'L L. 186, 191 (2001) (explaining the NAFTA tribunal decision as a refusal to follow explicitly non-binding precedent).

167. *See* Kaplan, *supra* note 99, at 184 (recommending that the future ASEAN dispute settlement mechanism avoid rewriting agreements with the binding principle of *stare decisis*); *see also* Lawrence D. Roberts, *Beyond Notions of Diplomacy and Legalism: Building a Just Mechanism for WTO Dispute Resolution*, 40 AM. BUS. L.J. 511, 535 n.123 (2003) (cautioning against a system of *de facto stare decisis* because it is often applied to the questions of great ambiguity within WTO rules, thus, allowing for the likelihood that litigation is being used to avoid negotiating unresolved issues). *But see* Bhala, *supra* note 60, at 978 (hypothesizing that a system of *de jure stare decisis* in international law may have beneficial effects despite the conflict such a system has with current agreements of international dispute resolution).

developed unexpectedly.[168] The result of applying *stare decisis* in the ASEAN EDSM would be an EDSM that may create new law, through binding decisions.[169]

Conclusion

The ASEAN members evidently did not intend for the EDSM to have the power to invalidate existing law or to create new law.[170] The absence of any direct mention of either in the EDSM Protocol would seem to indicate not only a rejection of their application but an unwillingness to even consider them as possibilities.[171] In fact, the Protocol specifically prohibits EDSM panels and the Appellate Body from adding to or diminishing the rights and obligations provided in the ASEAN agreements.[172] This prohibition would not necessarily prevent the panels or the Appellate Body from invalidating existing law, or from making new law.[173]

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168. *See* Curran, *supra* note 71, at 72–73 (claiming that the European Court of Justice's role as a source of European law creates a doctrine approaching *stare decisis*); *see also* Sheldon A. McDonald, *The Caribbean Court of Justice: Enhancing the Law of International Organizations*, 27 FORDHAM INT'L L.J. 930, 971 (2004) (asserting that the European Court of Justice has gone beyond a system of jurisprudence constant and is instead closer to a common law system).

169. *See* Bhala, *supra* note 59, at 934–35 (rejecting the proposition that the doctrine of *stare decisis* and a possibility of judicially created law are not inextricably linked); *see also* Mary C. Parker, Note, *"Other Treaties": The Inter-American Court of Human Rights Defines Its Advisory Jurisdiction*, 33 AM. U. L. REV. 211, 217 n.29 (1983) (arguing that the International Court of Justice, even in its technically non-binding advisory opinions, has created new law).

170. *See* ASEAN Protocol on Enhanced Dispute Settlement Mechanism, *supra* note 1, art. 14 (granting the Appellate Body the right to make recommendations regarding how a member state may conform with the agreement, while at the same time denying the Appellate Body the right to make any alterations); *see also* Kaplan, *supra* note 99, at 149 (indicating ASEAN's preference for caution when embarking into unknown territory); *see* Greenwald, *supra* note 1, at 204 (stating that the Founding Fathers clearly intended for ASEAN to be just a loosely organized political association with minimal institutionalization and without legal personality or constitutional framework); Onzivu, *supra* note 102, at 174 (acknowledging that the EDSM allows its member states to address their concerns in other forums).

171. *See* ASEAN, Recommendations of the High-Level Task Force on ASEAN Economic Integration, *available at* http://www.aseansec.org/hltf.htm (last visited Oct. 5, 2006) (outlining the proposed changes to the former ASEAN Dispute Settlement Mechanism); *The ASEAN Way*, *supra* note 101, at 174 (highlighting ASEAN's precision in drafting rules that explicitly define what conduct is authorized). *See generally* Greenwald, *supra* note 1, at 203 (referring to ASEAN's tendency to set aside all issues that have not been previously agreed upon).

172. *See* ASEAN Protocol on Enhanced Dispute Settlement Mechanism, *supra* note 1, art. 14 (limiting the Appellate Body to the rights explicitly stated in the "covered agreements"); *see also* Agreement on Dispute Settlement Mechanism of the Framework Agreement on Comprehensive Economic Co-Operation Between the Association of Southeast Asian Nations and the People's Republic of China, art. 8, Nov. 29, 2004, *available at* http://www.aseansec.org/16636.htm (prohibiting tribunals from making any alterations to the rights explicitly stated in the Framework agreement); *The ASEAN Way, supra* note 101, at 175 (noting that all rulemaking authority resides with the member states).

173. *See* Del Duca, *supra* note 21, at 516 (chronicling the development of NAFTA); *see also* John O. McGuinnis & Mark L. Movesian, *The World Trade Constitution*, 114 HARV. L. REV. 511, 569 (2000); Philip M. Nichols, *GATT Doctrine,* 36 VA. J. INT'L L. 379, 465 (1996) (articulating how the panels developed a system to invalidate laws).

The ability of the panels or the Appellate Body to invalidate existing law or create new law would shift law-making power away from the member states.[174] Clearly, such results would conflict with the desires of the member states to maintain their own sovereign powers and to avoid vesting too much power in supranational bodies.[175]

Therefore, the ASEAN member states should amend the EDSM Protocol to specifically restrict the panels and the Appellate Body from invalidating existing law and to restrict them from creating new law through binding precedent. The amendment should state that the panels and Appellate Body shall be unable to invalidate any provisions of existing law. The only recourse for a member state's failure to implement the findings and recommendations of a panel or Appellate Body report adopted by the SEOM is the compensation or suspension of concessions provided in article 16 of the Protocol. The amendment also should state that decisions of the panels or the Appellate Body shall not be considered as binding on themselves or any other body in future decisions.

Such limitations on the EDSM will not seriously limit its effectiveness.[176] Rather, the express restrictions should strengthen the EDSM and bolster the effectiveness of ASEAN in achieving its goals.[177] First, the express inability to invalidate existing law will clarify that violations must be dealt with through article 16 compensation or suspension of concessions instead of through narrow interpretation or weakening of the ASEAN agreements.[178] Expressly disallowing the panels and Appellate Body to invalidate member state law or create new law also

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174. *See* Haas, *supra* note 8, at 65 (detailing the major changes that would accompany the creation of a stronger legal entity); *see also* Mark L. Movsesian, *Sovereignty, Compliance, and the World Trade Organization: Lessons from the History of Supreme Court Review,* 20 MICH. J. INT'L L. 775, 793–794 (1994) (reflecting on the dangers inherent in submitting to an independent governing body). *But see* Kaplan, *supra* note 99, at 187 (stating that a change in ASEAN's current system would not result in a major change in power dynamics).

175. *See* DAVIDSON, *supra* note 76, at 145–46 ("[I]t is unlikely that ASEAN would be prepared to move toward a mechanism such as the Court of Justice of the European Communities, which gave decisions that are binding on member states and whose judgments (sic) overrule those national courts."); *see also* Tan, *supra* note 9, at 948–49 (addressing the reasons for ASEAN's resistance to forming a supernatural body); White, *supra* note 84, at 160–61 (denoting the fundamental principles upon which ASEAN was founded).

176. *See, e.g.,* Del Duca, *supra* note 21, at 542 (1993) (illustrating that it is possible to have an effective but limited system); *see also* Jablonski, *supra* note 28, at 498 (presenting some of the limitations of NAFTA's dispute settlement mechanism); Nichols, *supra* note 173, at 460–61 (proclaiming that the WTO dispute settlement mechanism is effective in spite of its limited powers).

177. *See* Greenwald, *supra* note 1, at 206–07 (arguing that although ASEAN's Enhanced Dispute Mechanism is a significant step in the direction of legalism, it still needs to be modified for purposes of decision-making). *But see* Editorial, *AEC Within Nine Years a Realistic Possibility,* MALAY. NAT'L NEWS AGENCY, Aug, 25, 2006 (maintaining that although restrictions will promote national interests of ASEAN, such restrictions will impede intra-ASEAN trade). *See generally* Haas, *supra* note 8, at 866–67 (stating that ASEAN must strive to achieve a successful economic framework through change to protect and encourage a new trading system).

178. *See* Thomas C. Fischer, *A Commentary on Regional Institutions in the Pacific Rim: Do APEC and ASEAN Still Matter?*, 13 DUKE J. COMP. & INT'L L. 337, 372–73 (2003) (arguing that ASEAN would like to secure concessions, but is being prevented from securing them because of internal disagreement among the member nations). *See generally* Haas, *supra* note 8, at 57 (stating that by imposing one ASEAN nation to too many concessions, the rest of the ASEAN nations will become vulnerable); David A. Andelman, Letter to the Editor, N.Y. TIMES, Aug. 8, 1977, at 4 (asserting that Japan would like to consider a broad range of economic concessions to help stabilize its economy).

will boost the confidence of member states in using the EDSM.[179] If member states have faith that they need only sacrifice their sovereignty to the extent of abiding with the specific commitments they knowingly make in ASEAN agreements and need not fear having sovereignty taken away, they should be more willing to live up to their agreements and to take on additional obligations. Thus, an explicitly limited EDSM will strengthen ASEAN as an institution within the context of the ASEAN Way.[180] Such an arrangement should not only increase cooperation but accelerate the rate at which progress in cooperation is made, as member states' confidence increases and suspicion decreases.[181] Outside investors will be more willing to invest in ASEAN as their confidence in its stability increases.[182] Therefore, explicitly limiting the EDSM to avoid invalidating existing law and creating new law will protect the member states while strengthening ASEAN and accelerating the realization of its economic goals.[183]

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179. *See* Lyou, *supra* note 11, at 306 (declaring that in order for ASEAN to establish a basic community system, it will first have to develop a multilateral cooperation framework that will lead to its members having confidence in each other). *See generally* Simon S.C. Tay, *Southeast Asian Fires: The Challenge for International Environmental Law and Sustainable Development*, 11 GEO. INT'L ENVTL. L. REV. 241, 289 (1999) (claiming that confidence-building measures as well as the participation of neutral agencies will help ASEAN in the long-term); Koh Lay Chin, *A Grand Vision..ZO: B-All Region New Straits Time,* NEW STRAITS TIMES (Malay.), Aug. 8, 2005, at 4 (arguing that through political dialogue and confidence-building measures, there will be unity among the ASEAN members).

180. *See* Haas, *supra* note 8, at 63 (1994) (alleging that ASEAN, under the EC, chose to create a loose "association" that would encourage cooperation while maintaining sovereignty among the member nations); *see also* Editorial, *Doubts Greet Move to Speed Up ASEAN Single Market*, JAKARTA POST (Asia), Aug. 24, 2006 (arguing that ASEAN nations were not ready for the European Union because they refused to surrender part of their sovereignty to an institution). *See generally* Davis Brown, *The Role of Regional Organizations in Stopping Civil Wars*, 42 A.F. L. REV. 255, 252–53 (1997) (stating that ASEAN nations agreed not to participate "in any activity which shall constitute a threat to the . . . sovereignty . . . of another . . . Party" and agreed to measures for the pacific settlement of disputes).

181. *See* Fischer, *supra* note 178, at 374 (claiming that since ASEAN's measures relaxing already-agreed tariff cuts will not build confidence within ASEAN, one has to question whether ASEAN will ever achieve the progress it covets); *see also* Editorial, *ASEAN Works on Catalysts for Human Rights Mechanism*, BERNAMA-MALAY. NAT'L NEWS AGENCY, July 24, 2006 (emphasizing that ASEAN's progress will depend on the confidence that is built among the ASEAN members); Editorial, *ASEAN Summit Warns Against Equating Terrorism with Religious, Ethnic Groups*, XINHUA NEWS AGENCY (Beijing), July 29, 2005 (reiterating the importance of confidence-building to ASEAN's progress).

182. *See* Li-ann Thio, *supra* note 107, at 9 (stating that in order to counter internal communist insurgencies, ASEAN must build internal political stability that would build investor confidence); *see also* White *supra* note 84, at 164 (illustrating that in a two-day period of frenzied panic, international investors withdrew over $1.4 billion from collapsing stock markets in the ASEAN region, which prompted ASEAN countries to ease investor confidence); Greenwald, *supra* note 1, at 201 (alleging that normalizing relations and increasing cooperation between ASEAN members were beneficial to ASEAN because it provided potential investors and potential allies).

183. *See* Editorial, *Japan-ASEAN Summit to Include Human Rights*, DAILY YOMIURI (Tokyo), Dec. 9, 2003, at 3 (stating that Japan will respect ASEAN's existing laws to promote economic development in the region). *But see* Editorial, *Malaysia Studying Legal Reforms to Encourage Knowledge Economy,* AFX NEWS LIMITED (Asia), Oct. 30, 2001 (reporting on the Minister of Energy, Communications and Multimedia Leo Moggie's remarks that existing laws are being examined to see if they should be amended or replaced "to speed up the adoption of electronic-based activities"). *See generally* Editorial, *U.S. Act, 'A New Form of Extra-Territorial Rights Legislation."* NATION (Thail.), Jan. 21, 2003 (arguing that the passage of a new law or an amendment to an existing law is commendable).

Thirteen Years of NAFTA's Chapter 11: The Criticisms, the United States's Responses, and Lessons Learned

Catherine M. Amirfar
Elyse M. Dreyer*

Introduction

The North American Free Trade Agreement (NAFTA) is just one of over 2,000 investment treaties currently in effect, and yet the investor-state arbitrations that its Chapter 11 enables attract a disproportionate amount of public attention. The NAFTA's Chapter 11, however, arguably merits that attention. Chapter 11 is somewhat of a novelty because through it, NAFTA has become the first investment treaty that has resulted in multiple claims against the United States. Casting the United States as a respondent in investor-state disputes has highlighted for some in civil society the potentially negative impact that investment treaty arbitration can have on domestic law-making, adjudication, and the institutions responsible for both. Indeed, the extensive attention that NAFTA Chapter 11 has garnered since its entry into force in 1994 has typically been in the form of the general criticism that Chapter 11 adjudications may undermine domestic public interests. Such criticism, at least in its more recent iterations, is perhaps all the more surprising in light of the limited impact that NAFTA cases actually have had in the 13 years since NAFTA's enactment. Nevertheless, an understanding of the criticisms now could mitigate the risk in the future of the harm forecast by NAFTA's critics.

The lessons learned are not restricted to the NAFTA scheme. The United States's NAFTA experience has had and will continue to have significant implications for the Free Trade Agreements (FTAs) currently being negotiated or planned by the United States. Since December 2003, the United States has concluded FTAs with nations of Central America (Guatemala, El Salvador, Honduras, Nicaragua, and Costa Rica), Australia, Chile, Panama, Peru, the Dominican Republic, Colombia, Israel, Jordan, Singapore, Malaysia, Oman, Bahrain, Morocco, and the nations of the South African Customs Union. Other FTAs are underway or planned with, among others, Ecuador, Bolivia, Taiwan, Korea, and Thailand.[1] Already, the Chilean and Australian FTAs specifically provide for protections against environmental or public health regulations being nullified through expropriation claims. The language adopted derives directly from the member states' experience with NAFTA Chapter 11 expropriation claims.

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1. See generally, Off. of U.S. Trade Rep., Trade Agreements, *available at* http://www.ustr.gov/Trade_Agreements/Section_Index.html.

* **Ms. Amirfar received her J.D. from New York University School of Law in 2000 and her undergraduate degree from Stanford University in 1995. She is a senior litigation associate with Debevoise & Plimpton LLP in New York City, specializing in international arbitration and litigation. Ms. Dreyer received her J.D. from Columbia Law School in 2004 and her undergraduate degree from Georgetown University's Edmund A. Walsh School of Foreign Service in 1999. She is a litigation associate with Debevoise & Plimpton LLP in New York City.** **The authors would like to acknowledge the invaluable insights of their colleague Barton Legum and the research assistance of Thomas Walsh in preparing this article.**

This article catalogues the most common criticisms of Chapter 11 arbitration, the United States's responses to date, and some of the various suggestions by commentators in the field as to how the United States should respond in the future. Part I discusses the major concerns that NAFTA has raised within the United States with regard to its impact on domestic law and institutions. Part II then addresses the measures that the United States and, to a lesser extent, its fellow member states, Canada and Mexico, have adopted in response to their NAFTA experiences, as well as additional measures that may still be taken.

I. The Impact of NAFTA: Real, Perceived and Potential

NAFTA Chapter 11 guarantees foreign investors certain protections designed to mitigate any perceived risks of investment in member states.[2] Specifically, NAFTA provides for: national and most favored nation treatment, which guarantees that foreign investors will receive treatment equivalent to domestic investors and those from countries granted "favored nation" status (arts. 1102-03); minimum standard of treatment under customary international law, including fair and equitable treatment (art. 1105); and full and timely compensation in the event of government expropriation of assets (art. 1110). Qualifying foreign investors who believe any of these substantive guarantees have been breached may initiate arbitration proceedings pursuant to the arbitral mechanism set forth in Chapter 11.[3] The arbitral tribunal constituted pursuant to Chapter 11 may award money damages or restitution, but may not enjoin the party from applying the challenged measure.[4]

Despite widespread public scrutiny of NAFTA's trade concessions prior to the Treaty's entry into force on January 1, 1994, it was not until the United States found itself as a repeat respondent in Chapter 11 claims that significant criticism of NAFTA's investment guarantees solidified within the United States. The first claim against the United States, *The Loewen Group, Inc. v. U.S.A.*,[5] filed in October 1998, highlighted the potential for the NAFTA arbitration scheme to effectively supplant U.S. courts; specifically, the ability of arbitral tribunals constituted under NAFTA Chapter 11 to scrutinize domestic laws and processes under international standards. Ten additional cases have since been submitted to arbitration against the United States.[6]

An analysis of the resulting jurisprudence and literature illustrates what Chapter 11's investment guarantees require of U.S. laws and institutions and the concomitant concerns

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2. North American Free Trade Agreement, Can.–Mex.–U.S., Dec. 17. 1992, Chapter 11, 32 I.L.M. 605 (1993) (hereinafter "NAFTA" or "Chapter 11").

3. *See* NAFTA, *supra* note 2, Sect. B, arts. 1115–38, 32 I.L.M. at 642.

4. *See* NAFTA, *supra* note 2, arts. 1134–35, 32 I.L.M. at 646.

5. The Loewen Group, Inc. et al. v. U.S.A., 42 I.L.M. 811, 851 (2003).

6. Cases against the United States in which final awards have been issued are: Mondev Int'l Ltd. v. U.S.A., Final Award, Oct. 11, 2002; ADF Group, Inc. v. U.S.A, Final Award, Jan. 9, 2003; Methanex v. U.S.A., Final Award, Aug. 3, 2005. Five cases remain pending: Canfor Corp. v. U.S.A., Notice of Arbitration, July 9, 2002 (consolidated with Tembec, Inc. v. U.S.A. and Terminal Forest Prods. v. U.S.A. by Order dated Sept. 7, 2005); Kenex Ltd. v. U.S.A., Notice of Arbitration, Aug. 2, 2002; Glamis Gold Ltd. v. U.S.A., Notice of Arbitration, Dec. 10, 2003; Grand River Enters. v. U.S.A., Notice of Arbitration, March 12, 2004; and Canadian Cattlemen for Fair Trade v. U.S.A., Notices of Arbitration, March 16, 2005–June 2, 2005. *See generally* NAFTA Claims, *available at* http://naftaclaims.com/disputes_us.htm (last visited Oct. 28, 2006).

those requirements raise about NAFTA's impact on the domestic legal scheme. Three issues predominate the criticism of NAFTA: *first*, that Chapter 11 decisions adjudicating claims of alleged "denial of justice" in U.S. courts threaten the finality of judicial decisions; *second*, that the specter of NAFTA liability deters governmental regulation of health, the environment, and other public interests; and *third*, that NAFTA provides foreign investors with a competitive advantage over domestic investors.

The gravity of these issues is hotly contested, with many commentators downplaying their significance.[7] Commentators commonly invoke two refrains for dismissing these concerns: *first*, that the United States has not lost a single NAFTA arbitration;[8] and *second*, that the few awards against Canada and Mexico have been small.[9] Of course, if the United States never loses a NAFTA arbitration or potential awards against it are small, Chapter 11 arbitrations should have little effect on U.S. conduct, law and institutions. Nonetheless, a lack of current repercussions does not guarantee that the future will remain similarly cost-free. As a consequence, understanding these issues, and the steps that the United States can and has taken to address them, remains important not only to managing Chapter 11's impact on U.S. law and institutions, but also to developing a coherent U.S. policy toward investor-state arbitration more generally.

A. Denial of Justice and the Integrity of the Judiciary

The Chief Justice of the Massachusetts Supreme Judicial Court has been quoted as saying that she was surprised to hear that her court's decisions might be "subject to further review" by way of an arbitral claim under NAFTA's investor-state dispute mechanism.[10] Review of NAFTA and the substantial literature on this issue, however, demonstrates that judicial decisions are not subject to "further review" in the domestic sense; NAFTA tribunals have expressly disavowed any power akin to appellate jurisdiction over domestic courts. In one arbitration, the tribunal stated: "As we have sought to make clear, we find nothing in NAFTA to justify

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7. *See, e.g.*, Jack J. Coe, Jr., *Taking Stock of NAFTA Chapter 11 in Its Tenth Year: An Interim Sketch of Selected Themes, Issues and Methods*, 36 VAND. J. TRANSNAT'L L. 1381, 1412–40 (2003) (concluding that "the existing arrangement is neither fundamentally flawed nor entirely free of troubling features").

8. *See* William Park, *NAFTA Challenges*, 2 TRANSNAT'L DISPUTE MGMT. 39, 40 (2005) (noting that concerns over NAFTA claims "are particularly ironic in light of the fact that the United States has, to date, won all of the actions against it brought by NAFTA investors"); John H. Knox, *The 2005 Activity of the NAFTA Tribunals*, 100 AM. J. INT'L L. 429, 430 (2006) (noting that unlike the other member states, the United States has been victorious in each NAFTA claim against it).

9. *See* Coe, *supra* note 7, at 1348 ("The staggering numbers accompanying the Chapter 11 prayers for relief, though making for sensational headlines, are misleading. The specter of chilling effect is more accurately assessed by considering net damages awarded rather than damages sought."). *See also* Barton Legum, *Lessons Learned from the NAFTA: The New Generation of U.S. Investment Treaty Arbitration Provisions*, 19 ICSID REV.—FILJ 344, 347 (2004) (reporting that "[t]he five decided claims against Mexico alleged total damages of US $199 million. . . . The recoveries in the case against Mexico have amounted to about US $18 million in total—about nine cents on the dollar, on average. . . . The recovery in the decided cases against Canada amounted to about US $4 million—a little over two cents on the dollar. . . . The United States so far has a perfect record in defending cases brought against it under the investor-State provisions of the NAFTA—no tribunal has found the United States to be liable under the NAFTA.").

10. *See* Park, *supra* note 8, at 40; *see also* Adam Liptak, *Review of U.S. Rulings by NAFTA Tribunals Stirs Worries*, N.Y. TIMES, Apr. 18, 2004, at 20 (referring to interview with the Chief Justice).

the exercise by this tribunal of an appellate function parallel to that which belongs to the courts of the host nation. In the last resort, a failure by that nation to provide adequate means of remedy may amount to an international wrong, but only in the last resort."[11]

Notwithstanding the apparent sensitivity of tribunals to the integrity of domestic institutions, it is abundantly clear that NAFTA can provide another avenue of scrutiny for foreign investors who claim denial of justice in domestic courts. To date, investors have sought compensation in two NAFTA Chapter 11 cases under Article 1105's "minimum standard of treatment" provision, for what they claimed to be denial of justice by U.S. courts. In *Loewen*, a Canadian funeral home chain that had unsuccessfully defended itself in Mississippi state courts brought a Chapter 11 claim against the United States arguing, in part, that the jury's award of $500 million dollars in damages against it—including $75 million for emotional distress and $400 million in punitive damages—and the 125% bond required by Mississippi law to stay execution of a judgment pending appeal (amounting to $625 million) constituted denial of justice in violation of Article 1105.[12] Loewen claimed in particular that the trial judge erred by allowing prejudicial comments about nationality, racial attitudes, and economic class.

Loewen's denial of justice claim was eventually rejected principally on the ground that Loewen failed to pursue its domestic remedies.[13] Notwithstanding this basis for dismissal, the *Loewen* tribunal opined on the substantial inadequacy of the Mississippi court proceedings, faulting the trial judge for allowing several different kinds of prejudicial behavior: repeated references to Loewen's Canadian nationality and partnership with an Asian bank,[14] suggestions that Loewen did business only with white people,[15] and appeals to class-based prejudice.[16] The *Loewen* tribunal concluded: "By any standard of measurement, the trial . . . was a disgrace. By

11. *Loewen*, 42 I.L.M. at 851. *See also Azinian v. Mexico*, ICSID (W. Bank), 39 I.L.M. 537, 552 (1999) ("The possibility of holding a State internationally liable for judicial decisions does not, however, entitle a claimant to seek international review of the national court decisions as though the international jurisdiction seised has plenary appellate jurisdiction."); Coe, *supra* note 7, at 1401–02 (noting that NAFTA tribunals have a limited mandate over state proceedings); William S. Dodge, *International Decision: Loewen Group, Inc. v. United States*, 98 AM. J. INT'L L. 155, 158 (2004) (clarifying that all reasonable efforts must be made to exhaust domestic remedies before seeking relief pursuant to NAFTA Chapter 11).

12. *Loewen*, 42 I.L.M. at 812; *see also* Dodge, *supra* note 11, at 155.

13. The trial court's decision, the Tribunal found, was not final because it had yet to be reviewed by appellate courts in Mississippi and because the claimant had not carried its burden to demonstrate that it had no possible domestic recourse since petition for *certiorari* to the U.S. Supreme Court remained available. *See Loewen*, 42 I.L.M. at 812. Notably, this finding is in some tension with the prevailing view that NAFTA Chapter 11 does not require that domestic remedies be exhausted. NAFTA, Arts. 1121(1)(b), 1121(2)(b); *see generally,* Dodge, *supra* note 11, at 161–63. The Tribunal further reasoned that it lacked jurisdiction to determine The Loewen Group Inc.'s (TLGI) claims under NAFTA because they had been assigned to a Canadian corporation owned and controlled by a U.S. corporation and that it lacked jurisdiction to determine Raymond L. Loewen's individual claims because it was not shown that he owned or controlled TLGI when the claims were submitted to arbitration or after TLGI was reorganized in bankruptcy proceedings. *Loewen*, 42 I.L.M. at 849–50; *see also* Loewen Supplemental Decision, Sept. 6, 2004 (clarifying basis for dismissal of Loewen's individual Art. 1116 claim), available at http://www.state.gov/documents /organization/36260.pdf.

14. *See Loewen*, 42 I.L.M. at 820.

15. *Id.* at 821.

16. *Id.* at 822 (for instance, opposing counsel accused Loewen of financing his "yacht" and "cocktail parties" with the money of "80 and 90 year old people" who "[don't] mean anything to him").

any standard of review, the tactics of [defendant's] lawyers . . . were impermissible. By any standard of evaluation, the trial judge failed to afford Loewen the process that was due."[17]

The only other denial of justice claim against the United States, *Mondev International v. U.S.A.*, arose out of a 1978 real estate development contract.[18] Mondev, a foreign investor, had prevailed before a Massachusetts state court jury on multiple claims. Its victory was frustrated, however, after parts of the judgment were set aside by the trial judge and eventually the state supreme court. Mondev brought a Chapter 11 claim arguing, in part, that the set aside of its awards constituted a denial of justice. The *Mondev* tribunal interpreted denial of justice to require the following showing:

> The test is not whether a particular result is surprising, but whether the shock or surprise occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the judicial propriety of the outcome, bearing in mind on the one hand that international tribunals are not courts of appeal, and on the other hand that Chapter 11 of NAFTA is intended to provide a real measure of protection. In the end, the question is whether, at an international level and having regard to generally accepted standards of the administration of justice, *a tribunal can conclude in the light of all the available facts that the impugned decision was clearly improper and discreditable, with the result that the investment has been subjected to unfair and inequitable treatment.*[19]

Applying what amounted to a deferential standard to review of domestic judicial decisions, the *Mondev* tribunal found no denial of justice based on the decisions of the Massachusetts state courts. The *Mondev* tribunal was careful not to consider the Court's substantive determinations, noting that, "it is one thing to deal with unremedied acts of the local constabulary and another to second-guess the reasoned decisions of the highest courts of a State."[20] In a careful analysis of the facts, the *Mondev* tribunal found that none of the acts about which the claimant complained could be deemed "improper and discreditable."[21]

Although neither Loewen nor Mondev was ultimately successful in its denial of justice claim, the tribunals in both cases answered the call to methodically analyze domestic court proceedings, recognizing that a NAFTA Chapter 11 claim, and resulting liability, may derive from judicial conduct. The *Loewen* tribunal identified elements of substantial injustice that were, simply put, quite shocking. In fact, based on the *obiter dicta* in *Loewen* seriously condemning the proceedings, it seems reasonable to conclude that but for the dismissal of Loewen's claim on exhaustion grounds, the investor may well have prevailed. Similarly, although the *Mondev*

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17. *Loewen*, 42 I.L.M. at 830.

18. Mondev International Ltd. v. U.S.A., 42 I.L.M. 85, 87 (2003) (hereinafter *Mondev*). *See also* Dodge, *supra* note 11, at 159 (detailing facts involved in *Mondev*).

19. *Mondev*, 42 I.L.M. at 110 (emphasis added).

20. *Id.* at 109.

21. *Id.* at 110.

tribunal dismissed that investor's claims on the merits, its recognition that liability may result from a breakdown of judicial function is itself notable.

The state judiciary appears to share the concerns cited by NAFTA critics. Most notably, in July 2004, the Conference of Chief Justices—comprised of state court chief justices—adopted Resolution 26, which urged the Bush Administration to negotiate and approve "provisions in trade agreements that recognize and support the sovereignty of state judicial systems and the enforcement and finality of state court judgments."[22]

B. Challenging U.S. Laws and the Chilling of Public Interest Regulation

Another risk arising out of NAFTA's Chapter 11 investor protections is, as Professor Jack Coe eloquently put it, the risk that "ruinous liability might restrain lawmakers from acting in the public interest."[23] The NAFTA opponents rely primarily on the 1997 *Ethyl Corp. v. Canada* case, in which Ethyl Corporation, a U.S. company, filed a $251 million Chapter 11 claim against Canada, arguing that its assets had been expropriated as a result of a Canadian statute banning the import of MMT, a fuel additive manufactured by Ethyl.[24] The Canadian legislators behind the ban were concerned that the manganese in MMT emissions posed a public health risk. While *Ethyl* was pending, a Canadian federal-provincial dispute settlement panel found against the federal measure at issue in *Ethyl* in response to a similar challenge launched by three Canadian provinces. Canada subsequently reversed its ban on MMT, settled with Ethyl for approximately $13 million, and in an unusual move, issued a statement for Ethyl's use in advertising, declaring that "current scientific information" did not demonstrate MMT's toxicity. Notably, at this time MMT had already been banned from use in unleaded gasoline by California and the United States Environmental Protection Agency due to environmental and public health concerns. Critics took the *Ethyl* case as proof that NAFTA Chapter 11 claims place positive or proactive environmental regulation at the mercy of corporations motivated solely by profit.[25]

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22. Conference of Chief Justices International Agreements Committee, Resolution 26: Regarding Provisions of International Trade Agreements Affecting the Sovereignty of State Judicial Systems and the Enforcement of State Court Judgments, 56th Annual Meeting on Jul. 29, 2004, *available at* http://www.citizen.org/documents/CCJresolution.pdf.

23. Coe, *supra* note 7, at 1438.

24. *See Ethyl Corp. v. Canada*, Statement of Claim (Oct. 2, 1997), *available at* http://www.dfait-maeci.gc.ca/tna-nac/disp/ethyl_archive-en.asp. MMT is a manganese-based compound that is added to gasoline to enhance octane and reduce engine "knocking."

25. *See, e.g.*, *NAFTA's Threat to Sovereignty and Democracy: The Record of NAFTA Chapter 11 Investor State Cases 1994–2005*, PUB. CITIZEN, Feb. 2005, at 10 (citing *Ethyl* as an example of how NAFTA Chapter 11 undermines the "precautionary principle," which is "generally understood to mean that in cases where there is a risk to public health or the environment, but the current data is insufficient to fully quantify or assess that risk, government has a right and a responsibility to err on the side of safety. The principle is based on the fact that science does not always provide the information necessary for authorities to avert public health or environmental threats in a timely manner."); Letter from D. Borut, Executive Director, National League of Cities (Mar. 12, 2002), *available at* http://www.citizen.org/documents/Chapter_11_--_National_League_of_Cities_Letter_to_Senate.pdf (hereinafter National League of Cities letter) (expressing displeasure that "vague expropriation language [in NAFTA] has allowed new avenues of recourse for foreign investors to challenge current state and local ordinances that provide for a balanced approach to local zoning regulations and protect the health and safety of our citizens").

The largest and most notorious claim brought by an investor against the United States alleging regulatory expropriation was that of *Methanex Corp. v. U.S.A.*, which sought $970 million in damages, plus costs and interest.[26] In that arbitration, Methanex, a Canadian company, alleged that California had discriminated against it and expropriated its investment by banning methyl tertiary-butyl ether (MTBE), a fuel additive for which Methanex provided a component chemical, methanol. The ban at issue was the result of multiple "measures" promulgated in California—a State Senate bill, an Executive Order and a few regulations—seeking to ban MTBE based on findings by the state that the use of the chemical presented significant potential environmental and human health risks.[27] The United States, and specifically California, was understandably concerned that an adverse ruling would hamper its ability to pass environmental and health measures.

Ultimately, the *Methanex* tribunal rejected all of the investor's claims, finding that California had not discriminated against the foreign investor and that California's regulatory action was not tantamount to expropriation.[28] The tribunal cited the following standard for regulatory expropriation:

> [A]s a matter of general international law, a non-discriminatory regulation for the public purpose, which is enacted in accordance with due process and, which affects, *inter alios*, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation.[29]

The *Methanex* tribunal easily disposed of the claims arising out of the MTBE ban under this standard, but while the claim was pending, the outcome was not evident to the general public. Critics concerned that NAFTA would stymie public interest regulation were worried that tribunals would follow the lead of the tribunal in *Metalclad v. Mexico*, which in 2000 had defined expropriation very broadly and left open the possibility of recovery for regulatory activity that merely "incidentally interfere[d]" with an investor's "use or reasonably-to-be-expected economic benefit of property."[30] Instead, the *Methanex* tribunal set forth a far more restrictive

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26. *See* Methanex Corp. v. U.S.A., Statement of Claim (Dec. 3, 1999) at 13, *available at* http://naftaclaims.com/Disputes/USA/Methanex/MethanexStatementOfClaim.pdf.

27. Barton Legum explains that the leaking of MTBE into drinking water made it taste like turpentine, but that it is unclear whether any actual health risks resulted. Barton Legum, *Trends and Challenges in Investor-State Arbitration*, 19 ARB. INT'L 143, 144 (2003). *See also* Environmental Protection Agency, *Concerns About MTBE*, available at http://www.epa.gov/mtbe/faq.htm#concerns (discussing possible health effects of MTBE).

28. *See* Methanex Corp. v. U.S.A., Final Award, Part IV, Chpt. F, ¶ 6 (Aug. 3, 2005), *available at* http://www.naftaclaims.com/Disputes/USA/Methanex/Methanex_Final_Award.pdf (hereinafter *Methanex*).

29. *Id.* ¶ 7.

30. Metalclad Corp. v. Mexico, Final Award, ¶ 103 (Aug. 30, 2000), *available at* http://naftaclaims.com/Disputes/Mexico/Metalclad/MetalcladFinalAward.pdf. (hereinafter *Metalclad*). *See also* National League of Cities Letter, *supra* note 25 (expressing displeasure that "vague expropriation language [in NAFTA] has allowed new avenues of recourse for foreign investors to challenge current state and local ordinances that provide for a balanced approach to local zoning regulations and protect the health and safety of our citizens").

standard for finding regulatory expropriation, which, in practice, poses a significant hurdle for any such future claims.

As commentators have noted, the threat of "ruinous liability" imposed by NAFTA Chapter 11 claims has not come to pass.[31] Thirteen years after NAFTA's entry into force, despite a great deal of concern from Congress and the public with respect to NAFTA's expropriation provisions, only the *Metalclad* tribunal has found a violation of Article 1110 based on Mexico's regulatory activity, and *Metalclad* appears to be a singularity. Nevertheless, even if the headlines overstate any potential chilling effect in light of the limited success of such actions, the stakes remain high. Notably, future Chapter 11 tribunals are not bound to adhere to the high bar set by the *Methanex* tribunal.[32] Thus, a different tribunal may adopt a standard closer to the one earlier adopted in *Metalclad*, making a finding of regulatory taking in the context of environmental or safety regulation more likely.

C. Comparative Advantage

The third prevailing concern is that foreign investors are provided greater protection against expropriation under Chapter 11 than domestic investors can expect under U.S. law. The criticism has been both widespread and high-profile. For instance, then-New York Attorney General Eliot Spitzer went on record opposing the foreign investment provision in a proposed trade bill[33] preceding the enactment of the 2002 Trade Act,[34] because, like NAFTA's Article 1110, it "is so broadly drawn as to potentially grant foreign, *but not U.S.*, investors compensation rights far *greater* than those available under American constitutional [sic] takings and due process law."[35] Similarly, the National Association of Attorneys General encouraged Congress "to ensure that in any new legislation providing for international trade agreements foreign investors shall receive no greater rights to financial compensation than those afforded to our citizens."[36]

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31. Coe, *supra* note 7, at 1437–39 (noting that of the 15 Chapter 11 tribunals that have issued final awards, only two have awarded "significant compensation"); Legum, *Lessons*, *supra* note 9, at 347–48 (characterizing compensation resulting from Chapter 11 claims to date as modest).

32. NAFTA, *supra* note 2, art. 1136(1) ("An award made by a Tribunal shall have no binding force except between the disputing parties and in respect of the particular case.").

33. Bipartisan Trade Promotion Authority Act of 2001, H.R. 3005, 107th Cong. (2001).

34. Trade Act of 2002, 19 U.S.C. § 3802(b)(3).

35. Letter from Eliot Spitzer, Attorney General of the State of New York, to Senators Charles E. Schumer and Hillary Rodham Clinton, May 9, 2002, *available at* http://www.citizen.org/documents/Chapter%2011-%20New%20York%20Attorney%20General%20Letter%20--%20complete.pdf.

36. National Association of Attorneys General, Resolution: In Support of State Sovereignty and Regulatory Authority, Adopted: Spring Meeting, Mar. 19–22, 2002, *available at* http://www.naag.org/naag/resolutions/res-spr02-regauth.php. The National Association of Counties, National Association of Towns and Townships, and the National League of Cities expressed similar concerns. Letters available at http://www.citizen.org/trade/nafta/CH__11/articles.cfm?ID=7619.

The concern of comparative advantage has been analyzed at great length both in the legal and popular literature, and need not be rehashed in detail here.[37] To summarize briefly, however, NAFTA critics argue two things. *First*, they argue that the definition of "investment" in NAFTA is broader than the definition under U.S. law, thereby allowing foreign investors to effectively recover for diminution of the value of an investment whereas domestic investors may not. They base their argument on statements by NAFTA tribunals that the term "investment" includes "market access" (*Pope & Talbot, Inc. v. Canada*[38]) and "market share" (*SD Myers, Inc. v. Canada*[39]) such that deterioration of either—as opposed to a complete taking—may trigger Chapter 11 protections. *Second*, critics worry that foreign investors are able to recover for regulatory expropriations, whereas domestic investors are not, because, at least according to the standard articulated by the *Metalclad* tribunal, recovery under NAFTA requires a lesser degree of adverse impact—"incidental interference"—than recovery under U.S. takings law.[40] Notably, as discussed above, the second concern is tempered by the more robust regulatory expropriation test enunciated in *Methanex*.

Largely as a result of the public debate, the U.S. Congress directed that the investment protection provisions of future trade agreements negotiated under the 2002 Trade Act comply with certain stated objectives, including: "Ensuring that foreign investors . . . are not accorded greater substantive rights with respect to investment protections than United States investors in the United States . . . [by, inter alia,] seeking to establish standards for expropriation and compensation for expropriation consistent with United States legal principles and practice."[41]

D. Why Bother With the Criticisms?

In sum, 13 years after NAFTA's entry into force, NAFTA Chapter 11 adjudication has hardly proven to be the threat to domestic judicial integrity or public interest regulation, or the source of ruinous state liability, or the haven for foreign investors seeking comparative advantage, as feared by some commentators. On the whole, Chapter 11 jurisprudence, in fact, reflects substantial deference to domestic court decisions and regulations due in part to the sensitivity of a treaty institution well-aware of the limitations of its own competence. As the *Loewen* tribunal put it: "Too great a readiness to step from outside into the domestic arena, attributing the shape of an international wrong to what is really a local error (however serious), will damage both the integrity of the domestic judicial system and the viability of NAFTA itself."[42]

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37. *See, e.g.*, Coe, *supra* note 7, 1439–41; Vicki Been & Joel C. Beauvais, *The Global Fifth Amendment? NAFTA's Investment Protections & The Misguided Quest for an International "Regulatory Takings" Doctrine*, 78 N.Y.U. L. REV. 30, 31 (2003); *Bill Moyers Reports: Trading Democracy* (Feb. 1, 2002), *available at* http://pbs.org/now/transcript/transcript_tdfull.html; Public Citizen Report, *supra* note 25.

38. Pope & Talbot, Inc. v. Canada, Final Award, Apr. 10, 2001, *available at* http://www.d_fait-maeci.gc.ca/tna-nac/documents/Award_Merits-e.pdf.

39. S.D. Myers, Inc. v. Canada, Final Award, Nov. 13, 2000, *available at* http://www.appletonlaw.com/cases/Myers%20-%20Final%20Merits%20Award.pdf.

40. *Compare, e.g.*, *Metalclad*, *supra* note 30, *with* Concrete Pipe and Products v. Construction Laborers Pension Trust, 508 U.S. 602, 645 (1993) (holding that "mere diminution" of the value of an investment is not sufficient to establish a taking).

41. Trade Act of 2002, 19 U.S.C. § 3802(b)(3) (2002).

42. *See Loewen*, 42 I.L.M. at 850.

But, arguably, the criticisms retain their teeth. Any limitations imposed by the tribunals' own sensitivity are largely informal; while general principles of international law provide guidance, no binding rules prevent tribunals from, for instance, construing expropriation differently than U.S. courts to impose monetary penalties relating to environmental regulation.[43] It would be a mistake to allow the potential friction between NAFTA and domestic public interests to grow to the point that political pressure within the member states demands amendment or—however unlikely it may seem now—revocation of Chapter 11's core investment guarantees.

II. Responses to the Criticisms: Past, Present and Future

Notably, the arbitrators that adjudicate Chapter 11 disputes have, to some extent, interpreted NAFTA in a manner that is beneficial to the public interests of the member states. Nonetheless, the member states have at their disposal certain procedural tools that may be used to mitigate the risk of friction between public interests and Chapter 11. These tools, some of which already exist and have been proposed by various commentators, can be organized into four categories. The substance and application of each is addressed below.

A. Interpretive Statements

At least one NAFTA tribunal has acknowledged the importance of interpreting Chapter 11's obligations in light of the impact awards could have on "the practical ability of governmental authorities to protect health and the environment."[44] In doing so, the tribunal found that both contemporaneous environmental treaties and NAFTA's preamble impose substantive environmental and health limitations on Chapter 11 obligations.[45] Whatever the source, any such limitation remains, at heart, an unresolved issue of treaty interpretation.

The member states have at their disposal two existing procedural measures that can be utilized in an attempt to direct treaty interpretation in accord with public health and environmen-

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43. *See generally* Colloquium, *Could Principles of Fifth Amendment Takings Jurisprudence Be Helpful In Analyzing Regulatory Expropriation Claims Under International Law?*, 11 N.Y.U. ENV. L. J. 174 (2002) (comparing and contrasting expropriation standards under U.S. and customary international law).

44. *See, e.g.*, S.D. Myers, Inc. v. Canada, Final Award, Nov. 13, 2000, Schwartz Concurring Opinion, pp. 85–86, 92, *available at* http://www.appletonlaw.com/cases/Myers%20%20Concurring%20Final%20Merits%20Award.pdf. (hereinafter *S.D. Myers*).

45. *Id.* p. 107. Notably, while the *S.D. Myers* tribunal did not find that the Canadian environmental regulation at issue was tantamount to expropriation, it found that Canada had violated NAFTA's national treatment guarantees. *See generally* Todd Weiler, *Interpreting Substantive Obligations in Relation to Health and Safety Issues*; *in* NAFTA INVESTMENT LAW AND ARBITRATION: PAST ISSUES, CURRENT PRACTICE, FUTURE PROSPECTS 107, 111 (Todd Weiler ed., 2004) ("The NAFTA's preamble includes resolutions to 'UNDERTAKE each of the preceding [liberalizing goals] in a manner consistent with environmental protection and conservation; PRESERVE their flexibility to safeguard public welfare; PROMOTE sustainable development; [and] STRENGTHEN the development and enforcement of environmental laws and regulations.'"). Furthermore, the *Methanex* decision could signify the development of an exception in the NAFTA jurisprudence for regulatory actions protecting human health and the environment. Such a development would encourage legislatures and public interest groups contemplating new regulations that might incidentally affect investors. Whether such an exception actually develops, however, is highly speculative at this point, relying as it does on only one—albeit highly publicized—opinion, and its parameters, if it were to develop, are even more unclear.

tal interests. *First*, NAFTA allows each member state to submit its view of the meaning and intent of the article in question during proceedings, referred to as "Article 1128 submissions."[46] Article 1128 submissions may address procedural or substantive issues and may be submitted by the member states that are not directly involved in the claim. This often-used control is somewhat limited, however, because the states' interpretations are not binding on the tribunal.[47] Member States have filed Article 1128 submissions in at least twelve claims to date.[48] In most of those claims, more than one member state submitted interpretive statements, and in some, the member states submitted more than one interpretive statement each. These submissions have overwhelmingly supported the position taken by the respondent state against the investor. Although Article 1128 submissions are non-binding, the careful analysis accorded by tribunals underscores their potential impact on treaty interpretation.

The submissions in the jurisdictional phase of the *Methanex* dispute demonstrate how Article 1128 submissions can be used by member states attempting to protect public interests. There, the parties disagreed about whether article 1101's authorization of claims against government measures "relating to" foreign investments should be interpreted to include, as Methanex proposed, measures "affecting" foreign investments. Canada and Mexico submitted article 1128 submissions advocating an interpretation of article 1101 limiting the scope of claims to exclude measures merely "affecting" investment.[49] "The NAFTA Parties clearly did not intend that every regulatory measure of general application which merely affects or has an incidental, minimal, or inadvertent effect on an investor, or its investment, would give rise to a claim under NAFTA Chapter Eleven," Canada wrote.[50] The *Methanex* tribunal ultimately dismissed all of Methanex's claims. Canada's and Mexico's Article 1128 tried to limit the scope of investor challenges to domestic laws and is a noteworthy use of the 1128 submission process to promote a common understanding of the treaty.

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46. NAFTA, *supra* note 2, art. 1128 ("On written notice to the disputing parties, a Party may make submissions to a Tribunal on a question of interpretation of this Agreement.").

47. Legum, *supra* note 9, at 355 (noting that the use of Article 1128, while often employed, is limited because the tribunals do not always take the approach suggested by the treaty members).

48. *See* ADF Group Inc. v. U.S.A., Case No. ARB(AF)/00/1 (Jan. 9, 2003) (by Canada and Mexico as to Article 1105); Feldman v. Mexico, Case No. ARB(AF)/99/1 (Dec. 16, 2002) (by Canada and the United States as to jurisdiction, and by Canada on the merits); Fireman's Fund v. Mexico, Case No. ARB(AF)/02/01 (July 17, 2003) (by the United States and Canada as to jurisdiction); GAMI Inv., Inc. v. Mexico (Nov. 15, 2004) (by the United States as to jurisdiction); *Loewen*, 42 I.L.M. 811 (by Canada and Mexico on the merits); *Metalclad*, *supra* note 30 (by Canada as to Article 1110, and by the United States as to treaty interpretation and Article 1110); *Methanex*, *supra* note 28 (by Canada and Mexico as to jurisdiction, as to Article 1105, and as to the amended claim); *Pope & Talbot*, *supra* note 37 (five each by Mexico and the United States on the merits, and by Mexico and the United States as to Article 1105 and as to damages); *S.D. Myers*, *supra* note 38 (by Mexico and the United States as to damages); Int'l Thunderbird Gaming Corp. v. Mexico (Jan. 26, 2006) (by Canada and the United States as to Article 1102); United Parcel Service of America, Inc. v. Canada (Nov. 30, 2006) (by Mexico and the United States as to amicus petitions, and two each by Mexico and the United States as to jurisdiction); Waste Mgmt, Inc. v. Mexico, Case No. ARB(AF)/00/3 (Apr. 30, 2004) (by Canada as to jurisdiction and on the merits). Submissions available at http://www.naftaclaims.com/disputes.htm.

49. Methanex v. U.S.A., Canada—Article 1128 Submission on Jurisdiction, pp. 10–24 (Apr. 30, 2001); Methanex v. U.S.A., Mexico—Article 1128 Submission on Jurisdiction, pp. 5–8, (Apr. 30, 2001).

50. Methanex v. U.S.A., Canada—Article 1128 Submission on Jurisdiction, ¶ 22 (Apr. 30, 2001).

Second, the member states may jointly issue binding interpretations of the NAFTA text in order to direct treaty interpretation.[51] Issued through the NAFTA's Free Trade Commission (FTC), these joint interpretations (referred to as "Commission Statements") are binding on all future tribunals. An example is the Commission's 2001 statement regarding the minimum standard of treatment required by international law under Article 1105.[52] That Commission Statement was issued in response to divergent tribunal decisions as to whether Chapter 11's minimum standard of treatment obligation required treatment better than customary international law. The member states clarified that investors need not be afforded rights any greater than those guaranteed by customary international law;[53] in other words, customary international law serves as a ceiling, rather than a floor, for the minimum standard of treatment member states must afford to foreign investors.[54] The same Commission Statement also addressed the availability of arbitration documents to third parties[55] and the FTC has also issued a Commission Statement regarding non-disputing party participation.[56]

Because of their binding nature, Commission Statements are powerful tools by which the member states can influence the application of NAFTA to protect public interests.[57] For instance, new language in the United States–Chile Free Trade Agreement includes a section confirming the parties' "shared understanding" that nondiscriminatory regulatory actions with any environmental or public health nexus do not, except in rare circumstances, constitute indirect expropriation.[58] The same goal could be achieved in the NAFTA context through the use of binding Commission Statements. To date, however, no Commission Statements have been issued relating to the appropriate standard for a finding of regulatory expropriation or what constitutes "investment" under NAFTA.

B. Procedural Safeguards

In addition to the measures of control provided by NAFTA over the interpretation of the treaty's text, it has been suggested that the member states may also exercise two procedural safeguards: preliminary questions and to interim review procedures.

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51. NAFTA, *supra* note 2, art. 1131(2); Legum, *supra* note 9, at 355 (noting that use of binding interpretations can assist in getting tribunals "back on track" as to disputed points).

52. Free Trade Commission, Statement on NAFTA Article 1105 and the Availability of Arbitration Documents, July 31, 2001 (hereinafter Commission Statement of July 31, 2001), *available at* http://www.naftaclaims.com/commission.htm.

53. *Id.*

54. *See generally* Coe, *supra* note 7, at 1427–30.

55. The NAFTA parties "agree to make available to the public in a timely manner all documents submitted to, or issued by, a Chapter Eleven Tribunal . . ." and member states have generally done so. Commission Statement of July 31, 2001, *supra* note 52.

56. Free Trade Commission, Statement of the Free Trade Commission on Non-Disputing Party Participation, Oct. 7, 2003, *available at* http://www.naftaclaims.com/Papers/Nondisputing-en.pdf

57. *See, e.g.,* Lucien J. Dhooge, *The Revenge of the Trail Smelter: Environmental Regulation as Expropriation Pursuant to NAFTA*, 38 AM. BUS. L. J. 475, 554–55 (2001) (comparing Commission Statements favorably to time-consuming amendment process); *cf.* Coe, *supra* note 7, at 1429 & n.230 (noting that the Commission Statement interpreting Article 1105 was criticized by investors as a pseudo-amendment of the NAFTA text).

58. United States–Chile Free Trade Agreement, Annex 10-D (June 6, 2003), *available at* http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Chile_ FTA/Final_ Texts/asset_upload_file926_4003.pdf.

Consideration of challenges to a tribunal's jurisdiction and to the admissibility of claims as preliminary questions allows the respondent state the opportunity to dispose of claims negatively impacting public interest early, or, at a minimum, to narrow the issues in dispute at the hearings on the merits of the claim.[59] The scope of preliminary questions varies depending on the arbitration rules under which the tribunal operates, and to some extent, the disposition of the tribunal.[60] NAFTA arbitrations conducted under the Additional Facility of the International Centre for the Settlement of Investment Dispute (ICSID) may entertain preliminary questions on both jurisdiction and the admissibility of the claim.[61] Recent amendments to ICSID Rules, effective April 2006, provide an additional basis for raising a preliminary objection: that the claim is "manifestly without legal merit."[62] In contrast, the text of the Arbitration Rules of the United Nations Commission on International Trade and Law (UNCITRAL) explicitly limits preliminary questions to jurisdictional challenges.[63] Where allowed, preliminary questions can lead to a more efficient NAFTA arbitral process and possibly enable respondent states to quickly dispose of claims negatively implicating public interest.

An additional mechanism—what Barton Legum, former Chief of the United States's NAFTA Arbitration Division, terms an "interim review procedure"[64]—is not now available in NAFTA disputes, but also would be a valuable tool. By this process, parties would have the opportunity to comment upon a tribunal's decision before it becomes final. Such an interim review procedure is included in the 2004 U.S. Model Bilateral Investment Treaty (BIT), which provides that "if either disputing party so requests, the tribunal is required to transmit a copy of the award on liability it proposes to make to both disputing parties and to the other State or States that are parties to the treaty. The disputing parties may comment on the award, and the tribunal is required to consider those comments before issuing its final award on liability."[65]

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59. *See* Legum, *supra* note 9, at 351.

60. *Id.* at 352.

61. *See* Convention on the Settlement of Investment Disputes between States and Nationals of Other States, art. 38 (Mar. 19, 1965), *available at* http://www.worldbank.org/icsid/basicdoc/partA-chap04.htm#s02 (hereinafter ICSID Convention), ICSID Additional Facility Arbitration Rules, art. 45(2), *available at* http://www.worldbank .org/icsid/facility/partD-chap08.htm#a45 ("The Tribunal shall have the power to rule on its competence.") "The term 'competence' is generally understood to be broader than the term 'jurisdiction'; and as a result the ICSID rules may be seen to provide preliminary treatment of . . . objections to the tribunal's jurisdiction [and] . . . objections to admissibility of the claim. . . . " Legum, *supra* note 9, at 352.

62. ICSID Additional Facility Arbitration Rules, *supra* note 61, art. 45(6).

63. Arbitration Rules of the United Nations Commission on International Trade and Law, Res. 31/98, art. 21(1) (Dec. 15, 1976), *available at* http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf (hereinafter UNCITRAL Arbitration Rules). *See also* Methanex Corp. v. U.S.A., First Partial Award, Aug. 7, 2002, ¶¶ 122–26, *available at* http://www.state.gov/s/l/c5818.htm (confirming that arbitrations conducted under the UNCITRAL rules cannot consider preliminary questions extending beyond jurisdiction); Legum, *supra* note 9, at 352. Notably, the NAFTA tribunal in *UPS v. Canada*, which also operated under the UNCITRAL rules, reached a result different from *Methanex* and considered preliminary questions regarding admissibility of the claim at issue. Legum, *supra* note 9, at 352.

64. Legum, *supra* note 9, at 355.

65. 2004 U.S. Model BIT, art. 28(9) (Feb. 2004), *available at* http://www.state.gov/documents/organization/38710 .pdf. The addition of an interim review process to NAFTA, however, would likely require an amendment to the treaty text.

C. Review of Awards

In addition to review of the proceedings at the preliminary and intermediate stages, the United States has considered providing the member states with more robust review of NAFTA arbitral awards once they are final. As NAFTA arbitrations are currently conducted, under either the UNCITRAL or ICSID Additional Facility rules, disputing parties may seek review of an award in the courts of the seat of arbitration, meaning the domestic courts of the member state in which the arbitration was conducted.[66] Generally, the scope of review, whether in the United States, Canada, or Mexico, is limited to procedural and jurisdictional errors.[67] The review is not an appeal in the sense that the court does not have jurisdiction to review the tribunal's substantive decisions.[68]

In practice, there have been few challenges to tribunal awards in national courts, and, with the exception of the first award reviewed, the *Metalclad* award, the national courts have generally exhibited the same level of deference to NAFTA awards as they would to other commercial arbitration awards.[69] The courts have been disciplined in their adherence to their respective laws governing the review of arbitral awards, refraining from reviewing the merits of the decisions and, instead, appropriately limiting their scope of review to procedural and jurisdictional challenges.[70] While beneficial from the viewpoint of finality of awards, the lack of appellate scrutiny does hinder the respondent states' ability to challenge final awards that are detrimental to public interests.

One proposed solution is the adoption of an appellate mechanism, either within or outside NAFTA—but in either case independent of domestic courts—with the power to review NAFTA awards for procedural, jurisdictional, and substantive errors. Creating a specialized forum for appeal would not only provide the potential benefits of heightened review of awards,

66. For an overview of the review process, see Noah Rubins, *Judicial Review of Investment Arbitral Awards*, 2 TRANSNAT'L DISPUTE MGMT. 40, 40–44 (2005).

67. *Id*. at 41–42 (comparing the scope of review in each of the member states).

68. ICSID Convention, *supra* note 61, arts. 50–52; UNCITRAL Arbitration Rules, *supra* note 63, arts. 35–36.

69. Rubins, *supra* note 66, at 43. There have been three challenges to arbitral decisions in Canadian courts. In *Metalclad*, the British Columbia Supreme Court partially set aside the arbitral decision. Reviewing courts in Ontario affirmed the decisions in *S.D. Myers* and *Feldman*. *See* Mexico v. Feldman Karpa, O.J. No. 5070, ¶ 66 (Ont. S.C.J. 2005); Canada v. S.D. Meyers, Inc., 2004 F.C. 38 (Fed. Ct. 2004). In the United States, the D.C. district court denied Loewen's motion to vacate the arbitral award on the grounds that the motion was untimely. *See* Loewen v. U.S., No. Civ. A. 04-2151, 2005 WL 3200885 (D.D.C. Oct. 31, 2005). A motion to vacate a consolidation order remains pending before the D.C. district court in the Softwood Lumber cases. *See* Softwood Lumber Consolidation Proceedings, *available at* http://www.state.gov/s/l/c14432.htm.

70. Rubins, *supra* note 66, at 43.

but also circumvent domestic courts and the possible erroneous application of the law by domestic judges unfamiliar with investor-State arbitration.[71]

The United States Congress provided for the development of an appeals mechanism as a negotiating objective in the 2002 Trade Act.[72] The proposal is not NAFTA-specific, but contemplates the development of an appellate system that could encompass NAFTA awards. The Trade Act is not the first source to suggest an appeals mechanism. Judges Stephan Schwebel and Howard Holtzmann have been promoting the development of an "International Court of Arbitral Awards" for over a decade.[73] The U.S. Trade Act is significant, however, because the United States is the first nation to formally pursue appeal, and, of course, the United States is influential not only in NAFTA, but also in the ICSID and throughout the broader investor-state system. Indeed, a 2004 proposed amendment of the ICSID Convention to include an "appeals facility" was likely inspired, at least in part, by the 2002 U.S. Trade Act.[74] Currently, the Chile and Singapore Free Trade Agreements contemplate the possibility, at least, of establishing some sort of appellate facility. The Chile Free Trade Agreement in particular calls for the parties to "consider whether to establish" an appellate body "within three years after the date of entry into force" of the agreement.[75] The Dominican Republic–Central America–United States Free Trade Agreement (CAFTA) goes further to require that a negotiating group be established within three months of its entry into force "to develop an appellate body or similar mechanism . . . designed to provide coherence to the interpretation of investment provisions in the Agreement."[76]

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71. Doak Bishop has said that he believes an appellate body "can provide the perception to Governments, NGO's and others of consistency of decisions, predictability of the law, [and] objectivity in making decisions as to the meaning of investment provisions." Doak Bishop, *The Case for an Appellate Panel and its Scope of Review*, 2 TRANSNAT'L DISP. MGMT. 8, 10 (2005). Similarly, Susan Franck champions an appellate body as a tool to "promote consistency, provide predictability, and reduce the risk of inconsistent decisions to make the system . . . legitimate in the long term." Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1607 (2005); see also Coe, *supra* note 7, at 1447 ("The potential for disparate standards and variegated results inherent in the present configuration would abate if control powers were vested exclusively in a single organ. . . . "). The ICSID Secretariat also introduced the proposed "Appeals Facility" as a tool for fostering coherence and consistency in the emerging case law regarding investment treaties. *See* ICSID Secretariat, *Possible Improvements of the Framework for ICSID Arbitration*, Discussion Paper ¶ 23 (Oct. 22, 2004), http://www.worldbank.org/icsid/highlights/improve-arb.pdf (hereinafter ICSID Proposal).

72. *See* Trade Act of 2002, *supra* note 34. For analysis of the Trade Act and issues regarding the development of an appeal mechanism, see Barton Legum, *The Introduction of an Appellate Mechanism: the U.S. Trade Act of 2002*, *in* ANNULMENT OF ICSID AWARDS (E. Gaillard & Y. Banifatemi eds., 2003); Barton Legum, *Visualizing an Appellate System*, 2 TRANSNAT'L DISPUTE MGMT. 64, 64–69 (2005).

73. *See* Charles N. Brower, Charles H. Brower, II, & Jeremy K. Sharpe, *The Coming Crisis in the Global Adjudication System*, 19 ARB. INT'L 415, 436–38 (2003) (advocating in favor of Judges Schwebel and Holtzmann's proposal, first made in 1993, for an appellate arbitration court, the 'International Court of Arbitral Awards,' as a solution to the conflicting awards that can be created by domestic courts that review arbitral awards).

74. *See* ICSID Proposal, *supra* note 71.

75. United States–Chile Free Trade Agreement, Annex 10-H, June 6, 2003, *available at* http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Chile_ FTA/Final_ Texts/asset_upload_file926_4003.pdf.

76. Central American Free Trade Agreement, Annex 10-F, Aug. 5, 2004, *available at* www.ustr.gov/Trade _Agreements/Bilateral/CAFTA/CAFTA-DR _Final_Texts/Section_Index.html.

Appeal of awards does not, of course, come without costs to the respondent states. The primary cost of appeal is the erosion of the finality of awards. This cost is particularly acute here, because the member states' relative success in NAFTA arbitrations should make them reluctant to provide their opponents with the opportunity to appeal and overturn these favorable awards. As previously discussed, the majority of NAFTA awards have been favorable to the member states, and the United States has yet to lose even one claim. If the member states, and in particular the United States, continue to have the same level of success, it is unlikely that they will be amenable to the appeal of awards.[77]

The appeals facility proposed by the United States in 2002 suffered a setback in early 2005.[78] This setback most likely reflects the fact that most capital-exporting states have yet to experience investor-state arbitration as a respondent. It may also indicate, however, a recent shift in U.S. policy away from support for appeal of arbitral awards.[79] Indeed, the Trade Act was passed at what Dan Price has described as "a time of great ferment and fear about NAFTA Chapter 11."[80] At that time, a number of NAFTA claims were pending against the United States, including a number of claims threatening U.S. institutions and public interests. Now that those claims have been favorably decided, the United States and the other member states may find that the tools already at their disposal are sufficient to protect their national interests.

D. Transparency and Third Party Participation

Member states have allowed public interest groups to gain a measure of influence in NAFTA arbitrations. Transparency measures enable the public to have input on Chapter 11 disputes by allowing individuals or organizations to become sufficiently knowledgeable about disputes to be able to lobby their government representatives. The original measures of transparency were introduced in NAFTA in response to demands by public interest groups to have notice of what public interests were at risk in disputes. Some of the early NAFTA tribunals denied public access to the arbitral proceedings.[81] This was in keeping with arbitration's tradition of privacy, but conflicted with public expectations in the member states, particularly in the United States and Canada, where NGOs and individuals believed that arbitrations that had repercussions for public interests should not be subject to the same privacy provisions as traditional commercial arbitration.[82] In 2001, in response to this conflict between arbitral practice and public expectation, the member states issued a Commission Statement clarifying that, "nothing in the NAFTA imposes a general duty of confidentiality on the disputing parties to a Chapter Eleven arbitration, and . . . nothing in the NAFTA precludes the Parties from providing public access to documents submitted to, or issued by, a Chapter Eleven tribunal."[83]

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77. *See generally* Thomas W. Walsh, *Substantive Review of ICSID Awards: Is the Desire for Accuracy Sufficient to Undermine Finality?*, 24 BERKELEY J. INT'L L. 444, 461 (2006).

78. *See generally* ICSID Secretariat, *Suggested Changes to the ICSID Rules and Regulations*, Working Paper of the ICSID Secretariat ¶ 4 (May 12, 2005), http://www.worldbank.org/icsid/highlights/052405-sgmanual.pdf (shelving the proposed "Appeals Facility").

79. Walsh, *supra* note 77, at 445–46.

80. Daniel Price, *US Trade Promotion Legislation*, 2 TRANSNAT'L DISPUTE MGMT. 47, 48 (2005).

81. Legum, *supra* note 9, at 349.

82. *Id.*

83. Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions, July 31, 2001, p. A(1), *available at* http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-Interpr-en.asp.

Importantly, the member states also agreed in the Commission Statement to make available all documents of general public interest in the cases.[84] Transparency was further advanced in 2002, when the tribunal in *UPS v. Canada* opened its hearings to the general public via closed-circuit televisions. NAFTA parties have maintained their discretion to close hearings to the public. However, in a 2003 Commission Statement, the United States and Canada "affirmed that they will consent to open public hearings in all Chapter 11 arbitrations to which either is a party, and will request the consent of disputing investors to such open hearings."[85] Since 2002, hearings in the *Methanex*, *Canfor*, *ADF Group*, *Grand River Enterprises—Six Nations*, *Mondev*, and *Softwood Lumber* claims against the United States have been open to the public, and Mexico consented to open hearings in *Thunderbird*.[86]

Public interest groups have also made demands to participate in NAFTA disputes. Participation, as opposed to transparency, enables public interest groups to exert direct influence on NAFTA disputes. The member states have begun to enable direct participation by public interest groups in the form of *amici curiae* submissions. Again, the *Methanex* and *UPS* tribunals set the precedent for third-party participation; both admitted *amici* submissions in 2001.[87] The formalization of the third-party submissions process was announced in the 2003 statement of the FTC, with the member states agreeing to joint guidelines.[88] The acceptance of third-party submissions remains at the discretion of the tribunal.

The increased transparency and third-party participation in NAFTA arbitrations has been well received by public interest groups. Most recently, they have demanded greater transparency in the form of guaranteed broadcasting of arbitral hearings and the ability of public-interest groups to make submissions to tribunals on issues relevant to the claims. In *UPS v. Canada*, public interest groups petitioned the tribunal not only for the right to submit *amici curiae*—which was granted—but also to be given standing to make submissions as parties to the dispute. The petitioners argued that their "direct and unique interest in the proceedings" and their "expertise and unique perspective on the broader public interest issues raised by the dispute" warranted granting them standing to make submissions regarding what the tribunal characterized as "matters that are exclusively reserved to those with the status of parties to the proceedings."[89] The tribunal denied the interest groups' petition for standing, concluding that NAFTA does not generally authorize the participation of third parties in disputes; the only exceptions are disputing parties with like claims and the non-party member states' aforementioned right to submit treaty interpretations.[90]

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84. *Id*. p. A(2).

85. Legum, *supra* note 9, at 350.

86. *Id*.

87. Methanex Corp. v. U.S.A., Decision on the Petition from Third Persons to Intervene as *Amici Curiae*, Jan. 15, 2001, *available at* http://www.state.gov/documents/organization/31979.pdf; United Parcel Service of America, Inc. v. Canada, Decision on Petitions for Intervention and Participation as *Amici Curiae*, Oct. 17, 2001, *available at* http://www.dfait-maeci.gc.ca/tna-nac/documents/IntVent_oct.pdf (hereinafter *UPS* Amici Decision).

88. NAFTA Free Trade Commission, Statement of the Free Trade Commission on Non-Disputing Party Participation, *supra* note 56.

89. *UPS* Amici Decision, *supra* note 87, p. 12.

90. *Id.* pp. 35–36.

III. Conclusion

The varied criticisms of NAFTA's Chapter 11 have not proven to be prophetic, due largely to the success of member states, particularly the United States, in defending against investor claims. The limited negative impact of NAFTA on domestic public interests and institutions, however, is due largely to the sensitivities of individual NAFTA tribunals cognizant of the limits of their competence, not formal rules imposed by explicit language in the operative instrument, principles of *res judicata*, or robust appeal mechanisms that traditionally operate in the domestic sphere to provide a check against errant decisions. As a result, the future of NAFTA Chapter 11 is far from assured and wisdom dictates that the lessons learned be taken seriously.

Violence Against Women and International Law: The Fundamental Right to State Protection from Domestic Violence

Rebecca Adams*

"Violence against women is perhaps the most shameful human rights violation. And it is perhaps the most pervasive. It knows no boundaries of geography, culture or wealth. As long as it continues, we cannot claim to be making real progress towards equality, development, and peace."[1]

Kofi Annan
United Nations Secretary-General

Introduction

In a statement to the Fourth World Conference on Women in Beijing in September 1995, then United Nations Secretary-General Boutros Boutros-Ghali stated that violence against women is a "universal problem that must be universally condemned."[2] Until recently, the international community viewed violence against women as a private matter.[3] International law has recently begun to recognize the alarming global dimensions of the problem and brought the issues of gender-based violence out in the open. Violence against women continues

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1. *See* Sandra Chapman, *Lifestyle: Ending the Pain of Domestic Violence*, BELFAST NEWS LETTER, Mar. 5, 2004, at 16 (citing Kofi Annan); *see also* Mohd Fisol Jaafar, *Violence Against Women Comes in Many Forms*, MALAYSIAN NAT'L NEWS AGENCY, May 8, 2005, at 1; Division for the Advancement of Women (DAW), Women 2000: Gender Equality, Development and Peace for the 21st-Century, June 5-9, 2000, *Fact Sheet No. 4—Violence Against Women* (hereinafter *Fact Sheet No. 4*), *available at* http://www.un.org/womenwatch/daw/followup/session/presskit/fs4.htm.

2. *See* Kambiz Rafraf, *Promoting Gender Equality Will Advance World Peace*, DALLAS MORNING NEWS, Mar. 16, 2002, at 4G; *see also* Muhammad Saleem, *Call for Efforts to End Violence Against Human Beings*, BUS. RECORDER, at 1; U.N. Dep't of Pub. Info., *Women and Violence*, U.N. Doc. DPI/1772/HR (Feb. 1996), *available at* http://www.un.org/rights/dpi1772e.htm.

3. *See* Deborah Epstein, Margret E. Bell & Lisa A. Goodman, *Transforming Aggressive Prosecution Policies: Prioritizing Victims' Long-Term Safety in the Prosecution of Domestic Violence Cases*, 11 AM. U. J. GENDER SOC. POL'Y & L. 465, 484 (2003) (highlighting that some people believed that domestic violence was a private matter that should not be aired); *see also* Moira L. McConnell, *Violence Against Women: Beyond the Limits of the Law*, 21 BROOK. J. INT'L L. 899, 906 (1996) (asserting that domestic violence against women was a private matter dealt with through internal national regulation and not as a matter between states). *But see* Andreea Vesa, *International and Regional Standards for Protecting Victims of Domestic Violence*, 12 AM. U. J. GENDER SOC. POL'Y & L. 309, 317 (2004) (arguing that in some countries, domestic violence is still treated as a private matter).

* **J.D., University of Richmond School of Law. The author is in her first year of practicing law as Senior Assistant Counsel to the Judicial Campaign Ethics Center in New York City. She attended the Washington College of Law at American University and went on to complete her law degree at the University of Richmond, in her hometown. The author sends many thanks to Margaret Bacigal, Professor at the T.C. Williams School of Law of the University of Richmond, whose Domestic Violence Seminar and guidance as the author's advisor during her third year of law school inspired her to write this piece. The author received her undergraduate degree from the College of William and Mary in 2001. Please note that this article is the independent work of the author and does not reflect the view of the Judicial Campaign Ethics Center or the New York State Unified Court System.**

to be one of the most pervasive and transcendent human rights abuses in the world.[4] It affects the lives of millions of women and thwarts their full participation in society.[5]

Violence against women takes many forms. Domestic violence,[6] which is the most common, is also the most difficult type to address due to the individual and private nature of the battering of women by their husbands and intimate partners.[7] Although domestic legal systems can—and should—be used to combat the problem, differences in the relative health and structure of respective legal systems and variations in the cultural and religious underpinnings in each country, require a tailored approach.[8] These legal mechanisms will be useless without

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4. *See* Kristen Boon, *Rape and Forced Pregnancy Under the ICC Statute: Human Dignity, Autonomy, and Consent*, 32 COLUM. HUM. RTS. L. REV. 625, 673 (2001) (expressing that violence against women is among the most serious and pervasive human rights abuses confronting the international community); Hilary Charlesworth, *Feminist Methods in International Law*, 93 AM. J. INT'L L. 379, 385 (1999) (affirming that violence against women is among the most serious and pervasive human rights abuses confronting the international community); Jisheng Li, Comment, *The Nature of the Offense: An Ignored Factor in Determining the Application of the Cultural Defense*, 18 HAW. L. REV. 765, 786 (1996) (asserting that gender violence is the most pervasive human rights abuse in the world today).

5. *See* Martha Davis, *Fighting Gender and Sexual Orientation Harassment*, 9 J.L. & POL'Y 387, 388 (2001) (arguing that violence against women is a public concern because it is vital to women's participation in civil society); Jennifer Lynn Crawford, Note, *America's Dark Little Secret: Challenging the Constitutionality of the Civil Rights Provision of the 1994 Violence Against Women Act*, 47 CATH. U. L. REV. 189, 218 (1997) (asserting that gender-based violence against women has prevented women from nationwide participation in society). *See generally* McConnell, *supra* note 3, at 900–01 (maintaining that a future goal is to bring women into full and equal participation in a peaceful society).

6. For the purposes of this article, it includes married and cohabitating, as well as boyfriend-girlfriend relationships. *See* J.M. Spectar, *The Hyda Hath but One Head: The Socio-Cultural Dimensions of the AIDS Epidemic & Women's Right to Health*, 21 B. C. THIRD WORLD L.J. 1, 19 (2001) (concluding that the government must change sociocultural attitudes because such attitudes are subjecting women to many forms of violence).

   See, e.g., Government Callous to Sufferings of Women: Amnesty International, PAC. ISLAND NEWS SERVICE, Sept. 5, 2006 (citing some of the many forms of violence against women); *see* Katherine M. Culliton, Article, *Finding a Mechanism to Enforce Women's Right to State Protection from Domestic Violence in the Americas*, 34 HARV. INT'L. L.J. 507, 561 n.1 (1993) (citing *General Recommendation No. 19,* Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW), 11th Sess., U.N. Doc. CEDAW/C/1992/L.1/Add. 15 (1992), which states that, "[i]n current terms of international law, domestic violence is defined to include acts of physical . . . and sexual violence perpetrated against women that occur within the family.").

7. *See* Lisbeth T. Pike & Paul T. Murphy, *The Columbus Pilot in the Family Court of Western Australia*, 44 FAM. CT. REV. 270, 271 (2006) (indicating that domestic violence is one of the most difficult matters in family court); *see also* Eric Weslander, *Domestic Violence Charges Most Frequently Dropped*, JOURNAL-WORLD (Kan.), Aug. 24, 2006 (establishing that domestic violence is one of the most common and serious crimes). *See generally* Mary A. Lynch, *Designing a Hybrid Domestic Violence Prosecution Clinic: Making Bedfellows of Academics, Activists and Prosecutors to Teach Students According to Clinical Theory and Best Practices*, 74 MISS. L.J. 1177, 1197 (2005) (suggesting possible methods of dealing with the complex and difficult issues regarding domestic violence).

8. *See* G. Kristian Miccio, *With All Due Deliberate Care: Using International Law and the Federal Violence Against Women Act to Locate the Contours of State Responsibility for Violence Against Mothers in the Age of Deshaney*, 29 COLUM. HUM. RTS. L. REV. 641, 685 (1998) (declaring that solutions to domestic violence will require multidisciplinary approaches across all countries). *See generally* Lisa Hajjar, *Religion, State Power, and Domestic Violence in Muslim Societies: A Framework for Comparative Analysis*, 29 LAW & SOC. INQUIRY 1, 8 (2004) (stressing that eradication of domestic violence requires changes in law and social attitudes); *Kenya to Set Up Domestic Violence Fund*, PANAFRICAN NEWS AGENCY, Nov. 3, 2000, at 1 (declaring that domestic violence is unacceptable and requires the appropriate legal structures).

functional enforcement mechanisms utilized by state and judicial actors willing to make sure they are carried out.[9]

Countries have implemented various mechanisms to address domestic violence but most are dysfunctional.[10] Since most societies continue to view domestic violence as a private concern, their legal systems rarely intervene.[11] Many states lack laws specifically criminalizing domestic violence; even those states with the appropriate legislation in place fail to fully implement the law.[12]

Domestic violence crosses religious, social, cultural, economic and geographic boundaries.[13] Its individual, social and economic costs impact the private sector and society as

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9. *See* Thomas E. Schacht, *Prevention Strategies to Protect Professionals and Families Involved in High-Conflict Divorce*, 22 U. ARK. LITTLE ROCK L. REV. 565, 586 (2000) (arguing that domestic legal mechanisms for domestic violence will be beneficial if other legal options are implemented); *cf.* Sandra J. Schmieder, *The Failure of the Violence Against Women Act's Full Faith and Credit in Indian Country: An Argument for Amendment*, 74 U. COLO. L. REV. 765, 768 (2003) (demonstrating that due to many Indian tribes failing to enforce foreign protection orders, domestic violence victims' advocates favor the use of legal mechanisms that compel Indian tribes to pass resolutions that comply with VAWA's full faith and credit mandate). *See generally* Leigh Goodmark, *The Legal Response to Domestic Violence: Problems and Possibilities: Law Is the Answer? Do We Know That for Sure?; Questioning the Efficacy of Legal Interventions for Battered Women*, 23 ST. LOUIS U. PUB. L. REV. 7, 18 (2004) (asserting that legal mechanisms have made significant strides in protecting women against domestic violence).

10. *See, e.g.,* Deborah M. Weissman, *Gender-Based Violence as Judicial Anomaly: Between "The Truly National and the Truly Local,"* 42 B. C. L. REV. 1081, 1137 (2001) (admonishing legal mechanisms that actually punish women who have acted against domestic violence, while simultaneously blaming them for taking no action); *see also* Yuhong Zhao, *Domestic Violence in China: In Search of Legal and Social Responses*, 18 UCLA PAC. BASIN L.J. 211, 226 (2001) (stressing that legal mechanisms in China do not provide remedies for abused women, nor do they help in controlling or preventing domestic violence in China); *BRCKO District Starts Public Campaign Against Domestic Violence*, ONASA NEWS AGENCY, June 13, 2002, at 1 (noting the lack of legal mechanisms in dealing with domestic violence).

11. *See* Margaret Martin Barry, *Clinical Supervision: Walking That Fine Line*, 2 CLINICAL L. REV. 137, 138 (1995) (recognizing that there needs to be a refinement in the legal system's response to domestic violence and to come up with solutions to the legal system's limited intervention in domestic violence); *see also* Katherine M. Culliton, *Legal Remedies for Domestic Violence in Chile and the United States: Cultural Relativism, Myths, and Realities*, 26 CASE W. RES. J. INT'L L. 183, 211 (1994) (stressing that American women are seeking the intervention of the legal system in combating domestic violence); Jay Folberg, *Family Courts: Assessing the Trade-Offs*, 37 FAM. & CONCILIATION CTS. REV. 448, 448 (1999) (concluding that expanding domestic violence requires more comprehensive judicial intervention).

12. *See* Jennifer Thompson, *Who's Afraid of Judicial Activism? Reconceptualizing a Traditional Paradigm in the Context of Specialized Domestic Violence Court Programs*, 56 ME. L. REV. 407, 419 (2004) (declaring that although state legislatures have passed statutes criminalizing domestic violence, the legal system continues to lag behind); *see also Making Violence Against Women Count: Facts and Figures—A Summary*, AMNESTY NEWS, Mar. 5, 2004, *available at* http://news.amnesty.org/index/ENGACT770342004 (detailing that 79 countries have no or unknown legislation against domestic violence). *See generally* Culliton, *supra* note 11, at 251 (acknowledging that criminalizing domestic violence is a necessary step in ending domestic violence).

13. *See* Joanne Fuller & Rose Mary Lyons, *Mediations Guidelines*, 33 WILLAMETTE L. REV. 905, 919 (1997) (suggesting that domestic violence crosses all cultural, religious, ethnic, economic and social boundaries); Karen Ann Gajewski, *Violence Against Women; Worth Noting; Brief Article*, THE HUMANIST, Jan. 1, 2004, at 46 (stressing that domestic violence spans cultural and religious boundaries and political, social and economic status); *see also* Madhabika B. Nayak et. al., *Attitudes Toward Violence Against Women: A Cross-Nation Study*, SEX ROLES: A JOURNAL OF RESEARCH, Oct. 1, 2003, at 333 (revealing that differences in culture, national boundaries, religion, or ethnic origin are expected to accompany differing attitudes toward domestic violence).

whole.[14] As a universal bane of the global community, domestic violence should be a collective concern of the international community and state actors. Current international law—directly and indirectly—addresses violence against women.[15] As such, states should be held accountable to effect legal change and establish corresponding enforcement mechanisms.

Part I of this article discusses domestic violence as an international epidemic, sustained and shaped by unique cultural and legal factors with gender inequality being the common thread. Part II compares domestic violence law in Pakistan, Central Europe and South Africa, with an emphasis on the unique cultural and social factors impacting their different approaches and the problems inherent in and common to each. Part III emphasizes the tangible social and economic costs of violence against women, which further illustrates the adverse effects on the world economy and the developmental potential of many countries.

Part IV discusses existing international law that condemns violence against women, explaining the possibility of holding state actors accountable for the dysfunction of their legal systems, while compelling states to allay the problem within their geographic boundaries.

Part V emphasizes that while enforcing state accountability may remain a challenge under international law, the pervasiveness and large social costs of domestic violence should compel state actors and international legal institutions to further integrate the elimination of domestic violence into the international legal schema. This should be achieved by recognizing domestic violence as an international human rights violation and through compelling change at the domestic level.

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14. *See* Ann E. Freedman, *Fact-Finding in Civil Domestic Violence Cases: Secondary Traumatic Stress and the Need for Compassionate Witnesses*, 11 AM. U. J. GENDER SOC. POL'Y & L. 567, 590 (2003) (arguing that there must be an improvement in the fact-finding process in civil courts relating to domestic violence, otherwise domestic violence matters that could have been handled in civil court will escalate to criminal courts, exerting greater costs on society); *see also* Lynn Hecht Schafran, *Symposium on Reconceptualizing Violence Against Women by Intimate Partners: Critical Issues: There's No Accounting for Judges*, 58 ALB. L. REV. 1063, 1075 (1995) (declaring that a judiciary must take strong action the first time a domestic violence victim comes into court, otherwise the violence will escalate leading to burdensome costs on society); Machaela M. Hoctor, Comment, *Domestic Violence as a Crime Against the State: The Need for Mandatory Arrest in California*, 85 CAL. L. REV. 643, 646 (1997) (emphasizing that society pays high costs for law enforcement due to domestic violence).

15. *See* M. Isabel Medina, *Symposium on Integrating Responses to Domestic Violence: Justifying Integration of Domestic Violence Throughout the Law School Curriculum*, 47 LOY. L. REV. 1, 13 (2001) (stating that domestic violence has been recognized in international law through international conventions, states' own domestic laws, and through the work of international organizations); *see also* Bonita C. Meyersfeld, Article, *Reconceptualizing Domestic Violence in International Law*, 67 ALB. L. REV. 371, 375 (2003) (arguing that international law imposes certain obligations on states that recognize domestic violence as a crime, and that indirectly through international pressure such obligations may be enforced). *See generally* Miccio, *supra* note 8, at 685 (recognizing that international customary law directly seeks to address domestic violence as human rights abuse).

I. An International Epidemic

A. The Scope of the Problem

In the United States, two to four million women are beaten by their husbands or intimate partners each year, which amounts to one woman every eighteen minutes.[16] One-third of these women will be murdered by their former or current partners.[17] In Chile, two and one-half million out of the 12 million families from "all classes of society" experience domestic violence.[18] Fifty percent of all women have been struck by their male partner at some point, and 25 percent are in permanently violent relationships.[19] In Pakistan, estimates place the rate of domes-

16. *See* Susanne M. Browne, Note, *Due Process and Equal Protection Challenges to the Inadequate Response of the Police in Domestic Violence Situations*, 68 S. CAL. L. REV. 1295, 1297–98 (1995) (stating that every year in the United States, an estimated three to four million women are physically beaten in intimate relationships); Caroline Dettmer, Comment, *Increased Sentencing for Repeat Offenders of Domestic Violence in Ohio: Will This End the Suffering?*, 73 U. CIN. L. REV. 705, 707 (2004) (proclaiming that approximately two million women are physically assaulted by male intimates each year in the United States); Caroline J. O'Neill, Comment, *Health Is a Human Right: Why the U.S. Immigration Law Response to Gender-Based Asylum Claims Require More Attention to International Human Rights Norms*, 17 J. CONTEMP. HEALTH L. & POL'Y 241, 248 (2000) (announcing that an estimated two million women are beaten by their male partners each year in the United States).

17. *See* Sonja K. Hardenbrook, Comment, *The Good, Bad and Unintended: American Lessons for Cambodia's Effort Against Domestic Violence*, 12 PAC. RIM L. & POL'Y J. 721, 736 (2003) (stating that one-third of women assaulted are murdered nationwide by husbands or boyfriends); *see also* Sharon L. Gold, Note, *Why Are Victims of Domestic Violence Still Dying at the Hands of Their Abusers? Filling the Gap in State Domestic Violence Gun Laws,* 91 KY. L.J. 935, 937 (2002) (proclaiming that domestic abuse becomes more severe over time and can sometimes lead to murder of women); Mia M. McFarlane, Article, *Mandatory Reporting of Domestic Violence: An Inappropriate Response for New York Health Care Professionals*, 17 BUFF. PUB. INT. L.J. 1, 6 (1998) (stating that in 1996, domestic violence led to 1,800 murders, of which 75 percent had a female victim). *See generally* Margaret A. Cain, *The Civil Rights Provision of the Violence Against Women Act: Its Legacy and Future,* 34 TULSA L.J. 367, 377 (1999) (pointing out that one million women seek medical assistance as a result of injuries sustained by their husbands or boyfriends each year, and that 20 to 30 percent of emergency room cases are related to domestic violence); Peter J. Liuzzo, *Bronkala v. Virginia Polytechnic Institute: The Constitutionality of the Violence Against Women Act—Recognizing That Violence Targeted at Women Affects Interstate Commerce,* 63 BROOK. L. REV. 367, 367 (1997).

18. *See* Culliton, *supra* note 6, at 516. *See generally Chile: President Bachelet Announces Measure to Stop Domestic Violence*, U.S. FED. NEWS, Apr. 7, 2006, at 1 (addressing the creation of toll-free hotlines and shelters in Chile to cope with the alarming cases of domestic violence); *Two Women Are Front-Runners in Presidential Race in Chile*, ORLANDO SENTINEL, Mar. 19, 2005, at A9 (commenting that domestic violence is common in Chile).

19. *See* Culliton, *supra* note 6, at 561 n.1 (reporting domestic violence statistics in Costa Rica, the Dominican Republic, Ecuador, Honduras, Jamaica, St. Kiss, Nevis and Santa Lucia); *cf.* Leslye E. Orloff & Janice V. Kaguvutan, *Offering a Helping Hand: Legal Protections for Battered Immigrant Women: A History of Legislative Responses*, 10 AM. U. J. GENDER SOC. POL'Y & L. 95, 143 (2001) (declaring that immigrant women, similar to Chilean women, are trapped in permanent violent relationships). *See generally* Maureen K. Collins, *Nicholson v. Williams: Who Is Failing to Protect Whom? Collaborating the Agendas of Child Welfare Agencies and Domestic Violence Services to Better Protect and Support Battered Mothers and Their Children*, 38 NEW ENG. L. REV. 725, 739 (2004) (suggesting that many women who flee abusive relationships return back to such permanent relationships because they are unable to find permanent housing arrangements, similar to the dependency of women in Chile).

tic violence at somewhere between seventy and ninety percent.[20] In South Africa, it is estimated that one in every six women is in an abusive relationship.[21] In Russia, 15,000 women died as a result of domestic violence during the year 2000—1 woman every 40 minutes.[22] In that country, 36,000 women are beaten by their partners every day.[23] In many other countries, domestic violence is so ingrained in social norms that statistics are not available.[24] In short, "[a] binding characteristic of communities throughout the world, almost without exception, is the battering of women by men."[25]

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20. *See* Hajjar, *supra* note 8, at 29 (revealing that domestic violence in Pakistan affects 70 to 90 percent of women); *see also Violence Against Women*, THE NATION, July 28, 2006, at 1 (indicating the high rate of domestic violence in Pakistan). *See generally* Rachel Bacon & Kate Booth, *Persecution by Omission: Violence by Non-State Actors and the Role of the State Under the Refugees Convention in Minister for Immigration Multicultural Affairs v Khawar*, 24 SYDNEY L. REV. 584, 597 (2002) (stressing the prevalence of domestic violence in Pakistan); Judy Mann, *A Matter of Honor v. Justice*, WASH. POST, Oct. 6, 1999, at C16 (reflecting on the prevalence of domestic violence and honor killings in Pakistan and their acceptance as part of a traditional culture).

21. *See* Judith Armatta, *Getting Beyond the Law's Complicity in Intimate Violence Against Women*, 33 WILLAMETTE L. REV. 774, 780 (1997); *see also* Adrien Katherine Wing, *Conceptualization Violence: Present and Future Developments in International Law: Panel III: Sex and Sexuality: Violence and Culture in the New International Order: A Critical Race Feminist Conceptualization of Violence: South African and Palestinian Women*, 60 ALB. L. REV. 943, 957 (1997). *Cf.* Penelope E. Andrews, *Violence Against Women in South Africa: The Role of Culture and the Limitations of the Law*, 8 TEMP. POL. & CIV. RTS. L. REV. 425, 444 (1999) (suggesting that although there are no accurate statistics available, domestic violence against women in South Africa is pervasive).

22. *See* Anna Badkhen, *In Russia, Women Have Their Day, Annually,* BOSTON GLOBE, Mar. 9, 2001, at A14 (estimating that between 12,000 and 16,000 women die in Russia each year); *see also* Jonathan Clayton, *Can U.S. Oil Deal Save This Sudanese Girl, 16, from Flogging for Adultery?,* TIMES (UK), Jan. 1, 2004, at 27 (reporting that 14,000 Russian women are killed per year); Olga Nedbayeva, *Women in Uniform on Lipstick Parade,* DAILY TELEGRAPH (Sydney, Austl.), Mar. 8, 2003, at 20 (claiming that 14,000 Russian women die each year from domestic violence).

23. *See* Venera Zakirova, *War Against the Family: Domestic Violence and Human Rights in Russia—A View from the Bashkortostan Republic,* 53 CURRENT SOC. 75, 79 (2005) (alleging that 36,000 Russian women are beaten every day by their husbands or partners); *Domestic Violence 'Rife' in Russia,* IRISH TIMES, May 14, 2003, at 10 (confirming the statistics reported by Amnesty International, which state that 36,000 Russian women are beaten every day); *see also* Amnesty International, Violence Against Women in the Russian Federation, *available at* http://www.amnesty.org/russia/womens_day.html (last visited Oct. 15, 2006) (highlighting the prevalence of domestic violence in the Russian Federation).

24. *See, e.g.,* Susan Smolens, *Violence Against Women: Consciousness and Law in Four Central Emerging Democracies—Poland, Hungary, Slovakia, and the Czech Republic*, 15 TUL. EUR. & CIV. L.F. 1, 20–21 (2001) (suggesting that the lack of statistics regarding Central and Eastern Europe is due to a failure to acknowledge the problem); *see also* Zhao, *supra* note 10, at 211 (citing the recent recognition of the domestic violence problem in China); Rachel A. Ruane, Comment, *Murder in the Name of Honor: Violence Against Women in Jordan and Pakistan*, 14 EMORY INT'L L. REV. 1523, 1534 (2000) (concluding that domestic violence statistics are underreported in Pakistan because of social isolation and fear of repercussions).

25. *See* Meyersfeld, *supra* note 15, at 371 (2003) ("A binding characteristic of communities throughout the world, almost without exception, is the battering of women by men."); *see also* Smolens, *supra* note 24, at 2 (noting the worldwide significance of the domestic violence epidemic); Barbara Crossette, *UNICEF Issues Report on Worldwide Violence Facing Women,* N.Y. TIMES, June 1, 2000, at A15 (finding that the prevalence of domestic abuse of women and girls around the world is alarming).

The accounts are shockingly numerous and hauntingly similar. In Pakistan, a woman was repeatedly beaten, kicked and generally subjected to high levels of violence from her husband, including being thrown down the stairs when she was pregnant.[26] When she tried to leave him, her family threatened to kill her "because of the shame a broken marriage would bring on the family."[27] In Cambodia, a country plagued by widespread and brutal domestic violence, a man bragged to his wife that he could kill her with "impunity."[28] In Brazil, a man angry at his girlfriend's attempts to end their relationship set her body on fire in front of her four-year-old son.[29]

Though separated by religious, ethnic and cultural differences, all societies share this common thread:[30] industrialized and developing nations alike experience high levels of domestic violence.[31] Within a 12-month period in 1999 as many as 50 percent of all women worldwide

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26. *See* Yolanda Asamoah-Wade, Note, *Women's Human Rights and "Honor Killings" in Islamic Cultures,* 8 BUFF. WOMEN'S L.J. 21, 21 (1999) (chronicling the tragic circumstances of Samia Sarwar's death); Manar Waheed, Note, *Domestic Violence in Pakistan: The Tension Between Intervention & Sovereign Autonomy in Human Rights Law,* 29 BROOK. J. INT'L L. 937, 944–45 (2004) (discussing the "most infamous honor killing case in Pakistan"); Kathy Gannon, *A Woman Sacrificed for Honor of Her Family,* L.A. TIMES, July 9, 2000, at 16 (referring to the horrific incident that caused Samia to flee her husband).

27. *See* Ruane, *supra* note 24, at 1523; *see also* Asamoah-Wade, *supra* note 26, at 21 (relaying the family's reaction to Samia's situation); Waheed, *supra* note 26, at 944–45 (denouncing the family's reaction to the abuse of Samia).

28. *See* Hardenbrook, *supra* note 17, at 721 (quoting the abuser's words to his distraught wife). *See generally* Sally Engle Merry, *Rights, Religion, and Community: Approaches to Violence Against Women in the Context of Globalization,* 35 LAW & SOC'Y REV. 39, 44 (2001) (declaring that men often brag about their ability to control their wives); Shannon Selden, *The Practice of Domestic Violence,* 12 UCLA WOMEN'S L.J. 1, 20 (2001) (suggesting that men brag in order to show pride in their masculinity and control over their relationship).

29. *See* Armatta, *supra* note 21, at 777 (expressing the horror felt by a victim of domestic violence in Brazil). *See generally* Judith E. Koons, *Gunsmoke and Legal Mirrors: Women Surviving Intimate Battery and Deadly Legal Doctrines,* 14 J.L. & POL'Y 617, 653–56 (2006) (listing the various methods that abuser's use in order to make their partners stay in the relationship); Kelly A. Zinna & Michael G. Gelles, *Domestic Violence and Stalking,* 36 MD. B.J. 54, 54 (2003) (maintaining that the end of an abusive relationship is often preceded by a continuous pattern of harassment, intimidation and mental terrorism by the former partner).

30. *See* Armatta, *supra* note 21, at 774–75 (indicating that one in every three women has been beaten, coerced into sex or otherwise abused during her lifetime); *see also* Amy G. Lewis, Note, *Gender-Based Violence Among Refugee and Internally Displaced Women in Africa,* 20 GEO. IMMIGR. L.J. 269, 272 (2006) (emphasizing that domestic violence is the leading cause of injuries to women worldwide); Jennifer Rios, Note, *What's the Hold-up? Making the Case for Lifetime Orders of Protection in New York State,* 12 CARDOZO J.L. & GENDER 709, 713 (2006) (revealing that domestic violence will occur in one out of every five families regardless of age, income, education, religion, immigration status or sexual orientation).

31. *See* Sushma Kapoor, *Domestic Violence Against Women and Girls*, INNOCENTI DIGEST NO. 6 (UNICEF, Innocenti Research Ctr., Florence, Italy), June 2000, at 5, *available at* http://unicef-icdc.org/publications/pdf/digest6e.pdf (presenting a global overview of the epidemic via data from industrialized and transitional countries); *see also* Table II, *infra* ending Section I. *See generally* Nancy Ehrenreich, *Subordination and Symbiosis: Mechanisms of Mutual Support Between Subordinating Systems,* 71 UMKC L. REV. 251, 291–92 (2002) (insinuating that high levels of domestic violence are visible among all groups regardless of socio-economic status); Nichole Miras Mordini, Note, *Mandatory State Interventions for Domestic Abuse Cases: An Examination of the Effects on Victim Safety and Autonomy,* 52 DRAKE L. REV. 295, 298 (2004) (dispelling the myth that domestic violence only affects lower socio-economic groups).

reported assault by an intimate partner.[32] The commonality lies in the uneven power dynamic, and gender inequality.[33] The differences between countries lie in the varied state mechanisms and solutions (if any) in place, the health and structure of their legal system, and the religious and cultural underpinnings of their societies.[34]

B. The Roots of the Problem—Cultural Enforcement of Domestic Violence

The foundation underlying the "universal phenomenon" of domestic violence throughout the world is the uneven power dynamic between men and women.[35] Historically, "domestic violence was a permissible activity" and "while the legal and cultural embodiments vary among different cultures, there is an astounding convergence regarding the basic tenets of patriarchy and the legitimacy, if not the necessity, of domestic violence as a mechanism of enforcing that system."[36] Violence against women results from the subordination of women and remains "one of the crucial social mechanisms" perpetuating their subordination, both socially and economi-

32. *See* Meyersfeld, *supra* note 15, at 426 (documenting the battery of women by male intimates); *see also* Kapoor, *supra* note 31, at 1 (commenting that women are not safe from domestic violence in any country in the world). *See generally* Claudia Garcia-Moreno et al., World Health Organization (WHO), WHO Multi-country Study on Women's Health and Domestic Violence Against Women 1–3 (2005) (hereinafter WHO MULTI-COUNTRY STUDY), *available at* http://www.who.int/gender/violence/who_multicountry_study/summary_report/summary_report_English2.pdf (monitoring the prevalence of intimate partner violence and its effects).

33. *See* Shazia Choudhry & Jonathan Herring, *Righting Domestic Violence,* 20 Int'l J.L. Pol'y & Fam. 95, 111 (2006) (reinforcing the fact that heterosexual intimate violence is part of a larger system of coercive control and subordination); Sally F. Goldfarb, *Applying the Discrimination Model to Violence Against Women: Some Reflections on Theory and Practice,* 11 Am. U.J. Gender Soc. Pol'y & L. 251, 251–52 (2003) (identifying domestic violence as a form of sexism); Lewis, *supra* note 30, at 272 (viewing gender equality to be a primary contributor to gender-based violence).

34. *See* Ruth Colker, *Marriage Mimicry: The Law of Domestic Violence,* 47 WM. & MARY L. REV. 1841, 1851–52 (2006) (offering a glimpse of several state mechanisms within the United States for dealing with domestic violence); Kapoor, *supra* note 31, at 3 (giving examples of the various positive steps that some states have taken to handle the domestic violence problem); *see also* Nadezhda Nadezhdina*, SOS Against a Background of Love,* TRUD (Moscow), Jan. 16–22, 1998, at 7, *available at* http://www.geocities.com/Athens/2533/crisis.html (comparing the United States prosecution-based approach to domestic violence with the lack of recourse for women in Russia).

35. *See* Meredith J. Duncan, *Battered Women Who Kill Their Abusers and a New Texas Law,* 29 HOUS. L. REV. 963, 980 (1992) (recounting the many faces of battered women); *see also* Amy K. Arnett, Comment, *One Step Forward, Two Steps Back: Women Asylum-Seekers in the United States and Canada Stand to Lose Human Rights under the Safe Third Country Agreement,* 9 LEWIS & CLARK L. REV. 951, 960–61 (2005) (admitting that domestic violence is a universal phenomenon).

> "From an international perspective, domestic violence is a nearly universal phenomenon. It exists in countries with varying social, political, economic, and cultural structures, and its pervasiveness signifies that the problem does not originate with the pathology of an individual person. Rather, domestic violence is embedded in the values, relationships and institutional structures of society." Subrata Paul*, Combating Domestic Violence through Positive International Action in the International Community and in the United Kingdom, India, and Africa,* 7 CARDOZO J. INT'L & COMP. L. 227, 243 (1999).

36. See, *e.g.,* Adrien Katherine Wing, *Constitutionalism, Legal Reform, and the Economic Development of Palestinian Women,* 15 TRANSNAT'L L. & CONTEMP. PROBS. 655, 661–62 (2006) (reducing the punishments for acts of domestic violence thereby communicating to the public that it was a somewhat permissible activity); *see* Rhonda Copelon, *Intimate Terror: Understanding Domestic Violence as Torture, in* HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 116, 120 (Rebecca J. Cook ed., 1994) (examining the foundational principles of domestic violence); *see also* Hazel D. Lord, *Husband and Wife: English Marriage Law from 1750: A Bibliographic Essay,* 11 S. CAL. REV. L. & WOMEN'S STUD. 1, 52–53 (2001) (granting the husband a right to beat his wife since he was required to answer for his wife's misbehavior).

cally.[37] The cycle of violence that keeps women in abusive relationships is a "manifestation (in both the public and private realm) of historically unequal power relations between men and women."[38] Domestic violence is an "act facilitated and made possible by gender inequalities."[39]

The women's movement has brought domestic violence to the forefront in a handful of countries, achieving some progress as a result of the challenge to traditional gender roles.[40] For instance, in the United Kingdom, men have historically been allowed to discipline their wives "moderately" as a matter of law.[41] Similarly, traditional cultural and religious influences

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37. *See* Kapoor, *supra* note 31, at 3 (describing the various crimes that keep women socially and economically disadvantaged); *see also* Choudhry & Herring, *supra* note 33, at 111 (believing that heterosexual intimate violence is definitively linked to gender inequality); Goldfarb, *supra* note 33, at 251–52 (discovering that domestic violence grows out of a pervasive pattern of male power and female subservience).

38. *See* Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, arts. 1–2, 4, 85th plen. mtg., U.N. Doc. A/Res/48/104 (Dec. 20, 1993), *available at* http://www.un.org/documents/ga/res/48/a48r104.htm (admitting that violence against women leads to domination and discrimination of women by men).

    The "cycle of violence" inherent in abusive relationships between intimates cuts across cultures, religions, ethnicities and national boundaries. A description of this cycle of violence experienced by domestic violence victims in the United States, with the minor battering stage leading to the acute battering stage, and then the honeymoon stage where the batterer seeks forgiveness, mirrors the description of a Russian woman's experience: "When stress levels peak, the man raises his hand to his wife. Then his anger passes, he repents, gives her gifts, apologises [sic], even gets down on his knees. But sooner or later he gets stressed again and it seems to him that his wife has 'taken advantage of his weakness' and is slipping from his control. Then he starts harassing [sic] her again, trying to bolster up his power. Anything can serve as a pretext: their son gets a bad mark at school, or the soup's too cold. . . ." *See* Nadezhdina, *supra* note 34; *see also* Gold, *supra* note 17, at 938–39 (cataloging the various stages in the "Cycle of Violence").

39. *See* Donna Coker, *Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking,* 47 UCLA L. REV. 1, 39–40 (1999) (linking domestic violence to women's subservient position within society and the family structure); *see also* Lewis, *supra* note 30, at 271–73 (insisting that the primary cause of gender-based violence is gender inequality); WHO MULTI-COUNTRY STUDY, *supra* note 32, at 22 (proposing that programs designed to end gender inequality would lessen the prevalence of domestic violence).

40. *See, e.g.,* Mazna Hussain, Note, *"Take My Riches, Give Me Justice": A Contextual Analysis of Pakistan's Honor Crimes Legislation,* 29 Harv. J.L. & Gender 223, 237 (2006) (stating that Muslim feminist scholars have made significant progress in Pakistan); Leah Riggins, Note, *Criminalizing Marital Rape in Indonesia,* 24 B.C. THIRD WORLD L.J. 421, 439 (2004) (maintaining that there has been some progress in Indonesia in spite of the many obstacles). *But see* Janet Halley, Prabha Kotiswaran, Hila Shamir & Chantal Thomas, *From the Institutional to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism,* 29 HARV. J.L. & GENDER 335, 343 (2006) (stating that advocates for human rights for women missed their chance to make significant progress regarding Yugoslavia).

41. *See* Lord, *supra* note 36, at 52–53 (pointing out the English common law's acceptance of a man moderately disciplining his wife); Christine Taylor, *Northern Ireland: The Policing of Domestic Violence in Nationalistic Communities,* 10 WIS. WOMEN'S L.J. 307, 312–13 (1995) (talking about the British husband's role as disciplinarian). *See generally* Linda L. Ammons, *What's God Got to Do with It? Church and State Collaboration in the Subordination of Women and Domestic Violence,* 51 RUTGERS L. REV. 1207, 1242 (1999) (naming the Homily of Marriage as an authority for a man's right to discipline his wife in the 17th century).

encouraged Irish women to "take (their) oil," placing the preservation of the marriage above the safety and security of women.[42] Both countries have now adopted legislation specifically protecting women from domestic violence.[43] In the United States, beating one's wife was allowed through the beginning of the 20th century, as long as the rod a man used was smaller than his thumb.[44] However, 40 years of struggle and social change have led to a prosecutorial model that helps combat domestic violence.[45] Although domestic violence in these countries is still prevalent due to the persistence of some gender inequality and the continued subordination of women, it is no longer accepted. Its prevention has become a subject of public discourse.[46]

Domestic violence tends to be more prevalent and severe in countries where the most pronounced gender inequalities persist, as reflected by the direct and universal correlation between domestic violence and sex discrimination.[47] Domestic violence in these countries remains a "manifestation of views, perceptions, priorities, and social importance."[48] "[S]ystemic and

42. *See* Virginia H. Murray, *A Comparative Survey of the Historic Civil, Common, and American Indian Tribal Law Responses to Domestic Violence,* 23 OKLA. CITY U. L. REV. 433, 437 (1998) (bringing up traditional cultural and religious influences that still encourage the Irish to "take their oil"); Taylor, *supra* note 41, at 311 (revealing that traditional cultural influences that encourage Irish women to "take their oil" mean that women should suffer in silence); *see also* Melisa J. Anderson, Note, *Lawful Wife, Unlawful Sex—Examining the Effect of the Criminalization of Marital Rape in England and the Republic of Ireland,* 27 GA. J. INT'L & COMP. L. 139, 160–61 (1998) (hinting that Irish women were suffering in silence).

43. *See* Paul, *supra* note 35, at 234–36 (recalling the numerous legislative changes surrounding the issue of domestic violence); *see also* Anderson, *supra* note 42, at 165 (averring that the marital rape law acknowledges a woman's fundamental right to bodily integrity). *See generally* McFarlane, *supra* note 17, at 4 (asserting that previous limits on discipline were only minimal).

44. *See* Alexandra Blake Flamme, *Hernandez v. Ashcroft: A Construction of "Extreme Cruelty" under the Violence Against Women Act and Its Potential Impact on Immigration and Domestic Violence Law*, 40 NEW ENG. L. REV. 571, 614 (2006) (expressing a man's common law right to chastise his wife); Matthew P. Hawes, *Removing the Roadblocks to Successful Domestic Violence Prosecutions: Prosecutorial Use of Expert Testimony on the Battered Woman Syndrome in Ohio*, 53 CLEV. ST. L. REV. 133, 136 (2005-06) (articulating the common law "rule of thumb"); G. Kristian Miccio, *Exiled from the Province of Care: Domestic Violence, Duty and Conceptions of State Accountability,* 37 RUTGERS L.J. 111, 152–53 (2005) (announcing that the common law "rule of thumb" gave men license to abuse their wives).

45. *See* Myrna Raeder, *Remember the Ladies and the Children Too,* 71 BROOK. L. REV. 311, 327–28 (2005) (contending that newly adopted prosecutorial practices have dramatically transformed domestic violence litigation during the last 20 years); *see also* Smolens, *supra* note 24, at 13 (supporting the American legalistic approach to dealing with domestic violence); Zakirova, *supra* note 23, at 80 (championing the system for dealing with domestic violence in the United States).

46. *See* Colker, *supra* note 34, at 1851 (outlining the changes in American domestic violence laws); Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy,* 2004 WIS. L. REV. 1657, 1726 (2004) (relaying the changing societal norms and support regarding the prevention of domestic violence); Hardenbrook, *supra* note 17, at 736–37 (stressing the progress that the United States has made in combating this societal epidemic).

47. *See, e.g.,* Andrews, *supra* note 21, at 430–32 (finding that the country's long history of apartheid is partly responsible for its high levels of domestic violence); Wing, *supra* note 36, at 658–59 (holding the country's customary law responsible for its high levels of domestic violence in Palestine); Angélica Cházaro & Jennifer Casey, Note, *Getting Away with Murder: Guatemala's Failure to Protect Women and Rodi Alvarado's Quest for Safety,* 17 HASTINGS WOMEN'S L.J. 141, 149–52 (2006) (blaming Guatemala's deeply rooted culture of patriarchy for the high levels of domestic violence in that country).

48. *See* Andrews, *supra* note 21, at 437–39; Cházaro & Casey, *supra* note 47, at 149–52; *see also* Mary C. Wagner, Comment, *Bélem Do Pará: Moving Toward Eradicating Domestic Violence in Mexico,* 22 PENN ST. INT'L L. REV. 349, 350–53 (2003).

structural," it remains an insidious materialization of the "economic, social and political predominance of men and the dependency of women."[49]

Patriarchal societies continue to experience much higher incidences of domestic violence.[50] The violence in these societies is often more severe and remains part of the social fabric.[51] In Eastern Europe and Russia, where the social structure continues to reflect "entrenched beliefs about traditional family roles," the "culture of silence" "allow(s) (domestic) violence to flourish" under the general attitude that "a husband who does not beat his wife does not love her. . . ."[52] In India, wife beating is accepted "as an integral part of the patriarchal social structure."[53] In Pakistan, "[w]omen's subordination remains so routine by custom, tradition, and even putatively by religion, that much of the endemic [of] domestic violence against her is con-

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49. *See* Copelon, *supra* note 36, at 120; *see also* DEBORAH L. RHODE, JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW 237 (1989) (declaring that domestic violence conflicts arise out of the foundations of power relations and social norms).

50. *See* Martha Minow, *Between Intimates and Between Nations: Can Law Stop the Violence?*, 50 CASE W. RES. L. REV. 851, 863 (2000) (discussing the reality of domestic violence as a feature of patriarchal society in gender analysis); *see also* Taylor, *supra* note 41, at 325 (explaining the devaluing of women's lives in the legal framework of patriarchal societies). *See generally* Committee on the Elimination of Discrimination Against Women, *Report*, ¶ 184, U.N. Doc. A/53/38/Rev.1 (May 14, 1998) (criticizing the Czech Republic government's tendency to treat women as mothers, rather than individuals, and alleging that this tendency limits the government's ability to implement the Convention on the Elimination of All Forms of Discrimination).

51. *See* Jenny Rivera, *Domestic Violence Against Latinas by Latino Males: An Analysis of Race, National Origin, and Gender Differentials*, 14 B.C. Third World L.J. 231, 240-41 (1994) (detailing the effects of pervasive misogynistic violence on general stereotypes of Latino culture); Human Rights Watch, *Oral Intervention at the 57th Session of the U.N. Commission on Human Rights, Item 12—Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women and "Honor" Crimes*, Apr. 6, 2001, *available at* http://hrw.org/english/docs/2001/04/06/global268.htm (describing the patriarchy in Jordan, where complaints from women victims result in indefinite detention of the woman); *cf.* Deana A. Pollard, *Banning Corporal Punishment: A Constitutional Analysis*, 52 Am. U. L. Rev. 447, 458–59 (2002) (claiming that the negative social effects of domestic violence merit state restrictions on corporal punishment in America).

52. *See* Smolens, *supra* note 24, at 26. *See* Daniela Lazarova, *Domestic Violence Remains a Big Problem*, RADIO PRAGUE, Sept. 7, 2006, *available at* http://www.radio.cz/en/article/82944 (citing statistic that shows 38 percent of women in the Czech Republic have suffered physical abuse from their partners); *see also* Sarah Rainsford, *Domestic Violence Plagues Russia*, BBC NEWS WORLD EDITION, Aug. 26, 2004, *available at* http://news.bbc.co.uk/2/hi/europe/3601884.stm (reporting the experience of a Russian woman who stays with abusive husbands because of social pressures to be a good wife and mother).

53. *See* Paul, *supra* note 35, at 236–37 (stating further that the "cultural limitations of women of South Asian origin [are] rooted deep into centuries of submissiveness, passiveness, and denial"). *See also* Francis Bloch & Vijayendra Rao, *Terror as a Bargaining Instrument: A Case Study of Dowry Violence in Rural India*, 92 AM. ECON. REV. 1029, 1030 (2002) (linking the use of domestic violence to coerce more dowry to the patriarchal system of arranged marriages in India); Gita Pandey, *India's Violent Homes*, BBC NEWS WORLD EDITION, Feb. 19, 2001, *available at* http://news.bbc.co.uk/2/hi/south_asia/1178714.stm (presenting Indian activists' claims that the social sanction of domestic violence is a major barrier to protecting women).

sidered normal behavior."[54] "[G]ender stereotyping (in South Africa) subjects women to live . . . in a patriarchal culture where men are believed to be . . . superior to women,"[55] accounting for the rampant violence against women in this country.[56] Domestic violence in China affecting hundreds of millions of Chinese women is "deeply intertwined" with the "traditional prejudice which views women as inferior, and as the property of their male partners."[57]

These deeply entrenched attitudes toward women that perpetuate domestic violence, enforce their subordination both within their relationship and within society. In many countries, these same attitudes translate into either a lack of law dealing specifically with domestic

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54. *See* Mann, *supra* note 20, at C16 (quoting a 1998 report from the Human Rights Commission of Pakistan). *See generally Pakistan Training Role for Police*, BBC NEWS, Dec. 30, 2004, *available at* http://news.bbc.co.uk/1/hi/england/northamptonshire/4134973.stm (discussing the use of British officers in training Pakistani police to successfully deal with the socially accepted problem of domestic violence).

    Honor killings and other egregious and horrible crimes against women under the guise of family honor are common-place. There were more than 450 honor killings in Pakistan in 2002 and 42 new cases in the province of Punjab between January and April 2003. Up to three women a day die from "stove deaths" in Pakistan, usually after a history of abuse for such reasons as the failure to give birth to a son, disobedience, and allegations of adultery. Families and the police often label these murders as "accidents" that occur while cooking, when in fact these women are intentionally doused with kerosene and lit on fire. In the past 8 years in Islamabad alone, 4,000 women were set on fire by their family members; less than 4 percent survived. The majority of the victims were between the ages of 18 and 35, and approximately 30 percent were pregnant. *See* SAMYA BURNEY, HUMAN RIGHTS WATCH, CRIME OR CUSTOM: DOMESTIC VIOLENCE IN PAKISTAN (1999), *available at* http://www.hrw.org/reports/1999/pakistan (follow hyperlink to "The Scope of the Problem of Violence") (detailing statistics on honor killings throughout Pakistan, including the burning of women, which, despite causing death, is often covered up as a domestic accident).

55. *See* Paul, *supra* note 35, at 240 (detailing the roots of racism and sexism in Africa). *See also* Andrews, *supra* note 21, at 430 (remarking on the pervasive natures of masculinity and patriarchy in South Africa and the violent conditions women face in that context); *South Africa: Start Young to End Domestic Violence*, AFR. NEWS, July 17, 2006 (linking partner violence to patriarchal socialization of men and women in South Africa).

56. *See* Sharon LaFraniere, *Entrenched Epidemic: Wife-Beatings in Africa*, N.Y. TIMES, Aug. 11, 2005, at A1 (citing a study that puts the frequency of domestic violence deaths at one every six hours); *see also* Moyiga Nduru, *Rights—South Africa: Domestic Violence Afflicts One Women in Four*, INTER PRESS SERVICE, Nov. 25, 2005 (discussing a study that shows that one in four South African women lives in an abusive relationship, while one woman dies every six days at the hands of her male partner); *South Africa: Domestic Violence Findings Stir Debate*, AFR. NEWS, Aug. 9, 2006 (exploring the possibility that apartheid's effects on South African men have contributed to the reality that the home is considered the most dangerous place for South African women).

57. *See* Janice A. Lee, *Family Law of the Two Chinas: A Comparative Look at the Rights of Married Women in the People's Republic of China and the Republic of China*, 5 CARDOZO J. INT'L & COMP. L. 217, 244 (1997) (linking the prevalence of patriarchy to the remaining presence of Confucian beliefs in natural female inferiority); *see also* Zhao, *supra* note 10, at 211 (noting that until recently Chinese society has viewed domestic violence as acceptable). *See generally Chinese Lawmaker Calls for Legislation Against Domestic Violence*, XINHUA GEN. NEWS SERVICE, Mar. 6, 2006 (discussing the recent effort to change Chinese law and close loopholes that allowed domestic violence to go largely unpunished).

violence, or a lack of state enforcement of existing laws.[58] In effect, gender discrimination is institutionalized.[59]

For the very reason that cultural and social differences require a tailored approach to combat the problem of domestic violence within countries, state and local legal systems are appropriate mechanisms for addressing the problem.[60] However, absent state enforcement, including action from legislators and cooperation from law enforcement officials and judicial actors, these laws will have little impact toward curbing this endemic violation.[61] In short, a major step toward ending domestic violence is "ending the law's complicity in it."[62] Since laws both embody and inform social mores, while the law in many countries promotes and perpetuates wife abuse, law reform could be used as a vehicle for social change by ending institutional complicity.[63]

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58. *See*, *e.g.*, Culliton, *supra* note 11, at 199–200 (citing a 1990 study showing that 83.3 percent of battered Chilean women were considered by authorities as having "light injuries," which only mandate small sentences or fines for the offender); Hardenbrook, *supra* note 17, at 727 (describing Cambodia's failure to enforce provisions of its constitution, international agreements, and family and criminal laws that should protect women from domestic violence); Waheed, *supra* note 26, at 953 (discussing the lack of police training for domestic violence in Pakistan, an omission which functions as a social acceptance of these acts).

59. *See*, *e.g.*, Culliton, Article, *supra* note 6, at 518 ("The failure of Chile's legal system to redress the problem of domestic violence is rooted in an institutionalized form of gender discrimination. Convincing work by Chilean legal scholars shows the clear relationship between failure to prosecute domestic violence and a sexist attitude that is entrenched in Chile's legal system."); *see also* Susan S. M. Edwards, *From Victim to Defendant: The Life Sentence of British Women,* 26 CASE W. RES. J. INT'L L. 261, 287 (1994) (claiming that the failure of the state to protect them from domestic violence leads many British women to fight back against their attackers and face subsequent criminal prosecution); Adrien Katherine Wing & Tyler Murray Smith, *The New African Union and Women's Rights*, 13 TRANSNAT'L L. & CONTEMP. PROBS. 33, 39 (2003) (noting the institutionalized discrimination of African nations that adopt customary, sexist laws into their modern legal systems).

60. *See*, *e.g.*, LOCAL GOVERNMENT ASSOCIATION (UK), LOCAL GOVERNMENT'S ROLE IN TACKLING DOMESTIC VIOLENCE 2 (2006), *available at* http://www.lga.gov.uk/Documents/Publication/tacklingdomesticviolence.pdf (promoting the value of local governmental programs to effectively counter domestic violence in the UK); Hajjar, *supra* note 8, at 4 (noting that the foundation of Islamic law in Muslim countries necessitates domestic violence solutions specifically focused towards that context); *see also* Susan F. Hirsch, *Problems of Cross-Cultural Comparison: Analyzing Linguistic Strategies in Tanzanian Domestic Violence Workshops*, 28 LAW & SOC. INQUIRY 1009, 1010–11 (2003) (discussing the role of international development in domestic violence reform, including the criticism that such efforts mask the role that developed nations play in perpetuating global sexism).

61. *See* Dawn J. Miller, *Holding States to Their Convention Obligations: The United Nations Convention Against Torture and the Need for a Broad Interpretation of State Action*, 17 GEO. IMMIGR. L.J. 299, 318 (2003) (claiming that state failure to punish domestic violence is an act of omission equivalent to state-sanctioned torture, possibly covered under the United Nations Convention Against Torture and Cruel, Inhumane, and Degrading Treatment of 1984); *see also* Culliton, *supra* note 6, at 514 (alleging that states' failures in responding to domestic violence are human rights violations); *cf.* Laura S. Adams, State Failure to Protect Domestic Violence Victims as a Basis for Granting Refugee Status, 24 T. JEFFERSON L. REV. 239, 240 (2002) (questioning the U.S.'s lack of official refugee status for domestic violence victims from nations that fail to provide them adequate legal protection).

62. *See* Armatta, *supra* note 21, at 782 (describing the reciprocity between law and social mores); *see also* Pamela Goldberg, *Anyplace but Home: Asylum in the United States for Women Fleeing Intimate Violence*, 26 CORNELL INT'L L.J. 565, 574 (1993) (noting that state complicity in domestic violence allows abuse to occur with impunity). *See generally* Miccio, *supra* note 8, at 666–67 (reading the International Covenant on Civil and Political Rights as implying the requirement that member states affirmatively protect women from domestic violence).

63. *See* Kiyoko Kamio Knapp, *Don't Awaken the Sleeping Child: Japan's Gender Equality Law and the Rhetoric of Gradualism*, 8 COLUM. J. GENDER & L. 143, 147 (1999) (claiming that legal reform has the power to encourage socially desirable behavior and ought to be part of the effort to achieve gender equality in Japan); *see also* Deborah L. Rhode, *The "No-Problem" Problem: Feminist Challenges and Cultural Change*, 100 YALE L.J. 1731, 1779–80 (1991) (acknowledging the limitations of legal reform as a response to gender inequality, yet claiming that it is necessary to place some responsibility on the legal actors with the power to affect change). *See generally* FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER 4 (Katharine T. Bartlett & Rosanne Kennedy eds., 1991) (noting the role legal reform can have in feminist social change).

DOMESTIC VIOLENCE AGAINST WOMEN:
COUNTRY-TO-COUNTRY STATISTICS[a]

(TABLE I)

Industrialized Countries

Canada

• 29% of 12,300 women reported physical assault by a current or former partner since the age of 16.

Japan

• 59% of 796 women surveyed in 1993 reported physical abuse by their partner.

New Zealand

• 20% of 314 women reported being hit or physically abused by a male partner.

Switzerland

• 20% of 1,500 women surveyed reported being physically assaulted, according to a 1997 survey.

United Kingdom

• 25% of women have been punched or slapped by a partner in their lifetime.

United States

• 28% of women in a nationally representative survey reported physical violence from their partner.

Asia and the Pacific

Cambodia

• 16% of a nationally representative group of women reported being abused by their spouse; 8% reported being injured.

India

• Up to 45% of married men admitted to abusing their wives, according to a 1996 survey of men in the state of Uttar Pradesh.

Korea

• 38% of women reported being abused by their spouse, based on a random survey.

Thailand

• 20% of husbands reported abusing their wives at least once during their marriage.

Pakistan

• 52% of women in urban areas admitted to being beaten by their husbands.

Middle East

Egypt

• 35% of a nationally representative group of women reported being beaten by their husband at least once during their marriage.

Israel

• 32% of women reported at least one episode of physical abuse, according to a survey of 1,826 Arab women.

a. *See* Amnesty International, Violence Against Women in the Russian Federation, *supra* note 23; VIOLENCE AGAINST WOMEN INFORMATION PACK: A PRIORITY HEALTH ISSUE 6 (1999), *available at* http://iggi.unesco.or.kr/web/iggi_docs/02/952327381.pdf. *See generally* Ruane, *supra* note 24, at 1523 (discussing the prevalence of domestic violence and the governments' response to it in Pakistan and Jordan); Zakirova, *supra* note 23, at 75 (analyzing the domestic violence in Russia).

Africa
Kenya
• 58% of 612 women in one district reported being beaten "often" or "sometimes."
Uganda
• 41% of women in a representative sample reported being beaten by their partner; 41% of husbands in this same sample reported beating their partner.
Latin America
Chile
• 29% of women from a representative sample in Santiago reported violence from a partner; 11% of those reported severe violence.
Colombia
• 19% of 6,097 women surveyed reported being physically assaulted by a partner at some point in their lifetime.
Mexico
• 30% of 650 women surveyed in Guadalajara reported at least one episode of physical violence by their partner; 13% reported violence within the past year, according to a 1997 survey.
Nicaragua
• 57% of women reported being abused by a partner at least once; 27% reported abuse within the past year, according to a 1996 report.
Central and Eastern Europe
Estonia
• 29% of women 18-24 fear domestic violence and the percentage rises with age; 52% for women 65 and older.
Poland
• 60% of divorced women reported being hit by their ex-husbands at least once; 25% reported consistent violence, according to a 1993 survey by the Centre for Public Opinion.
Russia
• 36,000 women in the Russian Federation are beaten by their husbands or partners each day; each year 14,000 lose their lives to domestic violence.
Tajikistan
• 23% of 550 women aged 18-40 reported physical abuse.

II. Domestic Law, Domestic Violence: Inherent Barriers to Effective Remedy

Countries around the world, without exception, share the problem of domestic violence, while historical, cultural and religious traditions manifest themselves in countries' varied approaches to the problem.[64] Some countries in effect, fail to even recognize domestic violence

64. *See* The Secretary-General, *Report of the United Nations Development Fund for Women on the Elimination of Violence Against Women—Note by the Secretary-General*, ¶ 22, U.N. Doc. E/CN.6/2006/10 (Dec. 20, 2005) (acknowledging the prevalence of violence against women throughout the world); *see also* WORLD HEALTH ORGANIZATION, WORLD REPORT ON VIOLENCE AND HEALTH 89 (2002), *available at* http://www.who.int/violence_injury_prevention/violence/world_report/en/index.html (reporting that domestic violence is a problem in most nations); Smolens, *supra* note 24, at 18–19 (linking post-Communist distrust of the state to Eastern European women's rejection of Western feminism's use of legal action as a means to combat domestic violence).

as a crime, thereby lacking a separate body of law that criminalizes domestic violence.[65] Others have legislation specifically addressing intimate violence towards women. Most, however, have ineffective enforcement mechanisms.[66] Often, due to cultural mores and societal attitudes, legal recourse is available only in theory.[67] Even in countries with more progressive legal systems, there remains a lingering unwillingness of state actors to interfere in what has historically been considered a private sphere.[68]

Pakistan, Central Europe, Russia and South Africa all suffer a high incidence of domestic violence.[69] Yet, these countries' respective cultures manifest unique treatment of violence

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65. *See generally* U.N. ECON. & SOC. COUNCIL (ECOSOC), *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences*: *Mission to Indonesia and East Timor on the Issue of Violence Against Women*, ¶ 49–50, U.N. Doc. E/CN.4/1999/68/ADD.3 (Jan. 21, 1999) (identifying a need for gender violence training for Indonesian police and army officers to account for present deficiencies); Culliton, *supra* note 6, at 518 (asserting that Chile suffers from institutional gender discrimination, resulting in not guilty verdicts for three-quarters of all batterers); Human Rights Watch, *A Dose of Reality: Women's Rights in the Fight Against HIV/AIDS*, *available at* http://hrw.org/english/docs/2005/03/21/africa10357.htm (last visited Oct. 30, 2006) (noting that marital rape is rarely criminalized in Africa and the Caribbean, limiting a woman's ability to control her own exposure to HIV and AIDS).

66. *See*, *e.g.*, Andrews, *supra* note 21, at 455–56 (discussing the reality that, despite the nation's efforts to implement one of the most progressive sets of domestic violence laws, the lingering hostility of the largely male-dominated system, accompanied by the burdensome requirement of proof and certainty, has rendered South Africa's enforcement mechanisms ineffective); Lee J. Teran, *Barriers to Protection at Home and Abroad: Mexican Victims of Domestic Violence and the Violence Against Women Act*, 17 B.U. INT'L L.J. 1, 64 (1999) (noting the failure of the Mexican criminal code, despite legislative changes, to effectively combat domestic violence); *see also* Meyersfeld, *supra* note 15, at 423 (referring to an example of a South African domestic violence case in which the husband's history of abuse was inadmissible at trial, effectively nullifying the law's efforts at protecting women).

67. *See*, *e.g.*, Julie Mertus, *Human Rights of Women in Central and Eastern Europe*, 6 AM. U. J. GENDER SOC. POL'Y & L. 369, 418 (1998) (criticizing the Polish legal system's failure to effectively implement its domestic violence laws); *see also* Celina Romany, *Women as Aliens: A Feminist Critique of the Public/Private Distinction in International Law*, 6 HARV. HUM. RTS. J. 87, 123 (1993) (suggesting that to ensure the protection of women within the context of a society that discriminates based on gender, the state must be responsible for correcting the "social and economic conditions that maintain and perpetuate subordination"); Zhao, *supra* note 10, at 232 (attributing some of the limitations of the Chinese legal response to domestic violence to social attitudes about spousal abuse).

68. *See* Nancy Cantalupo et al., *Report: Domestic Violence in Ghana: The Open Secret*, 7 GEO. J. GENDER & L. 531, 543–44 (2006) (explaining the treatment of domestic violence as a private matter by officials in Ghana has discouraged many abused women to report instances of violence to the police); *see also* Hajjar, *supra* note 8, at 8–10 (describing the difficulty in dealing with domestic violence in Muslim societies due to the private and religious nature of family life); Waheed, *supra* note 26, at 951–52 (challenging the domestic violence protection afforded by the protective measures within the Pakistani criminal justice system due to its treatment of the crime as a family issue).

69. *See* Burney, *supra* note 54 (estimating the percentage of Pakistani women subjected to domestic violence at 70 to 90 percent); *see also* HUMAN RIGHTS WATCH, WORLD REPORT 2001: WOMEN'S HUMAN RIGHTS (2001), *available at* http://www.hrw.org/wr2k1/women/women2.html (commenting on the lack of Russian legislation despite a 1999 report that Russian police had registered over four million men as potentially abusive of their families); Jane Standley, *South Africa Targets Domestic Violence*, BBC NEWS, Dec. 15, 1999, *available at* http://news.bbc.co.uk/1/hi/world/africa/566160.stm (noting the dispute over whether an adult rape occurs every 36, 11 or 4 seconds).

against women within the legal system.[70] Pakistan uses traditional criminal law to address the problem and does not have laws specifically criminalizing domestic violence.[71] This lack of law reflects the cultural attitudes that at best ignore, and often condone, violence against women. Most Central European countries do not specifically address domestic violence within their legal system.[72] Given the recent economic and social upheaval in these countries resulting from the fall of communism and the citizens' widespread distrust of the state in these countries,[73] an approach including education and social reform may prove more viable than prosecution and arrest. South Africa, in contrast, has one of the most inclusive and liberal domestic violence legal schemas in the world, but its laws are not enforced.[74]

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70. *See* Cynthia Grant Bowman, *Theories of Domestic Violence in the African Context*, 11 AM. U. J. GENDER SOC. POL'Y & L. 847, 848 (2003) (commenting on the efforts made in South Africa, including the passage of domestic violence criminal codes, specialized police units, and shelters for abused women); Vesa, *supra* note 3, at 321 n.61 (stating that the Pakistani rules of evidence mandate that a woman's testimony be given less weight than that of a man's, while also allowing evidence as to a woman victim's immorality); *see also* Mertus, *supra* note 67, at 410–422 (profiling the differences among individual Central and Eastern European nations' treatment of domestic violence).

71. See Hajjar, *supra* note 8, at 30 (explaining that because there is no law that specifically criminalizes domestic violence in Pakistan, domestic violence claims are tried under the traditional Islamic laws of murder and bodily hurt); Waheed, *supra* note 26, at 960–61 (remarking that in Pakistan domestic violence does not constitute a distinct category of crime, but falls under the Islamic crime of murder and bodily harm). *See generally* Evan Gottesman, Article, *The Reemergence of Qisas and Diyat in Pakistan*, 23 COLUM. HUM. RTS. L. REV. 433, 433–34 (1992) (discussing the evolution of Pakistani criminal law from the abandonment of the British-written criminal code to the traditional Islamic law of Qisas and Diyat, which governs murder, bodily hurt, and restitution).

72. *See*, *e.g.*, Comm. on the Elimination of Discrimination Against Women, AT v. Hungary, Commc'n No. 2/2003, 18 B.H.R.C. 579, para. 2.1 (2005) (recommending that Hungary enact laws that specifically prohibit domestic violence against women in order to comply with international human rights agreements); *see* Mertus, *supra* note 67, at 410–20 (presenting a survey of ten Central and Eastern European countries that shows that domestic violence is not acknowledged as a distinct category of crime in Albania, Croatia, Czech Republic, Hungary, Kosovo, Romania, and Serbia); *see also* Smolens, *supra* note 24, at 36 (explaining that social and economic reasons have contributed to Central European countries' lack of incentive to enact laws criminalizing domestic violence).

73. *See* Peter A. Ulram & Fritz Plasser, *Political Culture in East-Central and Eastern Europe: Empirical Findings 1990–2001*, *in* POLITICAL CULTURE IN POST-COMMUNIST EUROPE: ATTITUDES IN NEW DEMOCRACIES 31, 32 (Detlef Pollack et al. eds., 2003) (summarizing a survey that shows Central and Eastern Europeans' general disappointment with post-communist governments due to political and economic upheavals); *see also* Mertus, *supra* note 67, at 377–78 (indicating that the dismantling of previous communist welfare states has resulted in economic hardships and rising unemployment in Central and Eastern Europe); Smolens, *supra* note 24, at 36 (explaining that transitioning from socialist regime to democracy has resulted in Central Europeans' economic hardship, social stress, and distrust of government, which in turn makes the proposed legal reform on domestic violence law more difficult).

74. *See* Andrews, *supra* note 21, at 455–56 (analyzing that even though the progressive Domestic Violence Act has been enacted in South Africa, it has not been effectively enforced due to the hostility in a male dominated system; women's lack of access to relevant information; inappropriate legal response to domestic violence; and other social and economic factors); *see also* Paul, *supra* note 35, at 240–41 (arguing that the coexistence of progressive anti-domestic violence laws and the ineffective enforcement thereof has encouraged women's rights organizations to actively take action); Suzanne A. Kim, Article, *Betraying Women in the Name of Revolution: Violence Against Women as an Obstacle to Democratic Nation-Building in South Africa*, 8 CARDOZO WOMEN'S L.J. 1, 10–11 (2001) (discussing that South Africa's various progressive legislations addressing domestic violence have not been effectively enforced because the police are hostile to reports of domestic violence; the judiciary, including judges, law clerks, and prosecutors, make the complaint filing process difficult; and the government fails to provide necessary assistance).

A. Pakistan: Lack of Law, Lack of Enforcement

1. Culture and Religion

The subordination of women in Pakistan is effectively written into the law. Women have little or no recourse when they are victimized by domestic violence. "Cultural ideas of honor, shame and sexual purity of women," work together to "sustain gender inequality and justify violence against women."[75] Men view their wives as property and in fact, certain interpretations of Islamic law allow husbands to "control and physically discipline their wives as necessary."[76] Accordingly, domestic violence is pervasive and widely accepted.[77]

Estimates suggest that somewhere between 70 and 90percent of Pakistani women are victims of domestic violence.[78] A sample survey showed 82 percent of women in rural Punjab

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75. *See* Linda Rae Bennett & Lenore Manderson, *Introduction: Gender Inequality and Technologies of Violence, in* VIOLENCE AGAINST WOMEN IN ASIAN SOCIETIES 1, 9 (Linda Rae Bennett & Lenore Manderson eds., 2003) (arguing that in Asian societies, "cultural preoccupations with honour, shame, and sexual purity of women" are used to justify violence against women, which in turn perpetuate gender inequality). *See generally* AMNESTY INT'L, Pakistan: Violence Against Women in the Name of Honour 5 (1999), *available at* http://web.amnesty.org/library/index/ENGASA330171999 (noting that instances of violence against women in the name of honor are prevalent in Pakistan); Amnesty International, *Pakistan: Action as Well as Words Needed on So-Called "Honour" Killings*, Feb. 13, 2004, *available at* http://news.amnesty.org/index/ENGASA3313022004 (reporting that over 1,000 women are killed annually because their relatives believe that they have shamed the families).

76. *See* Armatta, *supra* note 21, at 784 (commenting that under certain interpretations of Islamic law, husbands are expected to, when necessary, physically discipline their wives); Waheed, *supra* note 26, at 964–65 (maintaining that men in Pakistan reinforce male dominance by stretched interpretations of Islamic law, such as citing Quranic verse out of context to show that men are allowed to beat their wives for their disobedience); *see also* AMNESTY INTERNATIONAL, PAKISTAN: WOMEN IN PAKISTAN DISADVANTAGED AND DENIED THEIR RIGHTS 3 (1995), *available at* http://web.amnesty.org/library/index/ENGASA330231995 (assessing that because women in Pakistan are married off by their families for a "bride-price," they are treated as the property of their husbands and are not allowed to defy their husbands).

77. *See* Michael F. Polk, Note, *Women Persecuted Under Islamic Law: The Zina Ordinance in Pakistan as a Basis for Asylum Claims in the United States*, 12 GEO. IMMIGR. L.J. 379, 392 (1998) (informing that even though domestic violence is widespread in Pakistan, the Pakistani government refuses to take measures that may change the situation); *see also* Human Rights Watch, Forms of Violence Against Women in Pakistan, *available at* http://www.hrw.org/campaigns/pakistan/forms.htm (last visited Sept. 28, 2006) (reporting that as many as 70 percent to 90 percent of the women in Pakistan are subjected to domestic violence); AMNESTY INTERNATIONAL, PAKISTAN: NO PROGRESS ON WOMEN'S RIGHTS 7 (1998), *available at* http://web.amnesty.org/library/Index/ENGASA330131998? open&of=ENG-PAK (finding that domestic violence in Pakistan is so common that 70 percent of the women are subjected to violence in their homes).

78. *See* Hajjar, *supra* note 8, at 29 (describing that the domestic violence rate in Pakistan is as high as 70 percent to 90 percent); Polk, *supra* note 77, at 385 (citing that as many as 80 percent of women in Pakistan are victims of domestic violence); Human Rights Watch, Forms of Violence Against Women in Pakistan, *supra* note 77 (estimating that 70 percent to 90 percent of women in Pakistan are subjected to domestic violence).

feared violence resulting from their husbands' displeasure over minor matters.[79] In the most developed urban areas, 52 percent admitted to having been beaten by their husbands.[80] In this country, where domestic violence is severely underreported, one-half of the 400 cases reported in the province of Punjab in 1993 resulted in death.[81]

A 1997 Human Rights Watch Report on Pakistan noted that, "[d]omestic violence remain(s) a pervasive phenomenon."[82] "The supremacy of the male and subordination of the female, assumed to be part of the culture and even to have sanction of the religion, make violence by one against the other in a variety of forms accepted and a pervasive feature of domestic life."[83] Accordingly, "[c]omprehensive studies on domestic violence indicate that domestic violence in Pakistan is a structural rather than causal problem."[84] It is the structure of the family that leads to or legitimizes these acts, a structure that is "mirrored and confirmed in the structure of society, which condones the oppression of women and tolerates male violence as one of

79. *See* BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEP'T OF STATE, Pakistan: COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES—2000, sec. 5 (2001), *available at* http://www.state.gov/g/drl/rls/hrrpt/2000/sa/710.htm (remarking that 82 percent of 1,000 women in ten communities in rural Punjab surveyed in 1999 expressed fear that even trivial matters would result in violence from their husbands); *see also* Mann, *supra* note 20, at C16 (reporting that 82 percent of women in rural Punjab fear their husbands will do violence unto them because of their displeasure over trivial things); AMNESTY INTERNATIONAL, PAKISTAN: HONOUR KILLINGS OF GIRLS AND WOMEN 10, *available at* http://web.amnesty.org/library/Index/ENGASA330181999?open&of=ENG-373 (stating that a survey revealed 82 percent of women in rural Punjab reported that their husbands would physically abuse them over small things).

80. *See* Ruane, *supra* note 24, at 1534 n.76 (noting that even in most urban areas of Pakistan, 52 percent of the women have been beaten by their husbands); Mann, *supra* note 20, at C16 (reporting that 52 percent of women in urban Pakistan said they have been beaten by their husbands); AMNESTY INTERNATIONAL, PAKISTAN: HONOUR KILLINGS OF GIRLS AND WOMEN 10 (1999), *available at* http://web.amnesty.org/library/pdf/ASA330181999ENGLISH/$File/ ASA3301899.pdf (finding that 52 percent of women surveyed in Pakistan urban areas admitted being beaten by their husbands).

81. *See* U.N. Dep't of Pub. Info., *Women and Violence*, *supra* note 2 (reporting that among the 400 domestic violence cases reported in Punjab in 1993, the wives were killed in almost one-half of these cases); International Council of Nurses, Violence: A Worldwide Epidemic, *available at* http://www.icn.ch/matters_violence.htm (last visited Oct. 30, 2006) (informing that wives were killed in nearly one-half of the 400 domestic violence cases reported in Punjab in 1993); Sikh Women, Anti-Violence: Domestic Violence, *available at* http://www.sikhwomen.com/ antiviolence/Domestic-Violence.htm (last visited Oct. 30, 2006) (quoting that in 1993 nearly one-half of the 400 domestic violence cases reported in Punjab ended with the wives' death).

82. *See* Burney, *supra* note 54, at ch. V, VIII; *see also* Hajjar, *supra* note 8, at 29–30 (describing that domestic violence is the most pervasive violation of human rights in Pakistan, with rates as high as 70 percent to 90 percent). *See generally* Polk, *supra* note 77, at 383 (stressing that notwithstanding some governmental promises to improve the situation, women in Pakistan are still subjected to abuse by their family members and the society at large).

83. *See* Burney, *supra* note 54, at ch. V; *see also* Hajjar, *supra* note 8, at 29–30 (reporting that the Human Rights Commission of Pakistan finds domestic violence to be an accepted and common feature of Pakistani families); Hussain, *supra* note 40, at 236–37 (arguing that the social acceptance of domestic violence against women can be explained in part by Islamic religious teaching taken out of context).

84. *See* Burney, *supra* note 54, at ch. V; *see also* Waheed, *supra* note 26, at 945–46 (explaining that domestic violence in Pakistan is not caused by any act by women, but rather is sanctioned by the culture as a means to further male dominance). *See generally* Hussain, *supra* note 40, at 227–30 (suggesting that the cultural concept and economic structure in Pakistan promote violence against female relatives).

the instruments in the perpetuation of this power balance."[85] Gender-based subordination and oppression of women are further institutionalized through the structuring and functioning of the legal system.[86] While religion and culture work together to perpetuate violence, the law reflects this cultural acceptance.[87]

2. The Pakistani Legal System

The Pakistani legal system is comprised of "tribal codes, Islamic law, Indo-British judicial traditions and customary traditions" that have created an "atmosphere of oppression around women, where any advantage or opportunity offered to women by one law, is cancelled out by one or more of the others."[88] The imposition of the Hudood Ordinance and the Qisas and

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85. U.N. Inst. for Training & Research, World Conference of the United Nations Decade for Women: Equality, Development and Peace, July 14–30, 1980, Copenhagen, *Report*, U.N. Doc A/CONF.94/BP/8, U.N. Sales No. E.80.IV.3 and Corrigendum, at 30 (1980); *see* Burney, *supra* note 54, at ch. V; *see also* Waheed, *supra* note 26, at 945–46 (proposing that Pakistani society uses tradition and religion to justify violence against women, which reinforces male dominance in the society).

86. *See* Laura S. Adams, *Beyond Gender: State Failure to Protect Domestic Violence Victims as a Basis for Granting Refugee Status*, 24 T. JEFFERSON L. REV. 239, 246 (2002) (describing a case in which a claimant seeking refuge fled Pakistan because the legal system discriminates against women); *see also* Perry S. Smith, Article, *Silent Witness: Discrimination Against Women in the Pakistani Law of Evidence*, 11 TUL. J. INT'L & COMP. L. 21, 43–47 (2003) (explaining that Pakistani evidence law devalues women's credibility and unfairly limits women's rights to take the witness stand, and thereby, causes injustice against women in the legal system); AMNESTY INT'L, PAKISTAN: WOMEN IN PAKISTAN DISADVANTAGED AND DENIED THEIR RIGHTS, *supra* note 76, at 5 (analyzing that Pakistani law is formulated with ways to further male dominance over women, such as allowing men to bring Zina accusations against their wives, daughters, or sisters without any basis; allowing a judge to incarcerate women with groundless Zina accusations for an extended period of time before making any investigation; and preventing women from testifying in court).

87. *See* Armatta, *supra* note 21, at 785–86 (identifying Pakistan as one of the countries in which the law still sanctions the larger culture that accepts domestic violence); *see also* Michelle Lewis Liebeskind, Article, *Preventing Gender-Based Violence: From Marginalization to Mainstream in International Human Rights*, 63 REV. JUR. U.P.R. 645, 657 (1994) (citing Pakistan as an example where the law sanctions domestic violence, which is culturally and religiously accepted); Ruane, *supra* note 24, at 1540 (arguing that by privatizing domestic violence, Pakistani law in effect manifests that any culturally accepted domestic violence or violence against women will not be prosecuted by the state).

88. *See* Marie D. Castetter, Note, *Taking Law into Their Own Hands: Unofficial and Illegal Sanctions by the Pakistani Tribal Councils*, 13 IND. INT'L & COMP. L. REV. 543, 559–562 (2003) (stating that although women have fundamental constitutional rights, these rights have not been enforced because the government still allows tribal laws, which treat women as properties of their families, as a source for dispute resolution, and because the Islamized Pakistani law, together with custom, allows perpetrators of violence against women to go unpunished); Hussain, *supra* note 40, at 233–34 (analyzing that the legal system in Pakistan is a mix of cultural, religious and western models, and the interaction of these mechanisms effectively blocks women from seeking justice); *see also* Ruane, *supra* note 24, at 1535–1542 (describing that the coexistence of tribal law's informal settlement mechanism that monetarily rewards men for making false accusation of their wives, state law's provision of outrageous as an excuse for men who kill their wives, and Islamized formal legal system that allows the heirs of the murdered to pardon the murderer, allows men to abuse or kill their wives for any reason, and then use groundless Zina accusation and pardon from the wives' heirs, who are also members of the family to escape any criminal liability).

Diyat Act in 1990, codifying Islamic law as part of the Pakistani legislative schema, tied religion and even informal tribal customs even more closely to the state.[89]

As previously noted, Pakistan does not have any specific legislation against domestic violence.[90] Instead, Islamic laws of Qisas and Diyat Act of 1990, a body of Islamic criminal laws dealing with murder, attempted murder, and the crime of causing bodily "hurt," encompass most acts of domestic abuse.[91] Section 332 of the Pakistani Penal Code defines "hurt" as follows: "[w]hoever causes pain, harm, disease, infirmity or injury to any person or impairs, disables or dismembers any organ of the body or part thereof [of] any person without causing death, is said to cause hurt."[92]

Pakistani judges may decide whether to punish an offender by Qisas (retribution) or Diyat (compensation for the benefit of the victim or his or her legal heirs).[93] However, "the victim or

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89. *See* Chapter XVI § 323, Pak. Pen. Code, *available at* http://annualreview.law.harvard.edu/ population/abortion/PAKISTAN.abo.htm (last visited Oct. 30, 2006) (requiring that "[t]he Court shall, subject to the Injunctions of Islam as laid down in the Holy Qur'an and Sunnah and keeping in view the financial position of the convict and the heirs of the victim, fix the value of the diyat which shall not be less than the value of thirty thousand, six hundred and thirty grams of silver."); *see also* Lawyers for Human Rights and Legal Aid, *The Hudood Ordinance*, *available at* http://www.lhrla.sdnpk.org/hudood.html (noting that the Hudood Ordinance outlaws Zina, or adultery, and further stipulates that offenders of Zina and Zina-bil-jabr are punishable by Hadd, a punishment ordained by the Holy Quran or Sunnah. The Hadd punishment is stoning to death; the tazir punishment for Zina is up to 10 years of imprisonment and up to 30 lashes; the tazir punishment for Zina-bil-jabr is up to 25 years of imprisonment and up to 30 lashes); University of California, *Glossary of Islamic Terms and Concepts*, *available at* http://www.usc.edu/dept/MSA/reference/glossary/term.QISAS.html, (explaining that qisas is an Islamic term meaning "eye for an eye," and is a retribution punishment); M. Muhsin Khan, *Translation of Sahih Bukhari*, vol. 9, bk. 83, no. 19, *available at* http://www.usc.edu/dept/MSA/fundamentals/hadithsunnah/bukhari/083.sbt.html (informing that diyat is a form of compensation that compensates victims' heirs).

90. *See* Hajjar, *supra* note 8, at 30 (stating that there is no law specifically criminalizing domestic violence in Pakistan); *see also* Patricia A. Seith, Note, *Escaping Domestic Violence: Asylum as a Means of Protection for Battered Women*, 97 COLUM. L. REV. 1804, 1814–15 (1997) (arguing that in some countries, including Pakistan, police protection is insufficient to protect battered women because the law does not criminalize domestic violence); Waheed, *supra* note 26, at 960–61 (noting that in Pakistan domestic violence does not constitute a distinct category of crime).

91. *See* Hajjar, *supra* note 8, at 30 (finding that because there is no law specifically criminalizing domestic violence in Pakistan, domestic violence claims are tried under Islamic traditional laws of murder and bodily hurt); *see also* Waheed, *supra* note 26, at 960–61 (indicating that in Pakistan, domestic violence does not constitute a distinct category of crime, but falls under the Islamic crime of murder and bodily harm). *See generally* Gottesman, *supra* note 71, at 433–34 (discussing that after the British-written criminal code was abandoned, traditional Islamic law of Qisas and Diyat, which governs murder, bodily hurt, and restitution, becomes the criminal law in Pakistan).

92. PENAL CODE, § 332 (Pak.). *See* Waheed, *supra* note 26, at 961; Burney, *supra* note 54, at ch. VI n.93.

93. "Barriers such as social stigma, legislation that punishes the victims, economic dependency, and lack of access to information about their rights prevent women and girls from reporting domestic violence and rape. . . . Pakistan has no specific legislation against domestic violence and police are reluctant to get involved in 'family matters.'" *See* Human Rights Watch, Forms of Domestic Violence Against Women in Pakistan, *available at* http://hrw.org/campaigns/pakistan/forms.htm (last visited Oct. 30, 2006) (noting lack of government intervention in domestic violence); *see also* Christina A. Madek, *Killing Dishonor: Effective Eradication of Honor Killing*, 29 SUFFOLK TRANSNAT'L L. REV. 53, 64 (2005) (defining Qisas as retaliation of a similar nature and Diyat as compensation); Elizabeth Peiffer, Note, *The Death Penalty in Traditional Islamic Law and as Interpreted in Saudi Arabia and Nigeria*, 11 WM. & MARY J. WOMEN & L. 507, 516–18 (2005) (elaborating that Qisas apply to crimes of murder or bodily injury and are punished by retaliation or forgiveness through compensation or Diyat).

heir has the right to determine whether to exact retribution or compensation or to pardon the accused. . . . They may pardon the criminal at any stage before the execution of the sentence."[94]

If the victim chooses to pardon, or to accept Qisas, this "purges" the crime, and the state has no power to intervene.[95] The decision to punish the offender is left up to the victim rather than the state, privatizing the crime.[96]

Even egregious crimes, such as "honor killings," where a man murders his wife for apparent or suspected infidelity, almost always receive minimal punishment.[97] In the case of "honor killings," the victim's family often chooses to pardon the offender and "forgive" the crime because the female has somehow brought shame on the family.[98] Murder is also exempt from retribution punishment if the heir of the victim is a direct descendant of the perpetrator, making punishment discretionary where a man kills a woman with whom he has children.[99] In light of the biased attitudes of the courts with respect to domestic violence, the fact that punishment in such cases of spousal murder is often left entirely to the discretion of judges may well spell total impunity for the most extreme form of domestic violence.

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94. *See* Burney, *supra* note 54, at 41 (noting that the power to seek retribution or forgive is in the hands of the victim or her heirs); *see also* Gottesman, *supra* note 71, at 434 (reiterating that Qisas refers to the right of the victim or heirs to seek retribution, pardon, or Diyat irrespective of the state's wishes); Hussain, *supra* note 40, at 232 (indicating that a victim or her heirs can seek retaliation or extend forgiveness after being compensated and that the state must generally abide by these wishes).

95. *See* Madek, *supra* note 93, at 68–69 (stating that victims and heirs have the power to prosecute instead of the government under Qisas ordinances); *see also* Hussain, *supra* note 40, at 238–39 (stressing the state's lack of control in the prosecution of crimes due to Qisas and Diyat ordinances); Ruane, *supra* note 24, at 1539–40 (recognizing the victim or heir's power to prosecute or forgive under Qisas and Diyat ordinances and the complete lack of state prosecutorial power).

96. *See* Hossein Esmaeili & Jeremy Gans, *Islamic Law Across Cultural Borders: The Involvement of Western Nationals in Saudi Murder Trials*, 28 DENV. J. INT'L L. & POL'Y 145, 153, 164 (2000) (stressing that the victim or her heirs has the exclusive right under a Qisas crime and that the government's only power is to effect the wishes of the victim or heirs); s*ee also* Ferris K. Nesheiwat, *Honor Crimes in Jordan: Their Treatment under Islamic and Jordanian Criminal Laws,* 23 PENN ST. INT'L L. REV. 251, 266 (2004) (noting that the family can accept a private monetary settlement for murder that diminishes state's motive to prosecute); Robert Postawko, *Towards an Islamic Critique of Capital Punishment,* 1 UCLA J. ISLAMIC & NEAR E. L. 269, 300 (2002) (recognizing that Qisas crimes are private claims and therefore have no state prosecutor assigned).

97. *See* Vanessa Lesnie, *Dying for the Family Honor*, 27 HUM. RTS. 12, 13 (2000) (noting the acceptance of "honor killing" via Diyat Ordinances and reduced sentences); *see also* Madek, *supra* note 93, at 68 (acknowledging Pakistan's use of Penal Code § 306 to reduce the sentence for honor crimes); Ruane, *supra* note 24, at 1540–41 (recognizing that Pakistan's Qisas and Diyat Ordinance sends the message that intrafamily murder of women is a private affair deserving minimal punishment or outright forgiveness).

98. In 1989, a young woman who had suffered repeated and severe abuse at the hands of her husband was killed by her family when she attempted to leave because the divorce was seen to bring shame on the family. The public sided with the family. Commentators argued that her killing, in accordance with tradition, did not qualify as a crime. *See* Ruane, *supra* note 24, at 1524–25 (detailing the abuse of Samia Sarwar, her murder, and the town's disinterest). *See generally* Hajjar, *supra* note 8, at 30 (acknowledging potential for Pakistani officials to refuse investigation or simply excuse conduct); Waheed, *supra* note 26, at 945 (showing how honor killings can even occur when a wife does not serve a meal quickly enough).

99. *See* Hajjar, *supra* note 8, at 30 (noting that Qisas may not apply in the case of a husband murdering a wife because the victim's heir also is a direct descendent of the offender); *see also* Peiffer, *supra* note 93, at 525 (noting that while the punishment for murder is beheading, all of the victim's heirs must demand the beheading instead of accepting Diyat). *See generally* Madek, *supra* note 93, at 56 (acknowledging that many countries directly or indirectly allow honor to excuse murder, a so-called "honor killing").

Where victims or their heir pardon an offender, or where the judge holds retribution inapplicable, courts can award discretionary punishment, but it must be awarded on the "facts of the case."[100] If the woman is killed for a reason such as infidelity, the court often treats the crime less seriously since adultery is also a crime under Islamic law; if a man's honor is at stake, killing or violence is not a crime.[101]

Ironically, Article 25 of the Pakistani Constitution provides that, "[a]ll citizens are equal before the law" and "[t]here shall be no discrimination on the basis of sex alone."[102] The justice system in Pakistan, however, continues to discriminate against women both by failing to recognize domestic violence as a crime and by failing to treat women seriously when they bring charges for abuse.[103] Women who choose to pursue claims of assault often face bias within the justice system from police officers, prosecutors and judges, who are more likely to believe that a woman is trying to "frame" a man or that domestic violence is a private matter that is sanctioned by the law and the culture.[104] For instance, a woman claiming sexual assault is more

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100. *See* Esmaeili & Gans, *supra* note 96, at 153 (emphasizing that those not convicted under Hadd or Qisas may still be found guilty of a Tazir crime and sentenced to discretionary punishment); *see also* Ruane, *supra* note 24, at 1540 (noting that courts have discretion to prosecute even when the crime is forgiven; however, this right is rarely exercised); Waheed, *supra* note 26, at 961 (recognizing imprisonment as a judicial-based discretionary option even if settlement, or Diyat, has been exercised).

101. *See* AMNESTY INT'L, PAKISTAN: VIOLENCE AGAINST WOMEN IN THE NAME OF HONOUR 12 (1999) (examining the intricacies of honor killing as an excuse for the murder of women); *see also* Kathryn Christine Arnold, Note, *Are the Perpetrators of Honor Killings Getting Away with Murder? Article 340 of the Jordanian Penal Code Analyzed under the Convention on the Elimination of all Forms of Discrimination Against Women*, 16 AM. U. INT'L L. REV. 1343, 1358–59 (2001) (detailing the strong convictions regarding female sexuality that relate to the existence of honor killings of adulterous women); Ruane, *supra* note 24, at 1537 (stressing that when a man's honor is at stake killing is not a crime).

102. THE CONST. OF THE ISLAMIC REPUBLIC OF PAK. Art. 25. (prohibiting gender inequality); *see also* Smith, *supra* note 86, at 27 (emphasizing that Article 25 is the most important constitutional provision regarding the equality of the sexes); L. Elizabeth Chamblee, Note, *Rhetoric or Rights: When Culture and Religion Bar Girls' Right to Education*, 44 VA. J. INT'L L. 1073, 1085 (2004) (declaring that of the Pakistani Constitution prohibits gender discrimination).

103. *See* Islam v. Sec'y of State for the Home Dep't [1999] 2 A.C. 629, 635 (Eng.) (finding that the Pakistani government does not protect women from abuse); *see also* Penelope Mathew, *International Decision: Islam v. Secretary of State for the Home Department, and Regina v. Immigration Appeal Tribunal, Ex Parte Shah* [1999] 2 A.C. 629 House of Lords, March 25, 1999, 95 AM. J. INT'L L. 671, 671 (2001) (recognizing that if female refugees were forced to return to Pakistan the government would do nothing to protect them); *Dictatorship, Feudal-Tribal Mindset Blamed for Prevailing Crisis,* PAK. PRESS INT'L, Mar. 26, 2006, at 1 (acknowledging the rampant violence against women in Pakistan).

104. *See* Charles J. Ogletree Jr., *The Recently Revised Marriage Law of China: The Promise and the Reality*, 13 TEX. J. WOMEN & L. 251, 299 n.201 (2004) (remarking that the Pakistani police force is hesitant to tackle domestic violence cases and frequently tries to coerce parties into settlement); *see also* Hussain, *supra* note 40, at 234 (acknowledging that many police officers sexually and physically assault women coming to them to report domestic violence and that judges and prosecutors discriminate against female victims); Waheed, *supra* note 26, at 970 (indicating that the Pakistani legal system still views domestic violence as a private family issue).

likely to be jailed for fornication or adultery than to be successful in her suit, and further, marriage is a complete defense to a charge of rape (i.e., marital rape is not a crime).[105]

Women are left vulnerable and without recourse in even the most egregious cases of abuse and even murder.[106] Cultural views of women manifest themselves through bias within the justice system.[107] Official refusal to view domestic violence as a crime, and refusal in many cases to acknowledge its existence as a problem in society, perpetuates the problem of domestic violence.[108] Pakistani officials are in effect complicit in the widespread and systematic abuse of women in their country.[109]

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105. *See* Human Rights Watch, Forms of Domestic Violence Against Women in Pakistan, *supra* note 93 (explaining that the enactment of the Hudood Ordinances in 1979 marked a shift in Pakistani rape law. Nearly 50 percent of women who report rape are jailed under the Hudood Ordinances, which criminalize extramarital sexual relations, including rape. To prove the crime of rape, the female must either have the male confess or have the testimony of four "pious" male witnesses. Four female witnesses will not suffice because female testimony is not given as much weight. If the victim fails to prove rape, the court may instead find a case of adultery or fornication, which is illegal under Pakistani law.); *see also* Anika Rahman, *A View Toward Women's Reproductive Rights Perspective on Selected Laws and Policies in Pakistan*, 15 WHITTIER L. REV. 981, 998 (1994) (stating that marital rape is not a crime in Pakistan); Polk, *supra* note 77, at 391–92 (emphasizing that the government of Pakistan is unwilling to control domestic abuse, including marital rape). *See generally* Jessica Neuwirth, *Sex Discriminatory Laws: A Challenge to the Integrity of International Law*, 29 HUM. RTS. 3, 3 (2002) (discussing the exclusion of marital rape in many countries' laws as well as Pakistan's strict evidentiary rules regarding witness testimony).

106. *See* Hajjar, *supra* note 8, at 30 (noting that when Pakistani women are killed by family members the government either excuses the act or refuses to investigate or prosecute); *see also* Madek, *supra* note 93, at 68–69 (acknowledging that the Pakistani court system uses gender neutral law to discriminate against women through the existence of honor killings); Hussain, *supra* note 40, at 234 (emphasizing that even those women who get past sexual and physical assault by the police are further victimized and discriminated against by the judges and prosecutors).

107. *See, e.g.,* Huma Ahmed-Ghosh, *Voices of Afghan Women: Women's Rights, Human Rights, and Culture*, 27 T. JEFFERSON L. REV. 27, 30 (2004) (addressing how many Muslim states object to CEDAW Article 16 pertaining to women's rights in marriage, divorce, custody, and property rights); *see also* Hussain, *supra* note 40, at 233 (characterizing most Muslim justice systems to contain feudal, all male councils and Shariah courts that govern religious and family matters to the exclusion of the secular court system with little regard for women's rights); Caryn L. Weisblat, Comment, *Gender-Based Persecution: Does United States Law Provide Women Refugees with a Fair Chance?*, 7 TUL. J. INT'L & COMP. L. 407, 410 (1999) (illustrating the cultural view of women in the Middle East via various demeaning laws geared strictly against women).

108. *See* Hussain, *supra* note 40, at 234 (quoting a Jordanian judge as saying that there was no domestic violence in Muslim countries); *see also* Burney, *supra* note 54, at 45 (acknowledging the pervasive bias against women in the Pakistani criminal justice system); Rana Lehr-Lehnardt, Note, *Treat Your Women Well: Comparisons and Lessons from an Imperfect Example Across the Waters*, 26 S. ILL. U. L.J. 403, 417 (2002) (suggesting that the first step to reducing violence against women is to criminalize wife abuse).

109. *See* Burney, *supra* note 54, at 31 (declaring that Pakistan has an enormous problem with violence against women, which is increased by the government's inadequate, if not non-existent, response); *see also* Hussain, *supra* note 40, at 235 (suggesting that lenient judicial practices amount to an endorsement of honor crimes).

Notably, even in the United States, where domestic violence has been recognized and fought through reforms and later mechanisms within the justice system for many years, "some responses to victims continue to demonstrate decades-old preconceptions about domestic violence. . . . [P]rosecutors, judges, and the court system . . . responsible for the application and enforcement of the law, lack an understanding of domestic violence. . . . Litigation frequently reflects the assumption that spousal abuse is uncommon, despite its prevalence. Similarly, domestic violence is still sometimes treated as an essentially private problem." *Cf.* Hardenbrook, *supra* note 17, at 746 (noting that even in the United States, personal biases come through in the justice system's failure to recognize the extent of domestic violence in the nation).

B. Central and Eastern Europe: A Culture of Silence

Domestic violence is a serious problem in Central and Eastern Europe and Russia. Ironically, it is exacerbated by the economic conditions created from the fall of communism, the traditional loyalty and obligations that women feel towards their family and their general distrust towards state interference.[110] These unique social considerations do not leave any options, as the state chooses an appropriate mechanism for dealing with domestic violence and explains the lack of effective enforcement mechanisms.[111] In this area of the world, programs designed to promote public awareness and provide abused women with shelter and economic resources may be the first step toward ending the abuses of women in the home.[112]

1. History and Culture

Since the fall of communism women, as a group, have suffered many adverse effects.[113] Communism ironically provided many of the same benefits that Western women are still demanding, including equal pay for equal work, free education, preventative health care, and guaranteed jobs.[114] Family-oriented legislation mandated equal duties within marriage and equal ownership, recognizing the economic value of childrearing by providing free child care, or the alternative of staying at home for three years with the benefit of a guaranteed job upon

110. *See* Smolens, *supra* note 24, at 35 (recognizing the multitude of problems associated with changing from communism to democracy, but asserting that the reluctance to examine domestic violence comes from a reluctance to legislatively invade the home); *see also* Krisztina Morvai, *Continuity and Discontinuity in the Legal System: What It Means for Women: A Female Lawyer's Perspective on Women and the Law in Hungary*, 5 UCLA WOMEN'S L.J. 63, 68 (1994) (maintaining that the fall of communism did not benefit women; it merely changed the methods of domestic violence); Shannon Keniry, Note, *Proletariat to Pauper: An Analysis of International Law and the Implications of Imperialism for Equality in Post-Communist Russia*, 11 AM. U.J. INT'L L. & POL'Y 475, 482–83 (1996) (acknowledging increasing domestic violence in Russia with little government prevention and sometimes outright ignoring the problem).

111. *See* Book Note, 42 STAN. J. INT'L L. 181, 183 (2006) (reviewing RULING RUSSIA: LAW, CRIME, AND JUSTICE IN A CHANGING SOCIETY, William Alex Pridemore ed., Rowman & Littlefield Publishers (2005)) (commenting on Russia's lack of official data regarding domestic violence); *see also* Keniry, *supra* note 110, at 489 (emphasizing that domestic violence in Russia is rarely prosecuted because its private nature precludes state intervention). *See generally* Armatta, *supra* note 21, at 814 (illustrating how the Russian police force harasses women who report domestic violence in an attempt to discourage and ultimately prevent them from filing complaints).

112. *See* Smolens, *supra* note 24, at 20 (claiming the first step to correcting domestic violence in Eastern Europe is defining the problem and collecting data to quantify the extent of the problem); *see also* Keniry, *supra* note 110, at 507–08 (suggesting that educational programs empowering Russian women can help combat violence against women).

113. *See* Star M. Eneva, Note, *The European Union Gender Equality Laboratory: Its Effect on Eastern European Candidate Countries*, 15 S. CAL. REV. L. & WOMEN'S STUD. 147, 151–52 (2005) (noting the worsened employment situation of Bulgarian women after the fall of communism as compared to women in the European Union); *see also* Hanh Diep, Note, *We Pay—The Economic Manipulation of International and Domestic Laws to Sustain Sex Trafficking*, 2 LOY. U. CHI. INT'L L. REV. 309, 309 (2005) (asserting that the fall of communism opened the door for the sex industry in the former Soviet Union). *But see* Christine Chinkin & Kate Paradine, *Vision and Reality: Democracy and Citizenship of Women in the Dayton Peace Accords*, 26 YALE J. INT'L L. 103, 146 (2001) (arguing that some Eastern European women, since the fall of communism, enjoy the ability to be housewives).

114. *See, e.g.,* Anna M. Han, *Holding up More Than Half the Sky: Marketization and the Status of Women in China*, 11 J. CONTEMP. LEGAL ISSUES, 791, 792 (2001) (suggesting that Chinese women benefited most under China's communist government); Eneva, *supra* note 113, at 161 (demonstrating how communist Bulgaria provided social benefits that are today regarded as gender equality reform objectives); *see* also Alicia Czerwinski, Note, *Sex, Politics, and Religion: The Clash Between Poland and the European Union Over Abortion*, 32 DENV. J. INT'L L. & POL'Y 653, 672 (2004) (alleging that since the fall of communism women have been forced into the traditional stereotype of mother and wife).

returning to work.[115] These benefits were lost with the fall of communism.[116] In the job market women were perceived as more expensive and less reliable workers due to maternity benefits and more time off, and they were often the first to go.[117]

As economic conditions have disempowered women, traditional views of the family have been idealized.[118] In a climate defined by social upheaval and economic turmoil, "[w]omen continue to feel responsibility for family harmony, for creating and maintaining domestic comfort and a warm emotional climate."[119] With the tradition of the family as a buttress and respite from the oppression of the communist state, where home was a refuge, women and men alike still hold an "historic aversion to state interference" in family life.[120] In the home, inti-

115. *See* Smolens, *supra* note 24, at 15 (indicating legislation allowing for equal rights during and after marriage); *see also* Eneva, *supra* note 113, at 161 (explaining how communist governments provided for free healthcare, maternity leave, and childcare). *See generally* Zillah Eisenstein, *Stop Stomping on the Rest of Us: Retrieving Publicness from the Privatization of the Globe,* 4 IND. J. GLOBAL LEGAL STUD. 59, 75 (1996) (informing that some women in Eastern Europe are distrustful of the equal rights stance of feminism).

116. *See* Czerwinski, *supra* note 114, at 672 (acknowledging that since the fall of communism, women have lost benefits of equal pay for equal work, maternity leave, and childcare); *see also* Eneva, *supra* note 113, at 152–53 (reporting that with the fall of communism came fewer childcare resources for women); Keniry, *supra* note 110, at 480–81 (recognizing that women in post-communist Russia are paid less than men for equal work).

117. *See* Mertus, *supra* note 67, at 384 (recognizing that job security for women decreased dramatically in post-communist European countries); *see also* Smolens, *supra* note 24, at 17–18. *See generally* Oksana Yablokova, *Women Don't Get Fair Deal, Study Says,* MOSCOW TIMES, Mar. 2, 2006 (claiming that women do not know they are victims of gender discrimination when they are refused a job because of maternity or pregnancy).

118. *See* Belinda Cooper & Isable Traugott, *Women's Rights and Security in Central Asia; Advocacy,* WORLD POL'Y J., Mar. 22, 2003, at 59 (explaining how women are still responsible for the home and child care); *see also* Editorial, *Women Pay for Fall of Socialism,* STATESMAN (India), June 15, 2006 (finding that the fall of socialism has adversely affected the prospects of women and that women are paid much less than men in all sectors); Ann H. Koblitz, *Women Under Perestroika and Doi Moi: A Comparison of Marketization in Russia and Vietnam,* CAN. WOMAN STUD., December 1995, at 54–59 (claiming how Russian politicians believe that domestication of women is important for promoting a democratic government).

119. See *Nadezhdina, supra* note 34 (expressing how women feel responsible for taking care of their families); *see also* Elizabeth Messud, *The Status of Women in New Market Economies: Russian Women and Women's Rights: A Case Study in Universalist/Cultural Relativist Debate,* 12 CONN. J. INT'L L. 77, 101 (1996) (finding that the loss of job opportunities for women has furthered women's responsibilities in the home); Shelley Inglis, Article, *Re/Constructing Right(s): The Dayton Peace Agreement, International Civil Society Development, and Gender in Postwar Bosnia-Herzegovina,* 30 COLUM. HUM. RTS. L. REV. 65, 102 (1998) (noting that women are responsible for their family, home, and child care).

120. *See* Smolens, *supra* note 24, at 20 (explaining that state intervention in domestic violence matters has barred methods for addressing the problems in families); *see also* Maria V. Antokolskaia, *The New Aspects of Russian Family Law,* 31 CAL. W. INT'L L.J. 23, 23–24 (2000) (illustrating how new Russian family laws have given more rights to families while also limiting the amount of state intervention in family matters); Jean-Marie Henckaerts & Stefaan Van der Jeught, *Human Rights Protection Under the New Constitutions of Central Europe,* 20 LOY. L.A. INT'L & COMP. L. REV. 475, 484 (1998) (stating that Central European countries restrict state interference in private life).

mate spheres of friendship, loyalty, and sexuality were sheltered from communist ideologies.[121] The state oppressed men *and* women in the latter years of communism, and both lived under this despotism.[122] The interests of women, therefore, have not been historically separate from those of men like in other countries.[123]

This shared enemy, along with recent social and economic uncertainty, has resulted in a "reactionary idealization of the traditional family."[124] At the same time, the resultant lack of housing and income leaves women without options.[125] These considerations are reflected in the law and practices dealing with domestic violence in Central Europe and Russia.[126]

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121. *See* Jeffrey Fleishman, *A Czech Toke on Freedom,* L.A. TIMES, Jan. 24, 2006, at 1 (proclaiming that drinking and sex was confined to the home during communist times). *But see* Paul Hollander, *A Man of Faith*, NATIONAL INTEREST, Summer 2003 (arguing that communism strengthened friendships between people). *See generally* Randy Lee, *When a King Speaks of God; When God Speaks to a King: Faith, Politics, Tax Exempt Status, and the Constitution in the Clinton Administration*, 63 LAW & CONTEMP. PROBS. 391, 415 (2000) (finding that religion and churches were not sheltered from the affects of communism).

122. *See* Elena Bonner, *Nationalism, Ethnic Strife and Human Rights,* 28 J. MARSHAL L. REV. 769, 771 (1995) (attributing the illusion of friendships in the Soviet Union to the total oppression of the people by communist authorities); *see also* Stephen Schwartz, *The New Evil Empire? Applying Cold War Lessons to Saudi Global Mischief,* WKLY. STANDARD, Dec. 13, 2004 (noting that the citizens of Soviet communism were promised freedom and wealth and instead received government oppression). *See generally* Michael Kilian, *Freedom Costs Diplomat His Homeland,* CHI. TRIB., June 24, 1986, at C1 (emphasizing the expansion of communism across central Europe).

123. *See* John N. Hazard, *Socialism and Federation,* 82 MICH. L. REV. 1182, 1193 (1984) (explaining the communist party's campaign to regulate the Soviet people into a single ethnic group of men and women); *see also* Mertus, *supra* note 67, at 375–76 (finding that both men and women's common enemy was the communist regime). *See generally* Erica S. Flores, *Global Critical Race Feminism: An International Reader,* 16 BERKELEY WOMEN'S L.J. 217, 223 (2001) (comparing how Communist China controlled the clothing and haircuts of both men and women).

124. *See* Smolens, *supra* note 24, at 29 (alleging that the "traditional family" ideology has placed women's safety at further risk when the wife is under the control of the husband); *see also* Rebecca L. Hillock, Comment, *Establishing the Rights of Women Globally: Has the United Nations Convention on the Elimination of All Forms of Discrimination Against Women Made a Difference?,* 12 TULSA J. COMP. & INT'L L. 481, 505 (2005) (noting the Czech Republic's current idealization of women's family roles).

125. *See* Mertus, *supra* note 67, at 420, 472, 478 (recognizing that because of the housing shortage in Central and Eastern European countries, women cannot escape their husband's abuse); *see also* Dianne Post, *Women's Rights in Russia: Training Non-Lawyers to Represent Victims of Domestic Violence,* 4 YALE HUM. RTS. & DEV. L.J. 135, 143 (2001) (reporting that abused women may continue to live with their abusers because of housing shortages); 7 HUMAN RIGHTS WATCH, No. 5, RUSSIA: NEITHER JOBS NOR JUSTICE: STATE DISCRIMINATION AGAINST WOMEN IN RUSSIA n.106 (1995), *available at* http://www.hrw.org/reports/1995/Russia2a.htm (stating that Russia's housing shortage forces divorced couples to live together while the woman remains fearful of her ex-husband).

126. *See* Jennifer L. Enck, Note, *The United Nations Convention Against Transnational Organized Crime: Is It All That It Is Cracked Up to Be? Problems Posed by the Russian Mafia in the Trafficking of Humans*, 30 SYRACUSE J. INT'L L. & COM. 369, 388 (2003) (demonstrating that Russian police practices subject women to continued abuse by spouses); *see also* Nicki Negrau, *The Status of Women in New Market Economies: Listening to Women's Voices: Living in Post-Communist Romania*, 12 CONN. J. INT'L L. 117, 131 (1996) (examining the differences of using domestic violence by men and women in divorce proceedings). *See generally* Scott Splittgerber, Note & Comment, *The Need for Greater Regional Protection for the Human Rights of Women: The Cases of Rape in Bosnia and Guatemala*, 15 WIS. INT'L L.J. 185, 210 (1996) (commenting on the failure of the European Convention to limit domestic violence against women in member states).

2. An Overview of Law in Central Europe and Russia

In Slovakia, where domestic violence has been on the rise, affecting an estimated 30 to 40 percent of all women, no specific domestic violence laws exist.[127] Instead, domestic violence is treated like an assault, and "only when the injury is serious will the abuser be taken into custody."[128] Ironically, the abuser actually remains at home until the police invite him down to the station.[129] Not surprisingly, as reflected in the lack of a separate law to deal with the offense, many Slovaks do not view domestic violence as a crime, and society generally views domestic violence as a private matter.[130]

Similarly, domestic violence in Hungary is perceived as a private matter and is commonly accepted.[131] Accordingly, the criminal code does not specifically criminalize domestic violence and "cultural acceptance of a certain level of domestic abuse" makes the prosecution of offend-

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127. *See* Smolens, *supra* note 24, at 27–28 (presenting that, despite the risk of domestic violence, women in Slovakia receive no special treatment and are protected under general laws); *see also* Beata Balogova, *Domestic Violence: When Cosy Nests Turn into Living Hells,* SLOVAK SPECTATOR, Sept. 9, 2005 (reporting that one out of four women in Slovakia are exposed to domestic violence); *First Women's Refuge Centre Opens in Bratislava,* CTK NAT'L NEWS WIRE (Czech Rep.), Mar. 17, 1998 (describing domestic violence in Slovakia as a "hidden epidemic").

128. *See* Smolens, *supra* note 24, at 28 (explaining the practices of the Slovak police in relation to domestic violence); *see* BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEP'T OF STATE, SLOVAK REPUBLIC: COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES—1999 sec. 5 (2000), *available at* http://www.state.gov/g/drl/rls/hrrpt/1999/359.htm (recognizing that police in Slovakia treat domestic violence against women in the same way as other criminal offenses). *But see* Mary Massingale, *Victims' Advocate Fights Battle Abroad; Takes on Domestic Violence in Slovakia,* St. J.-Reg. (Ill.), May 22, 2005, at 19 (reporting that Slovakia currently has laws criminalizing domestic violence and sexual assaults).

129. *See* Martina Pisárová, *Domestic Violence Remains Concealed,* SLOVAK SPECTATOR, Aug. 16, 1999, *available at* http://www.slovakspectator.sk/clanok_tlac.asp?cl=3959&rub=spect_news (indicating that it can take days before the police contact a husband to invite him to the police station). *But see Slovak Police Detain that Sold Her Daughter as Prostitute*, CTK NAT. NEWS WIRE (Czech Rep.), Feb. 3, 2006 (reporting that Slovak police intervened in a child abuse case after it was reported). *See generally* Genine Babakian, *Half Russia's Murders: Husbands Kill Wives,* MOSCOW TIMES, Apr. 19, 1995 (noting that police take a hands-off approach in family domestic violence cases).

130. *See* HRI—Human Rights Internet, Slovakia: Commissioner for Human Rights, *available at* http://www.hri.ca/fortherecord2001/euro2001/vol2/slovakiachr.htm (last visited Oct. 30, 2006) (recognizing that domestic violence between spouses is seen as a private matter); *see also* Ed Holt, *Rights—Slovakia: Taking Domestic Violence Out of the Closet,* IPS–INTER PRESS SERV., May 7, 2002 (explaining that due to the country's rural history, domestic violence in Slovakia is not seen as a problem); INT'L HELSINKI FED'N FOR HUMAN RIGHTS, WOMEN 2000—AN INVESTIGATION INTO THE STATUS OF WOMEN'S RIGHTS IN CENTRAL AND SOUTH EASTERN EUROPE AND THE NEWLY INDEPENDENT STATES 404 (2000) *available at* http://www.ihf-hr.org/viewbinary/viewdocument.php?doc_id=2070 (reiterating that Slovak police view domestic violence as a private affair and do not interfere).

131. *See* Merle H. Weiner, *International Child Abduction and the Escape from Domestic Violence,* 69 FORDHAM L. REV. 593, 624 n.141 (2000) (stating that domestic violence is believed to be common in Hungary and that police are unsympathetic to victims); *see also* Kriszta Szalay, *Victims of the State's Iron Fist,* HERALD (Glasgow), Nov. 25, 1996, at 10 (suggesting that Hungarian social opinion is to blame the victim); Interview by Gusztáv Kosztolányi with Professor Kirsztina Morvai, Professor, Faculty of Law of the Loránd Eötvös University of Sciences, Hung. (May 1, 2001), *available at* http://www.ce-review.org/01/16/csardas16.html (finding that police in Hungary believe that domestic violence is a private matter).

ers for criminal assault unlikely.[132] Law enforcement officials are mostly unresponsive until there is bloodshed. Housing shortages, the fact that the man is most often the wage earner, and general distrust of the police further exacerbate the problem.[133]

Until 2004, the Czech Republic, which is a country in which 38 percent of women reported domestic violence,[134] did not have any specific laws addressing domestic violence.[135] Although its constitution incorporated the United Nations Charter of Fundamental Rights and Freedoms, which guarantees "fundamental rights" regardless of sex, race, and the color of one's skin,[136] domestic violence had not yet reached the national discourse in terms of educat-

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132. *See* Smolens, *supra* note 24, at 36 (reiterating that cultural acceptance of a certain level of domestic abuse makes prosecution unlikely); *see also* Mertus, *supra* note 67, at 416 (suggesting that the Hungarian criminal code is insufficient to prosecute domestic violence). *See generally,* 13 HUMAN RIGHTS WATCH, No. 4, UZBEKISTAN: SACRIFICING WOMEN TO SAVE FAMILY? DOMESTIC VIOLENCE IN UZBEKISTAN 34 (2001), *available at* http://www.hrw.org/reports/2001/uzbekistan/uzbek0701.pdf (reporting that there were very few prosecutions against abusers).

133. *See* Smolens, *supra* note 24, at 31 (recognizing that the lack of shelters forces abused women to stay in violent homes); *see also* Carla Power et al., *The Shackles of Freedom*, NEWSWEEK, Mar. 18, 2002, at 74 (expressing that because women lack shelters and support from authorities domestic violence is seldom reported). *See generally* Douglass W. Cassel, *Treaty Effects Change in Small Steps*, CHI. DAILY L. BULL., Mar. 8, 2006, at 5 (acknowledging the need to build shelters for abused women and their children).

134. *See* BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEP'T OF STATE, CZECH REPUBLIC: COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES—2004 sec. 5 (2005) (hereinafter Country Reports—Czech Republic), *available at* http://www.state.gov/g/drl/rls/hrrpt/2004/41677.htm (stressing that 38 percent of women in the Czech Republic experienced violence while in a partner relationship). *See generally* Kamila Michalkova, *Coalition Protects Victims of Domestic Violence,* PRAGUE POST, May 14, 1997 (reporting that 16 percent of women in the Czech Republic are victims of domestic violence); *Ten Percent of Czechs Believe Domestic Violence Frequent—Poll,* CZECH NEWS AGENCY, Sept. 7, 2004 (informing that Czechs believe that domestic violence against women is common and that women are frequent targets of both verbal and physical assaults).

135. *See Austrian Domestic-Violence Law a Good Model for Czech Rep-Experts,* CTK NAT'L NEWS WIRE (Czech Rep.), Nov. 14, 2003 (revealing that Czech law lacks an approach to solve the problem of domestic violence); *see also Figures of Victims Appeal to Parliament for Domestic-Violence Law,* CTK NAT'L NEWS WIRE (Czech Rep.), Nov. 26, 2003 (emphasizing that the Czech Republic is "one of the few countries in Europe" that does not list domestic violence as a crime). *See generally UN Committee Experts Applaud Czech Republic's Political Will to Implement Convention on Elimination of Discrimination Against Women; Conditions Being Created for Equal Opportunities (Part 2 of 2),* M2 PRESSWIRE, Aug. 9, 2002 (suggesting that the Czech Republic should adopt domestic violence legislation similar to the laws in Austria and Germany).

136. *See* Ústavní zákon Ceské republiky [Constitution of the Czech Republic] ch. I, art. 3, *available at* http://www.psp.cz/cgi-bin/eng/docs/laws/constitution.html (stating that the United Nations Charter of Fundamental Rights and Freedoms is an integral component of the Czech Constitution); *see also* U.N. Charter of Fundamental Rights and Freedoms, ch. 1, art. 3, *available at* http://www.psp.cz/cgi-bin/eng/docs/laws/listina.html (declaring that "[f]undamental human rights and freedoms are guaranteed to everybody irrespective of sex , race, colour of skin, language, faith, religion, political or other conviction, ethic or social origin, membership in a national or ethnic minority, property, birth, or other status"); COUNTRY REPORTS—CZECH REPUBLIC, *supra* note 134 (maintaining that the Czech Republic's Constitution prohibits discrimination on the basis of race, gender, disability, language, or social status).

ing the public and law enforcement officials.[137] The criminal law also required the victim to press charges.[138]

In 2004, however, the criminal code was amended to recognize domestic violence as a distinct crime.[139] Notably, the option of criminal prosecution was bolstered by a large network of women's shelters, allowing women the option of seeking respite, and NGOs offering counseling and medical services.[140] Notably, at the end of 2004, only 17 cases of domestic violence had been reported under the new law; only 10 were investigated and none were prosecuted.[141]

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137. *See* Smolens, *supra* note 24, at 33 (declaring that in the Czech Republic, domestic violence has not reached the level of awareness and national discourse). *See generally Czech Deputy Minister Tells Anti-Discrimination Committee of Stepped Up Efforts to Protect Women Against Violence, Trafficking, Workplace Exploitation*, U.S. FED. NEWS, Aug. 17, 2006 (remarking that the Czech Republic has initiated a public awareness campaign to educate people about domestic violence); *Ten Percent of Czechs Believe Domestic Violence Frequent—Poll*, CZECH NEWS AGENCY, Sept. 7, 2004 (indicating that not even one in ten Czechs believe that domestic violence is a usual phenomenon).

138. *See* Kamila Michalkova, *Coalition Protects Victims of Domestic Violence*, PRAGUE POST, May 14, 1997 (asserting that the responsibility of pressing charges rests on the victim); *see also* Mertus, *supra* note 67, at 415 (stating that if the offender is related to the victim when the crime was committed then the victim must agree to press charges; if the offender is a stranger the offender is prosecuted regardless of the victim's consent). *See generally* Daniela Lazarova, *Silent Witnesses Bring Awareness of Domestic Violence*, RADIO PRAGUE, Nov. 25, 2005, *available at* http://www.radio.cz/en/article/73066 (contending that it is also difficult for women to press charges for psychological reasons).

139. *See* COUNTRY REPORTS – CZECH REPUBLIC, *supra* note 134 (stating that the Czech Republic amended its Criminal Code to make domestic violence a distinct crime); *see also Czech President Signs into Law Bill on Domestic Violence*, BBC INT'L REP., Feb. 13, 2004 (declaring that Czech President Klaus amended the Penal Code to include domestic violence as a new type of crime); *Experiences from Abroad in Treating Perpetrators of Domestic Violence*, SECURE COEXISTENCE: TREATMENT FOR PERPETRATORS OF DOMESTIC VIOLENCE (League of Hum. Rts., Bratislavská, Czech Rep.), Feb. 2005, at 4, *available at* http://www.llp.cz/eng/data/down/priloha_eng.pdf (asserting that in June 2004, § 215(a) was added to the Criminal Code which stated, in pertinent part, "on abuse of persons living in a shared residential apartment or house"—this language criminalized domestic violence).

140. *See* INT'L HELSINKI FED'N FOR HUMAN RIGHTS, WOMEN 2000—AN INVESTIGATION INTO THE STATUS OF WOMEN IN CENTRAL AND SOUTHEASTERN EUROPE AND THE NEWLY INDEPENDENT STATES 147 (2000), *available at* http://www.ihf-hr.org/viewbinary/viewdocument.php?doc_id=2057 (contending that NGOs were the first to recognize domestic violence in the Czech Republic as a serious problem and tried to influence government and state views on the subject); *see also* Committee on the Elimination of Discrimination Against Women [CEDAW], Aug. 5–23, 2002, *Czech Republic: Second Periodic Report*, ¶ 8, U.N. Doc. CEDAW/C/2002/EXC/CRP.3/Add.2/Rev.1 (Aug. 23, 2002), *available at* http://www.hri.ca/fortherecord2002/documentation/tbodies/cedaw-c-2002-exc-crp3-add2-rev1.htm (establishing that efforts by NGOs helped highlight the issue of domestic violence leading to the development of new laws); DIVISION FOR THE ADVANCEMENT OF WOMEN [DAW], WOMEN WATCH, NATIONAL REPORT ON IMPLEMENTATION OF THE BEIJING PLATFORM FOR ACTION: CZECH REPUBLIC 9, *available at* http://www.un.org/womenwatch/daw/followup/responses/czech.pdf (last visited Oct. 4, 2006) (positing that NGOs play a decisive role in helping women harmed and threatened by violence).

141. *See, e.g.,* Stop Violence Against Women [StopVAW], Country Pages: Czech Republic, *available at* http://www.stopvaw.org/Czech_Republic2.html (last visited Oct. 4, 2006) (presenting that 1 in 10 women in the Czech Republic are victims of domestic abuse but only 21 percent seek help from authorities). *See generally Czech Deputy Minister Tells Anti-Discrimination Committee of Stepped Up Efforts to Protect Women Against Violence, Trafficking, Workplace Exploitation*, US FED. NEWS, Aug. 17, 2006 (noting that after the new Penal Code regarding domestic violence was introduced there were 41 convictions and one sentencing); COUNTRY REPORTS—CZECH REPUBLIC, *supra* note 134 (stating that "[a]ccording to the new law, those who commit violence against relatives or domestic partners may receive up to 3 years in prison; if the extent of the domestic violence is severe, prolonged, or involves multiple victims, the prison sentence is 2 to 8 years. If domestic violence is committed against a person under the age of 18, a pregnant woman, the elderly, or the seriously ill or handicapped, the sentence may be longer").

Along with the Czech Republic, Poland also has passed legislation dealing with domestic violence.[142] Women rarely take advantage of the law, however, due to heavy influence by the Roman Catholic Church's emphasis on family unity and a strong aversion to police entry into the home.[143]

Particularly severe domestic violence in Russia results in the debilitating injury or permanent handicap of 57,000 women, and the death of 14,000 women each year.[144] The country has no law against domestic violence despite being a signatory to the United Nations Convention to End Discrimination Against Women. It also lacks a national policy against domestic violence.[145] Cultural attitudes promote "tacit agreement" that "women are owned by men."[146] Moreover, victims face indifference from law enforcement officials, who rarely intervene unless a family quarrel ends in murder.[147] Families tend to cover up the problem as a private matter. Since Russian women are often economically dependent on men, this economic control and

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142. *See* BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEP'T OF STATE, POLAND: COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES—2005 sec. 5 (2006), *available at* http://www.state.gov/g/drl/rls/hrrpt/2005/61668.htm (stating that Poland passed a domestic violence law that "provides for the creation of a national program on counteracting domestic violence"); *see also* Mertus, *supra* note 67, at 417 (maintaining that the Penal Code in Poland specifically recognizes domestic violence as a crime); Stop Violence Against Women [StopVAW], Country Pages: Poland, *available at* http://www.stopvaw.org/Poland2.html (last visited Oct. 4, 2006) (asserting that violence against women has been addressed in the Polish Constitution and through legislation, such as the Counter Violence in Close Relations Bill).

143. *See* Smolens, *supra* note 24, at 38 (asserting that the Roman Catholic Church's promotion of traditional gender roles contributes to women remaining in violent relationships). *See generally* Isabel Marcus, *Preliminary Comments on Dark Numbers: Research on Domestic Violence in Central and Eastern Europe*, 21 U. ARK. LITTLE ROCK L. REV. 119, 129 (1998) (addressing women in violent relationships and the tension between the state and the Catholic Church regarding divorce).

144. *See* Kerry Kennedy Cuomo, *Speak Truth to Power*, 73 PA. B. ASS'N Q. 169, 170 (2002); *see also* Meyersfeld, *supra* note 15, at 415 (declaring that 14,000 women die every year and one woman dies every 40 minutes from domestic violence abuse); Post, *supra* note 125, at 136.

145. *See* Kester Kenn Klomegah, *From Russia with Domestic Violence*, INTER PRESS SERVICE, Mar. 8, 2005, *available at* http://www.worldrevolution.org/article/1772 (contending that there is no law that recognizes domestic violence as a crime under Russian law). *See generally* Convention on the Elimination of All Forms Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13, *available at* http://www.un.org/womenwatch/daw/cedaw/states.htm (listing that Russia became a signatory to the Convention on the Elimination of All Forms of Discrimination Against Women in 1980).

146. *See* Zakirova, *supra* note 23, at 79 (illustrating the effects of male dominated Russian society on domestic violence); *see also* Rainsford, *supra* note 52 (maintaining that women stay in abusive relationships because of societal pressure); John Varoli, *Sexual Harassment, Russian Style*, ST. PETERSBURG TIMES, Mar. 9, 1999 (proclaiming that Russian women have little rights other than to "serve" men and that sexual harassment is "often accepted as the natural course of relations between men and women").

147. *See* Armatta, *supra* note 21, at 814 (declaring that in Russia, women who report incidents of domestic violence are harassed by police officers to prevent them from filing complaints); *see also* Janet Elise Johnson, *Privatizing Pain: The Problem of Woman Battery in Russia*, 13 NAT'L WOMEN'S STUD. ASS'N J. 153, 156 (2001) (stating that only when a woman was murdered were the perpetrators prosecuted and jailed for short periods of time); Tifany E. Markee, Comment, *A Call for Cultural Understanding in the Creation, Interpretation and Application of Law: Is the United States Meeting the Needs of Russian Immigrant "Mail-Order Brides?,"* 31 CAL. W. INT'L L.J. 277, 281–82 (2001) (maintaining that the Russian police rarely arrest or prosecute perpetrators of violent crimes and if they are arrested, offenders are only held overnight).

dependence, along with a lack of housing, leaves women without legal recourse and a lack of overall options.[148]

3. Ending the Culture of Silence

Central and Eastern Europe and Russia's unique socio-economic characteristics, recent history, and current social reality, keep domestic violence in the private realm. It is hidden from public view by the family and ignored by the state.[149] Criminal prosecution is less of a viable option due to a pervasive societal distrust of state interference with private matters, the economic dependency of women in this area of the world, and the shortage of housing.[150] Victims are unlikely to press charges, and in an unstable economy, prosecuting the sole wage earner in the family might prove even more detrimental and destabilizing.[151]

Core components of the United States' successful campaign against domestic violence have included legislation and public intolerance, which have bolstered each other; the police and the judiciary are trained to respond to this issue.[152] Education is similarly an essential com-

148. *See* Julie Hemment, *Global Civil Society and the Local Costs of Belonging: Defining Violence Against Women in Russia*, 29 SIGNS 815, 823–24 (2004) (maintaining that economic dependence and a lack of housing contribute to domestic violence against women); *see also* Deborah M. Thaw, *The Feminization of the Office of Notary Public: From Feme Covert to Notaire Covert*, 31 J. MARSHALL L. REV. 703, 732 (1998) (discussing that women are either unemployed or paid much less than men leaving them little protection from abuse); Mairead Carey, *Russia's Battered Women Find a Voice*, IRISH TIMES, Mar. 15, 1997 (stating that housing is very expensive and many women are financially dependent on their husbands).

149. *See* Zakirova, *supra* note 23, at 75 (contending that socio-economic factors contribute to the view that domestic violence in Russia is a private matter); *see also* Christine Rotter*, Acceptance of Domestic Violence Blocks Equality,* THE BUDAPEST SUN, Feb. 16, 2006 (maintaining that there is a blasé attitude towards domestic violence in Hungary and that economic dependence on men is perpetuated by gender stereotypes). *See generally* Mertus, *supra* note 67, at 376–77 (reasoning that the collapse of communism in Central and Eastern Europe increased unemployment for women and led to greater violence against women).

150. *See* Smolens, *supra* note 24, at 6 (attributing a "profound distrust of state interference in private life" in Central and Eastern Europe to problems prosecuting domestic abusers); *see also* Amnesty International, Violence Against Women in the Russian Federation, *supra* note 23 (declaring that the economic situation in Russia has lead to greater violence. Russian women fear authorities and do not report domestic abuse); Stop Violence Against Women [StopVAW], Attitudes Towards Domestic Violence in Hungary Inhibit Equality (June 29, 2006), *available at* http://www.stopvaw.org/Attitudes_Towards_Domestic_Violence_in_Hungary_Inhibit_Equality2.html (claiming that domestic abuse is not reported in Hungary because it is considered a private matter "steeped in a patriarchal tradition").

151. *See* Vanora Bennett, *Russia's Ugly Secret: Misogyny; Underneath Gallantry and Sentiment, a Widespread Contempt for Women Often Ends in Black Eyes, Broken Bones and Worse. And Activists Say the Violence Is Increasing*, L.A. TIMES, Dec. 6, 1997, at A1 (declaring that in Russia, women are unlikely to press charges because of possible fines and the husband's time in jail would negatively impact the family's financial budget); *see also* Zakirova, *supra* note 23, at 83 (contending that women cannot leave abusive relationships because of economic dependence and a lack of housing); Carey, *supra* note 148 (suggesting that expensive housing and dependence on husbands financially make it difficult for women to leave abusive relationships).

152. *See* Colker, *supra* note 34, at 1853–55 (opining that legislation introduced by the federal government and states led to many of the successes of topping domestic violence in the United States); *see also* Deborah Epstein, *Procedural Justice: Tempering the State's Response to Domestic Violence*, 43 WM. & MARY L. REV. 1843, 1853, 1859 (2002) (reasoning that legislation has contributed to the United States successes in battling domestic violence); Hardenbrook, *supra* note 17, at 737 (attributing the United States' success in combating domestic violence to mandatory arrests, legislation, and public awareness campaigns).

ponent to combat domestic violence in Central and Eastern Europe and Russia.[153] This will help bring the problem into the public realm, forcing cultural recognition. Programs designed to promote public awareness and provide services to abused women will be most successful.[154]

C. South Africa: Progressive Law, Cultural Barriers

1. History and Culture

South Africa has one of the most progressive domestic violence laws in the world.[155] With the end of apartheid and the reorganization of the South African government in 1994, debate about women's rights and gender equality in South Africa was presented to legislators in a persuasive manner. Consequently, issues of gender equality have moved to a "central place in the post-apartheid political and legal agenda."[156] The politicization of women's issues have made "women's needs national needs," providing a solid foundation for structuring programs and policies that will attack violence "in effects as well as causes."[157] Cultural barriers, however,

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153. *See* Barbara Stark, *Domestic Violence and International Law: Good–Bye Earl (Hans, Pedro, Gen, Chou, etc.)*, 47 LOY. L. REV. 255, 280 (2001) (stressing that the roles of NGOs in public education are crucial to combating domestic violence); *see also* Jennifer L. Ulrich, *Confronting Gender-Based Violence with International Instruments: Is a Solution to the Pandemic Within Reach?*, 7 IND. J. GLOBAL LEGAL STUD. 629, 631 (2000) (emphasizing that domestic violence is exacerbated by the society's lack of education); Gabrielle Akimova, Russian Domestic Violence–Prevention Movement: Steps in the Right Direction, *available at* http://www.baido.org/topics/human_rights/2002/russia_domestic_violence.php (last visited Oct. 4, 2006) (recognizing that professional education is an "essential element in the prevention of domestic violence").

154. *See* Hon. Ronald Adrine & Michael W. Runner, *Engaging Men and Boys in Domestic Violence Prevention Strategies*, 6 J. CTR. FAM. CHILD. & CTS. 175, 175–76 (2005) (attributing the United States' successes in combating domestic violence to creating public awareness and social services); *see also* Naomi Cahn & Joan Meier, *Domestic Violence and Feminist Jurisprudence: Towards a New Agenda*, 4 B.U. PUB. INT. L.J. 339, 355 (1995) (asserting that public awareness campaigns in the United States "successfully elevated social recognition of the reality and severity of domestic violence"); Hardenbrook, *supra* note 17, at 744 (opining that increased public awareness campaigns have increased discussion and education regarding domestic abuse in the United States).

155. *See* Paul, *supra* note 35, at 240 (suggesting that South Africa has one of the most progressive Constitutions in the world because "[i]t offers each person the right to live free of oppression and violence"); *see also* Lisa Vetten, Addressing Domestic Violence in South Africa: Reflections on Strategy and Practice 3, *in* VIOLENCE AGAINST WOMEN: GOOD PRACTICES IN COMBATING AND ELIMINATING VIOLENCE AGAINST WOMEN (United Nations, Division for the Advancement of Women 2005), *available at* http://www.un.org/womenwatch/daw/egm/vaw-gp-2005/docs/experts/vetten.vaw.pdf (declaring the Domestic Violence Act passed in 1998 as progressive legislation). *But see* Helen Moffett, Entering the Labyrinth: Coming to Grips with Gender War Zones—The Case of South Africa 2 (United Nations Int'l Training Inst. for the Advancement of Women, Working Paper No. 5, 2001), *available at* http://www.un-instraw.org/en/docs/mensroles/Moffett.pdf (contending that although South Africa has one of the most progressive Constitutions in the world, it also possesses the worst figures for gender violence for a country not at war).

156. *See* Andrews, *supra* note 21, at 440 (noting that The National Coalition of Women lobbied politicians to address women's rights); *see also* Penelope E. Andrews, *From Gender Apartheid to Non-Sexism: The Pursuit of Women's Rights in South Africa*, 26 N.C. J. INT'L L. & COM. REG. 693, 693 (2001) (asserting that the transition from apartheid to democracy led to a Constitution committed to gender equality); Kim, *supra* note 74, at 3 (arguing that the lobbying efforts of women's groups led to provisions mandating gender equality).

157. *See* Andrews, *supra* note 21, at 442 (asserting that it is now understood that the major problems affecting women affect the nation as a whole); *see also* Bowman, *supra* note 70, at 847 (noting that by the mid-1990s, attention started to be paid to domestic violence in African countries, including South Africa); Wing, *supra* note 21, at 959 (citing various programs that have been created in South Africa since the 1990's that deal with the domestic violence problem).

continue to impede the law's full realization.[158] In fact, despite this progressive legislation, "violence against women has been one of the most prominent features of post-apartheid South Africa."[159]

In South Africa, domestic violence occurs at high rates across society.[160] Due to the relative poverty of much of the population, "[a] man is seen as necessary, especially in rural areas, and a degree of violence in a male-female relationship is frequently accepted as normal and inevitable."[161] In fact, in 1999, on average one woman was killed by her spouse every six days.[162] South Africa's domestic violence culture is viewed by some as a legacy of apartheid.[163] Domestic violence has been a subject of public debate, galvanizing activist groups and NGOs,

158. *See* Paula C. Johnson, *Danger in the Diaspora: Law, Culture, and Violence Against Women of African Descent in the United States and South Africa*, 1 J. GENDER RACE & JUST. 472, 524 (1998) (positing that the legacy of apartheid and persistent cultural traditions that condone women's subordination create an environment that permits violence against women); *see also* Bowman, *supra* note 70, at 857 (noting that a strong culture of violence was created in South Africa resulting from civil wars and post-colonial governments that used oppressive practices); Adrien Katherine Wing, *Critical Race Feminism and the International Human Rights of Women in Bosnia, Palestine, and South Africa: Issues for Latcrit Theory*, 28 U. MIAMI INTER-AM. L. REV. 337, 356 (1996) (asserting that South Africa's legacy of apartheid violence has left many citizens with the understanding that domestic violence is acceptable).

159. *See* Vetten, *supra* note 155, at 2 (describing how the domestic violence problem in South Africa has been controversial and has sparked activism and intervention by non-governmental organizations); *see also* Fionnuala Ni Aolain, *Political Violence and Gender During Times of Transition*, 15 COLUM. J. GENDER & L. 829, 829 (2006) (positing that there is increased reporting of domestic violence after the end of violent conflict, which may be the source of a sense of increased domestic violence in South Africa); Rebecca S. Katz, *The Role of Profiling in American Society: Racial Profiling: Genocide: The Ultimate Racial Profiling*, 5 J.L. & SOC. CHALLENGES 65, 76 (2003) (noting that as of 2003, South Africa had the highest rape per capita of any nation in the world).

160. *See* Andrews, *supra* note 21, at 444–45; *see also* Suzanne A. Kim, *Betraying Women in the Name of Revolution: Violence Against Women as an Obstacle to Democratic Nation-Building in South Africa*, 8 CARDOZO WOMEN'S L.J. 1, 7 (2001) (noting that statistics indicate that domestic abuse in South Africa cuts across all racial and class boundaries). *See generally* Wing, *supra* note 21, at 959 (asserting that many men experience a sense of trespass on their families as a result of the legacy of apartheid, and continue to take their frustration out on women).

161. See Andrews, *supra* note 21, at 446 (noting the considerable effect of South African culture on the domestic violence problem). *See generally* Brook K. Baker, *Teaching Legal Skills in South Africa: A Transition from Cross-Cultural Collaboration to International HIV/AIDS Solidarity,* 9 LEGAL WRITING 145, 157 (2003) (noting that several feminists have described lobola as a patriarchal bride's price used to justify men's domination of women); Rebecca S. Katz, *Genocide: The Ultimate Racial Profiling*, 5 J.L. & SOC. CHALLENGES 65, 76 (2003) (noting that cultural norms have placed women as subordinate objects of hate).

162. *See* Jennifer Podkul, *Domestic Violence in the United States and Its Effect on U.S. Asylum Law*, 12 HUM. RTS. BRIEF 16, 19 (2005) (noting that the World Health Organization has reported that, on average, a wife is killed by her spouse every six days in South Africa, despite the country's effort to formally recognize domestic violence victims as refugees under its Refugee Act); Standley, *supra* note 69. *See generally* Phoebe A. Haddon, *All the Difference in the World: Listening and Hearing the Voices of Women*, 8 TEMP. POL. & CIV. RTS. L. REV. 377, 387 (1999) (stating that statistics of crime against women in South Africa are stunning).

163. *See* Marina Angel, *Foreword to Symposium on Redefining Violence Against Women*, 8 TEMP. POL. & CIV. RTS. L. REV. 273, 282 (1999) (noting that the high incidence of rape of black women grew out of the fact that apartheid limited blacks to rural areas and the homelands); *see also* Wing, *supra* note 21, at 958 (arguing that because customary beliefs include the ideas that women are the property of men, many men believe that they have the right to batter and rape women). *See generally* Standley, *supra* note 69 (describing the Domestic Violence Act, enacted to combat high levels of domestic violence in South Africa).

and a "national priority" since the National Crime Prevention Strategy of 1996.[164] The laws surrounding domestic violence have increased and tightened over the past eight years, yet much remains to be done to change cultural attitudes towards women.[165]

2. The Legal Fight Against Domestic Violence

South Africa's Constitution[166] recognizes the right of all persons to "psychological integrity." This directly and implicitly prohibits all forms of discrimination.[167] It also provides the right to "be free from all forms of violence from either public or private sources."[168] These

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164. *See* Paul, *supra* note 35, at 242 (noting that the passage of the Domestic Violence Act in 1998 signified a positive development); *see also* Bowman, *supra* note 70, at 848 (remarking that non-governmental organizations, including those in South Africa, have set up shelters for battered women); Standley, *supra* note 69 (describing the Domestic Violence Act as a reaction to the rampant domestic violence problem in South Africa).

165. *See* Penelope Andrews, *Evaluating the Progress of Women's Rights on the Fifth Anniversary of the South African Constitution*, 26 VT. L. REV. 829, 835 (2002) (noting that after the 1994 elections, the legislation passed some laws to deal with the domestic violence problem); *see also* Deborah Zalesne, *Sexual Harassment Law in the United States and South Africa: Facilitating the Transition from Legal Standards to Social Norms*, 25 HARV. WOMEN'S L.J. 143, 182 (2002) (observing that since the end of apartheid South African women have made substantial gains in representation in law, government, and society). *See generally* Wing, *supra* note 21, at 957 (noting that domestic violence has been accepted as normal in certain spheres of society).

166. *See* S. AFR. CONST. 1996 ch. 2, § 12, *available at* http://www.info.gov.za/documents/constitution/1996/96cons2.htm#12 (providing for the right to psychological integrity, including the right to make decisions concerning reproduction and to security and control over one's body); *see also* Justice Yvonne Mokgoro, *Constitutional Claims for Gender Equality in South Africa: A Judicial Response*, 67 ALB. L. REV. 565, 566 (2003) (noting that the constitution also contains a bill of rights). *See generally* Marianne Geula, *South Africa's Truth and Reconciliation Commission as an Alternate Means of Addressing Transitional Government Conflicts in a Divided Society*, 18 B.U. INT'L L.J. 57, 61 (2000) (noting that the Constitution was one of the products of the agreement to transfer power from an apartheid government to a non-apartheid government).

167. *See* Erika George, *Instructions in Inequality: Development, Human Rights, Capabilities, and Gender Violence in Schools*, 26 MICH. J. INT'L L. 1139, 1169 (2005) (noting that the South African Constitution protects the right to bodily and psychological integrity); *see also* Charles Ngwena, *An Appraisal of Abortion Laws in South Africa from a Reproductive Health Rights Perspective*, 32 J.L. MED. & ETHICS 708, 715 (2004) (stating that the South African Constitution recognizes reproductive rights as part of the right to psychological integrity). *See generally* Julia L. Ernst, Laura Katzive & Erica Smock, *The Global Pattern of U.S. Initiatives Curtailing Women's Reproductive Rights: A Perspective on the Increasingly Anti-Choice Mosaic*, 6 U. PA. J. CONST. L. 752, 761 (2004) (remarking that the Choice on Termination of Pregnancy Act of 1996 reflects the South African Constitution's commitment to psychological integrity).

168. *See* S. AFR. CONST. 1996 ch. 2, § 12, *available at* http://www.info.gov.za/documents/constitution/1996/96cons2.htm#12 (providing for the right to be free from all forms of violence from either public or private sources). *See generally* Mark S. Kende, *The South African Constitutional Court's Embrace of Socio-Economic Rights: A Comparative Perspective*, 6 CHAP. L. REV. 137, 138–39 (2003) (noting that the new Constitution enacted in 1996 embodied South Africa's transformation from an oppressive regime to a democratic government); Wing, *supra* note 158, at 358 (noting that the Constitution of South Africa was scheduled to take effect in 1997 with a revised provision on freedom and security of the person).

guarantees are reflected in South Africa's policy against domestic violence, including the Domestic Violence Act.[169]

The purpose of South Africa's Domestic Violence Act is to "afford victims of domestic violence the maximum protection from domestic abuse that the law can provide; and to introduce measures . . . *to ensure that the relevant organs of the State give full effect to the provisions* . . . to convey that the State is committed to the elimination of domestic violence."[170] This Act specifically refers to South Africa's international obligations under the United Nations Convention on the Elimination of Violence Against Women to provide freedom, security of persons, and to end violence against women.[171] Promoting a "comprehensive legal approach," it emphasizes the responsibilities of law enforcement and the courts to arrest and prosecute batterers. It also provides for protective orders such as those available for domestic violence victims in the United States and the "imposition of 'additional conditions' . . . reasonably necessary to protect and provide for the safety, health or well-being of the complainant."[172]

The Act was a product of a committee of feminist lawyers and domestic violence experts, organized by the South African Law Commission to review current legislation.[173] The passage of this progressive legislation was the outcome of mobilizing women's organizations, and key networks between women politicians and bureaucrats that existed within the state and the pres-

169. *See* Domestic Violence Act in GG No. 19537 of Dec. 2, 1998 (S. Afr.) (hereinafter D.V.A.), http://www.info.gov.za/gazette/acts/1998/a116-98.pdf (providing comprehensive protections to curb domestic violence in South Africa); *see also* Andrews, *supra* note 21, at 446 (noting that the passage of the Domestic Violence Act in 1998 vindicates recognition of domestic violence as interfering with a woman's rights to security, equality, health and development, and is a commitment by the South African government to address the problem). *See generally* Podkul, *supra* note 162, at 19 (stating that although South Africa has a considerable domestic violence problem it has comprehensive asylum laws to protect victims of domestic violence).

170. *See* D.V.A., *supra* note 169, at pmbl. (providing that the appropriate government bodies must fully enforce the Domestic Violence Act). *See generally* Andrews, *supra* note 156, at 718–19 (remarking that the Domestic Violence Act provides an aggressive approach to combat violence against women); Cantalupo et al., *supra* note 68, at 582–83 (noting that statutes including the Domestic Violence Act have created civil remedies in the form of protection orders).

171. *See* D.V.A., *supra* note 169, at pmbl. (making reference to international commitments to curb violence against women); *see also* Andrews, *supra* note 21, at 453 (noting that the preamble of the Domestic Violence Act refers to the government's obligations under the Constitution, as well as South Africa's international obligations). *See generally* Meyersfeld, *supra* note 15, at 394 (noting that the 1994 U.N. Declaration on Violence Against Women described violence against woman as any gender-based violence that is likely to result in physical or psychological harm).

172. *See* D.V.A., *supra* note 169, at § 7(2) (providing that a court may impose any conditions it deems reasonably necessary to protect the safety of a domestic violence victim); *see also* Andrews, *supra* note 21, at 450 (stating that the Domestic Violence Act provides for full implementation and enforcement of domestic violence law by the relevant organs of the government); Zalesne, *supra* note 165, at 183 n.246 (noting the various protections the government must provide to victims of domestic violence under the Domestic Violence Act).

173. *See* Vetten, *supra* note 155, at 3–4 (noting that the establishment of this committee occurred after the Commission solicited the opinion of the Department of Justice and the Office of the Family Advocate). *See generally* Andrews, *supra* note 21, at 449 (stating that the Domestic Violence Act replaced large sections of the Prevention of Family Violence Act); Ashley J. Moore, *Endangered Species: Examining South Africa's National Rape Crisis and Its Legislative Attempt to Protect Its Most Vulnerable Citizens*, 38 VAND. J. TRANSNAT'L L. 1469, 1483 (2005) (noting that in 1996 the South African Law Commission also created a committee to examine sexual offenses by and against children).

ence of a "democratic discourse that integrates gender," and "civil society organizations with the skills and knowledge to intervene in and negotiate with, complex state processes."[174]

While the approaches to domestic violence laid out in the Act are sweeping and comprehensive, the ability of South Africa's legal system to fully implement these laws is limited.[175] The legal system is still largely male-dominated and characterized by "lingering hostility, insensitivity, and incompetence of major actors."[176] There also are burdensome requirements of proof, and many women remain ignorant of their legal rights.[177]

It is encouraging to note the increase in public discourse surrounding the passage of this legislation, and the fact that violence against women has become the focus of numerous women's and non-governmental organizations.[178] The government also has devoted funding to several initiatives prescribed in the Act, including a shelter program and a victim empowerment

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174. *See* Vetten, *supra* note 155, at 4 (noting that a more progressive version of the Domestic Violence Act was passed, in part, due to the efforts and lobbying by women's activists); *cf.* Mokgoro, *supra* note 166, at 566 (noting that a strong women's movement ensured that gender equality was firmly placed on the agenda when creating the constitution for South Africa). *See generally* Bowman, *supra* note 70, at 848 (noting that women activists lobbied for the passage of domestic violence codes in various African countries).

175. *See* Johanna E. Bond, *International Intersectionality: A Theoretical and Pragmatic Exploration of Women's International Human Rights Violations*, 52 EMORY L.J. 71, 110 (2003) (asserting that women in South Africa have more difficulty accessing the legal system); *see also* Zalesne, *supra* note 165, at 184 (stating that the lack of education and resources, as well as cultural notions about women and institutionalized gender stereotypes, have interfered with women's ability to take advantage of new domestic violence legislation); Shanyn Gillespie, Note, *Terror in the Home: The Failure of U.S. Asylum Law to Protect Battered Women and a Proposal to Right the Wrong of In re R-A-*, 71 GEO WASH. L. REV. 131, 135 (2003) (noting that many nations, including South Africa, have domestic violence laws that are underenforced).

176. *See* Andrews, *supra* note 21, at 455 (arguing that the use of law is full of contradictions because of hostility of the major actors in the legal system); *see also* Wing, *supra* note 21, at 958 (stating that domestic violence victims are unable to obtain much help from police and doctors, which results in them having to deal with a legal system that doubts their credibility). *See generally* Armatta, *supra* note 21, at 822 (noting the considerable judicial bias against victims of domestic violence).

177. *See* Rhoda Kadalie, *Abuse of Women a Blot on 'New SA'*, BUS. DAY (S. Afr.), Mar. 27, 2003, at 11 (noting that a study conducted in 2000 by the Medical Research Council found that of the 1,000 women interviewed, most were ignorant of their rights). *But see* Angel, *supra* note 163, at 281 (noting a 1998 decision by South Africa's highest court that eliminated the requirements for a cautionary instruction and collaborating evidence in rape cases). *See generally* Kim, *supra* note 74, at 8–9 (stating that few rape cases are reported and those that are reported are rarely prosecuted to conviction).

178. *See* Andrews, *supra* note 21, at 445 n.153 (stating that non-governmental organizations, female parliamentarians, and feminist scholars have highlighted the issue of violence against women); *see also* Johnson, *supra* note 158, at 525 (positing that dialogues between women constitute an integral part in the reconstruction of South Africa, as they help redefine the issues and contribute to the building of appropriate responses to rape and domestic violence); Donna E. Young, *Violence and Culture in the New International Order: Culture Confronts the International*, 60 ALB. L. REV. 907, 911 (1997) (noting that while women remain somewhat unprotected against domestic violence, they are actively pursuing the changes necessary to bring about equality).

program.[179] In 2004, the fight against domestic violence was intensified with the publication of a training manual to "enhance the skills of workers handling domestic violence cases," which "aims to help police officers, prosecutors, magistrates, counselors, health practitioners and victim assistant officers to deal adequately with domestic violence."[180] South Africa—armed with one of the most comprehensive and progressive domestic violence laws and policies in the world—along with the advocacy and cooperation of civil society, will likely continue to make progress.[181] The most important thing for South Africa to do now is monitor the implementation and progress achieved by the legislation currently in place.[182]

III. The Domestic and International Costs of Domestic Violence

As the most common form of violence against women, domestic violence is also the single, largest contributor to injury against women.[183] Its prevalence has an impact on public health costs, reproductive health and the economic contributions of women throughout the world. Costs include lost wages, lost realization of talent, lost economic development opportunities,

179. *See* South African Government Services, Admission into Shelters for Victims of Domestic Violence, *available at* http://www.services.gov.za/shelterhomesforvictims.aspx (last visited Sept. 27, 2006) (listing the services provided by the shelters for victims of domestic violence); *see also* Nduru, Moyiga, *Violence in South Africa Against Women Rising*, TRI-STATE DEFENDER (Tenn.), Dec. 3–7, 2005, at 7A (noting that although shelters provide an essential service for abused women, they are, at best, a temporary solution). *See generally* Moira Richards, *Women Standing Up Against Violence,* (reviewing RECLAIMING WOMEN'S SPACES: NEW PERSPECTIVES ON VIOLENCE AGAINST WOMEN AND SHELTERING IN SOUTH AFRICA (Yoon Jung Park, Joanne Fedler & Zubeda Dangor eds., 2002)), *available at* http://www.africanreviewofbooks.com/Review.asp?book_id=84 (last visited Sept. 27, 2006) (acknowledging that in addition to the government-funded shelters there are privately funded shelters opening up in South Africa).

180. *See* National Instruction 7/1999 in GG No. 28581 of March 3, 2006 (S. Afr.), *available at* http://www.info.gov.za/gazette/notices/2006/28581b.pdf (stressing that domestic violence workers are being given clear directions on how to respond to domestic violence cases); *see also* Richard Mantu, Domestic Violence Training Manual (Mar. 30, 2004), *available at* http://www.southafrica.info/public_services/citizens/your_rights/manual-domesticviolence.htm (announcing that South Africa has published a training manual to aid domestic violence workers in caring for victims of domestic violence). *See generally* Colleen Lowe Morna, *365 Days of Action to End Gender Violence in South Africa*, 18 SISTER NAMBIA 10, 10 (2006) (finding that low conviction rates for domestic violence offenders is in large part a result of bungled investigations by the police).

181. *See* Paul, *supra* note 35, at 240–41 (proclaiming that South Africa has an extremely progressive constitution that has encouraged many women's rights organizations to raise awareness about domestic violence and offer shelter for battered women); *see also* Wing, *supra* note 158, at 351 (asserting that South Africa's anti-discrimination clause, which covers gender and sex, is one of the most comprehensive in the world). *See generally* D.V.A., *supra* note 169 (codifying the rights of domestic violence victims and providing them with the maximum protection possible).

182. *See* Vetten, *supra* note 155, at 3 (positing that while South Africa is heading in the right direction with its new legislation it must be effectively implemented to make a difference); *see also Domestic Violence and Sexual Abuse Remain Priority for NPA*, AFR. NEWS, Mar. 18, 2004 (commenting that the South African National Prosecuting Authority has kept the fight against domestic violence and sexual abuse as one of their key priorities). *But see* Kim, *supra* note 74, at 10–11 (remarking that although South Africa has been reforming its rape law, women are still facing serious impediments within the judicial system and as a result are not afforded any real relief).

183. *See* Miccio, *supra* note 44, at 126 (claiming that the leading cause of injury to women between the ages of 15–44 is male intimate violence*); see also Domestic Violence is an Epidemic*, YORK DISPATCH (Pa.), Aug. 23, 2002 (noting that according to a U.S. Department of Justice nationwide study, 37 percent of women seeking treatment for violence-related injuries were hurt by a male intimate partner); ValueOption, The Costs of Domestic Violence, *available at* http://www.valueoptions.com/spotlight_domvio/htmlpages/costs.htm (last visited Sept. 27, 2006) (stating that one-fifth of all hospital emergency room patients and one-third of all female homicide victims were either hospitalized or murdered by a person with whom they were having an intimate relationship).

health care and numerous less visible costs.[184] The World Bank concluded in a 1999 Discussion Paper that the "social costs of domestic violence are enormous."[185] Ignoring the problem of domestic violence on an international and domestic level ignores real and significant harm to the worldwide economy.[186]

1. Medical Costs

The World Bank estimates that 1 to 5 years of life are lost in women ages 15 to 44 through death or disability resulting from domestic violence.[187] That is "more than to breast cancer, cervical cancer, obstructed labor, heart disease, AIDS, respiratory infections, motor vehicle

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184. *See* Andrew King-Ries, *Crawford v. Washington: The End of Victimless Prosecution?*, 28 SEATTLE U. L. REV. 301, 307 (2005) (alleging that the costs of domestic violence include property damage, medical costs, mental and healthcare costs, police and fire protection services, and victims services); *see also* Smolens, *supra* note 24, at 12 n.63 (citing Roxanna Carillo, VIOLENCE AGAINST WOMEN: AN OBSTACLE TO DEVELOPMENT IN WOMEN'S LIVES AND PUBLIC POLICY: THE INTERNATIONAL EXPERIENCE 108–13 (Meredith Turshen & Briavel Holcomb eds., 1993), asserting that the costs of domestic violence include "lost hours at work, lost realization of talents, costs to the health care and social services system, lost economic development opportunities, and numerous other less visible costs"); *Domestic Violence Affects Economy*, AFR. NEWS, Dec. 5, 2001 (remarking that a country's economy is negatively affected by violence against women because battered women often miss work and the nations health is at risk because violence against women contributes to the spread of HIV/AIDS).

185. *See* King-Ries, *supra* note 184, at 307 (alleging that domestic violence costs society billions of dollars a year); *see also* Jill Tiefenthaler, Amy Farmer & Amandine Sambira, *Service and Intimate Partner Violence in the United States: A County-Level Analysis*, 67 J. MARRIAGE & FAM. 565, 565 (2005) (claiming that domestic violence in the United States amounts to between $10 and $65 billion in losses a year); SYLVIA WALBY, WOMEN AND EQUALITY UNIT, THE COST OF DOMESTIC VIOLENCE 12 (2004) *available at* http://www.womenandequalityunit.gov.uk/research/cost_of_dv_Report_sept04.pdf (finding domestic violence in England and Wales to cost the state approximately 3.1 billion pounds a year).

186. *See* Carolyn Fish, *Community View*, JOURNAL NEWS (N.Y.), Jan. 12, 2005, at 4B (claming that domestic violence harms the U.S. economy to the tune of $7.5 billion of out-of-pocket costs with an additional $3 to 5 billion in lost workdays and productivity); *see also The Hidden Costs of the Domestic Relations Bill*, AFR. NEWS, June 7, 2005 (reporting that domestic violence has profound economic costs and ignoring domestic violence is a violation of the international laws calling for gender equality); Takyiwaa Manuh, *Women in Africa's Development: Overcoming Obstacles, Pushing for Progress*, AFR. RECOVERY ONLINE, Apr. 1998, *available at* http://www.un.org/ecosocdev/geninfo/afrec/bpaper/maineng.htm (establishing that according to The World Bank, ignoring violence against women hinders the growth of developing countries).

187. *See* Lori L. Heise, Adrienne Germain & Jacqueline Pitanguy, VIOLENCE AGAINST WOMEN: THE HIDDEN HEALTH BURDEN (World Bank Publications 1994); *see also* Sarah Venis & Richard Horton, *Violence Against Women: A Global Burden*, 359 LANCET 1172, 1172 (2002) (maintaining that domestic violence causes as much death and ill health in women ages 15 to 44 as cancer); Nieves Rico, *Gender-Based Violence: A Human Rights Issue* 26 (July 1996) *in* 16 MUJER Y DESSARROLLO (WOMEN AND DEVELOPMENT) (United Nations, CEPAL, Women and Development Unit 1989), *available at* http://www.eclac.cl/publicaciones/xml/3/4743/lcl957i.pdf (stressing that women can lose years of their lives as a result of death or illness caused by domestic violence or rape).

accidents or war."[188] Estimates of medical costs in the United States alone are telling.[189] While physical abuse from male partners in this country causes injury at higher rates than those caused by automobile accidents, muggings and rape combined, studies estimate that domestic violence accounts for 22 to 35 percent of women's visits to the emergency room. This results in 400,000 visits, 21,000 hospitalizations, 99,800 days in the hospital, and 39,000 visits to physicians every year.[190] According to the American Bar Association, medical expenses from Domestic Violence total at least $3 billion annually.[191]

Violence against women is a public health concern of considerable importance in developed and developing countries alike.[192] The World Health Organization has found that gender-based violence represents a substantial health burden in terms of morbidity and mortality

188. *See* Venis & Horton, *supra* note 187, at 1172 (explaining that domestic violence is a greater cause of death in women ages 15 to 44 than malaria and traffic accidents combined). *See generally* Yvette Lopez, *Sleeping with the Enemy: Mexico and Domestic Violence, Out for a Rude Awakening or Rising in Time?*, 25 WOMEN'S RTS. L. REP. 1, 1 (2003) (claiming that domestic violence is the leading cause of injury and death in women); Connecticut Department of Pubic Health, Looking Toward 2000—State Health Assessment, http://www.dph.state.ct.us/OPPE/sha99/intentional_injuries.htm (last visited Sept. 28, 2006) (concluding that domestic violence is the leading cause of injury to women).

189. *See* Tiefenthaler, Farmer & Sambira, *supra* note 185, at 565 (asserting that domestic violence costs the United States $10 billion a year in medical costs alone); *see also Domestic Violence Is an Epidemic*, *supra* note 183 (indicating that domestic violence in Pennsylvania alone is estimated to cost $326.6 million a year according to the Pennsylvania Blue Shield Institute); Domestic Violence, National Crime Victim's Rights Week, *available at* http://www.ojp.usdoj.gov/ovc/ncvrw/2005/pg5f.html (last visited Sept. 28, 2006) (stating that the United States spent almost $4.1 billion on direct medical and mental health care because of intimate partner violence).

190. *See* Hardenbrook, *supra* note 17, at 736 (positing that domestic violence results in 400,000 visits to emergency rooms, 21,000 hospitalizations, 99,800 days in the hospital, and 39,000 visits to physicians in the United States); *see also* Hoctor, *supra* note 14, at 646 (attributing more than 400,000 visits to emergency rooms, 21,000 hospitalizations, 99,800 days in the hospital, and 39,000 visits to personal physicians every year to domestic violence); N.Y. State Office for the Prevention of Domestic Violence, Medical and Legal Protocol for Dealing with Victims of Domestic Violence 1 (2004), *available at* http://www.opdv.state.ny.us/health_humsvc/health/protocol/protocol.pdf (alleging that women in the United States make approximately 700,000 domestic violence-related healthcare visits a year).

191. *See* Karen P. West et al., *The Mandatory Reporting of Adult Victims of Violence: Perspectives from the Field*, 90 KY. L.J. 1071, 1072 (2001) (stressing that domestic violence-related medical expenses total between an estimated $3 and $5 billion a year); *see also* A. Renee Callahan, Article, *Will the "Real" Battered Woman Please Stand Up? In Search of a Realistic Legal Definition of Battered Woman Syndrome*, 3 AM. U.J. GENDER SOC. POL'Y & L. 117, 119 n.7 (1994) (quoting Teri Randall, *Abuse at Work Drains People, Money, and Medical Workplace Not Immune*, 267 JAMA 1439, 1440 (1992), recognizing that domestic violence costs the United States approximately $45 billion a year, with most of that attributable to medical costs); Islam: The Modern Religion, Domestic Violence in the West, *available at* http://www.themodernreligion.com/women/w_violence.htm (last visited Sept. 28, 2006) (citing OASIS, Opposing Abuse with Service, Information & Shelter, *available at* http://www.themodernreligion.com/women/w_violence.htm, declaring that domestic violence costs at least $3 billion annually in medical expenses).

192. *See* Shakeel Ahmed Ibne Mahmood, *The Socio-Economic Impact of HIV/AIDS in Bangladesh: The Role of Public Administration in Response to HIV/AIDS*, 30 S. BUS. REV. 25, 25 (2004) (recognizing that violence against women is a major public health concern, especially in developing countries). *See generally* Cynthia Dockrell, *Women's Health Checkup; Tripping on Tripp*, BOSTON GLOBE, June 3, 1998, at F3 (noting that violence against women is one of the many health issues popping up in magazine and newspaper articles); World Health Organization, Violence Against Women, *available at* http://www.who.int/mediacentre/factsheets/fs239/en/index.html (last visited Sept. 28, 2006) (discussing the impact that violence against women has on the health care systems of countries, such as the United States, Zimbabwe, and Nicaragua).

rates, and has a significant negative impact on women's physical and mental health.[193] These risks include immediate physical and psychological injury and less obvious risks, such as gynecological disorders, unsafe abortions, pregnancy complications, unwanted pregnancy and sexually transmitted infections, including HIV.[194]

Physical injuries "ranging from bruises and fractures to chronic disability such as partial or total loss of hearing or vision,"[195] remain a physical manifestation of the costs of injury to women due to domestic violence.[196] Studies in many countries indicate high levels of violence during pregnancy result in a risk to the health of the mother and the fetus.[197] Domestic vio-

193. *See* Tanya Jacobs, Health Systems Trust, Breaking the Silence: A Profile of Domestic Violence in Women Attending a Community Health Center (June 2, 2000), *available at* http://www.hst.org.za/news/20000602 (citing the World Health Organization, which stated that, "[v]iolence against women is the world's most pervasive form of human rights violation. Gender based violence represents a substantial health burden for women in terms of morbidity and mortality rates and makes a significant negative impact on their physical and mental health"); *see also* Rafael Lozano Ascencio, *The Health Impact of Domestic Violence: Mexico City, in* TOO CLOSE TO HOME: DOMESTIC VIOLENCE IN THE AMERICAS 81, 83 (Andrew R. Morrison & Maria Loreto Biehl eds., 1999) (analyzing the effect domestic violence has on women's health, including loss of reproductive years, physical and psychological injury); World Health Organization (WHO), World Report of Violence and Health: Sexual Violence 149, *available at* http://www.who.int/violence_injury_prevention/violence/global_campaign/en/chap6.pdf (last visited Sept. 28, 2006) (expressing that domestic violence has a grave impact on the physical and mental health of the victim).

194. *See* Patricia Glaser Shea, *Recent Murder Trial Cast Needed Glare on Verbal Abuse*, TENNESSEAN (Tenn.), Sept. 5, 2006, at 7A (commenting that one of the injuries sustained through domestic abuse is the systematic control over a person's life); *see also Notice to Readers: Domestic Violence Awareness Month*, CENTERS FOR DISEASE CONTROL AND PREVENTION, MORBIDITY AND MORTALITY WEEKLY REPORT, Oct. 6, 2006 (reporting that victims of domestic violence suffer from a variety of physical injuries that can turn into permanent disabilities as well as psychological injuries including depression, anxiety, and post-traumatic stress disorder); Tanya Jacobs, Health Systems Trust, Breaking the Silence: A Profile of Domestic Violence in Women Attending a Community Health Center, June 6, 2002, *available at* http://www.hst.org.za/news/20000602 (asserting that domestic violence victims suffer physically and mentally).

195. *See* Epstein et al., *supra* note 3, at 473 (proclaiming that women who are abused suffer from bruises, cuts, scrapes, sprains, burns, broken teeth and bones, dislocations, internal injuries, wounds from knives or guns, and permanent disfigurement or brain damage); *see also* Michelle Rice, U.S. Dep't of Veterans Affairs, Domestic Violence: A National Center for PTSD Fact Sheet, *available at* http://www.ncptsd.va.gov/facts/specific/fs_domestic_violence.html?printable=no (last visited Sept. 28, 2006) (listing the physical injuries that may be experienced by domestic violence victims, such as lacerations, bruises, broken bones, head injuries, internal bleeding, chronic pelvic pain, abdominal and gastrointestinal complaints, frequent vaginal and urinary tract infections, sexually transmitted diseases, HIV and possibly pregnancy-related problems). *See generally* Kapoor, *supra* note 31, at 4–5 (acknowledging that in countries around the world, the percentages of women who are victims of physical domestic violence are astounding).

196. *See* Callahan, *supra* note 191, at 130–31 (positing that battered women's syndrome can lead to physical manifestations of the injuries suffered by a victim of domestic violence); *see also* American College of Surgeons, Statement on Domestic Violence, *available at* http://www.facs.org/fellows_info/statements/st-32.html (last visited Sept. 28, 2006) (stating that the physical manifestations of domestic violence include anything from a minor cut to a penetrating wound). *See generally* Cházaro & Casey, *supra* note 47, at 143 (illustrating the plight of domestic violence victims in Guatemala who, although exhibiting the physical manifestations of being severely beaten, are often not heard).

197. *See Domestic Violence During Pregnancy Increases Risk of Early Childhood Mortality,* ASCRIBE NEWSWIRE (Baltimore), Aug. 1, 2006 (reiterating that domestic violence towards mothers during pregnancy raises the risk of death for the child); *see also Domestic Violence Linked to Child Death,* UPI (India), Aug. 2, 2006 (reporting that domestic violence against pregnant women raises the child's risk of death); Kapoor, *supra* note 31, at 9 (explaining that children of mothers who are beaten are more likely to be born underweight; they carry a higher risk factor of dying in infancy or childhood).

lence also has an adverse effect on the mental health of women; increases the incidence of depression, drug and alcohol abuse and sleeping and eating disturbances; elevates blood pressure and causes post-traumatic stress disorder.[198] It is difficult to fully quantify the enormous impact domestic violence has on the public health system. The costs of domestic violence are direct and indirect and statistics on domestic violence and medical costs in many less developed countries are scarce.[199]

2. Costs to the Economy

The 1994 United Nations World Survey on the Role of Women in Development reported that women "play a major economic role in all countries,"[200] contributing to the formal and informal sectors.[201] The United States Agency on International Development reports that millions of women are "economically active worldwide—in agriculture, small and microenterprise, and, increasingly, in the export processing industries that drive globalization. [The majority] . . .

198. *See* Evan Stark, *Nicholson v. Williams Revisited: When Good People Do Bad Things*, 82 DENV. U. L. REV. 691, 711 (2005) (indicating that battered women are more likely to abuse drugs and alcohol, have a psychotic break, report depression or attempt suicide); *see also* Kelsey S. Barnes, *The Economics of Violence: Why Freedom from Domestic Violence Must Be Treated as a Developmental Right in International Law*, 6 U. MIAMI Y.B. INT'L L. 97, 120 (1997) (revealing that victims of domestic abuse are 15 times more likely to abuse alcohol or drugs than women who are not abused); Kapoor, *supra* note 31, at 9 (commenting on the severe and fatal consequences domestic violence can have on a victim's mental health).

199. See Linda L. Ammons, *Dealing with the Nastiness: Mixing Feminism and Criminal Law in the Review of Cases of Battered Incarcerated Women—A Tenth-Year Reflection*, 4 BUFF. CRIM. L. REV. 891, 899–900 (2001) (asserting that the cost of domestic violence, including medical costs, is $67 billion a year); *see also* Mercedes Perez, *Legislative Reform and the Struggle to Eradicate Violence Against Women in the Dominican Republic*, 14 COLUM. J. GENDER & L. 36 (2005) (acknowledging that the under reporting of domestic violence cases in Latin American countries results in only a small percentage of family violence cases being reported); Status of Women Canada, Women and Violence 2, *available at* http://www.swc-cfc.gc.ca/pubs/b5_factsheets/ b5_factsheets_13_e.pdf (last visited Sept. 28, 2006) (concluding that Canada estimates the full cost of domestic violence in the country to be $4.2 billion per year).

200. *See* Barnes, *supra* note 198, at 114–15 (finding that even though many consider their contributions to be insignificant, women play a vital economic role in every country); *see also* Cindy A. Schipani et al., *Women and the New Corporate Governance: Pathways for Obtaining Positions of Corporate Leadership*, 65 MD. L. REV. 504, 514–17 (2006) (analyzing the role that women play in the American workplace); *PM Urges Women to Play Pro-Active Role in Socio-Economic Progress of Country*, PAKISTAN NEWSWIRE, Oct. 17, 2003 (citing the Prime Minister of Pakistan, Mir Zafarullah Khan Jamali, as saying that the country needs women to play a pro-active role in socio-economic development of the country in order for the country to grow at a rapid pace).

201. See Katherine Spengler, *Expansion of Third World Women's Empowerment: The Emergence of Sustainable Development and the Evolution of International Economic Strategy*, 12 COLO. J. INT'L ENVTL. L. & POL'Y 303, 310 (2001) (noting that the majority of women's work in developing regions takes place in the informal economic sector, which includes work like agriculture and domestic duties); *see also* Rekha Mehra, *Women, Empowerment, and Economic Development*, 554 ANNALS AM. ACAD. POL. & SOC. SCI. 136, 144 (1997) (noting that a higher percentage of women, as opposed to men, work in the informal sector because of illiteracy, lack of education and/or skills); Lorraine A. Schmall, *Transnational Issues of Women and Pension Security and Reform*, 14 N.Y. INT'L L. REV. 87, 99 (2001) (recognizing that cultural issues in some countries force women to remain unemployed or to work in the informal sector).

of these women live in developing regions of Asia, Africa, and Latin America."[202] Women's economic contributions, especially in developing countries, are under-counted because they are often in the "informal" sector where reporting is less systematic.[203]

While women account for only 31 percent of the labor market in developing countries, "economic activity" in the informal sector increases the estimated percentage of women active in the economy to 88 percent of women in India and 80 percent in some African countries.[204] Households are intimately involved in economic production, "an economic unit . . . interdependent with larger economic forces."[205] Within the formal sector alone, without counting household work and informal economic activity, women account for 854 million of the global work force.[206]

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202. *See* USAID, Women in Development: Achieving Results, *available at* http://www.usaid.gov/our_work/cross-cutting_programs/wid (last visited Sept. 26, 2006) (maintaining that over 800 million women participate in the worldwide economy, particularly in agriculture, small and microenterprise, and export processing industries, and that over 70 percent of these women live in the developing regions of Asia, Africa, and Latin America); *see also* Uché U. Ewelukwa, *Centuries of Globalization; Centuries of Exclusion: African Women, Human Rights, and the "New" International Trade Regime,* 20 BERKELEY J. GENDER L. & JUST. 75, 86–87 (2005) (stating that since African women do not have the same access to formal employment as African men, a majority of African women are farmers who produce agricultural exports for domestic consumption and export); Rachel Rebouché, Note, *Labor, Land, and Women's Rights in Africa: Challenges for the New Protocol on the Rights of Women,* 19 HARV. HUM. RTS. J. 235, 241 (2006) (stating that in 26 African countries, between 80 percent and 97.8 percent of all economically active women worked in agriculture in 1991).

203. *See* UNFPA, Counting the Cost of Gender Inequality, *available at* http://www.unfpa.org/swp/2000/english/ch05.html (last visited Sept. 26, 2006) (noting that because the majority of women's economic activities take place in the less systematic and informal sector, their contributions are under-counted and the benefits that could be obtained if those activities were to receive the adequate support are underscored); *see also* Spengler, *supra* note 201, at 310–11 (positing that if unpaid female labor was included in statistics, it would add $4 trillion to the world economy). *See generally* Guy Davidov*, Enforcement Problems in "Informal" Labor Markets: A View from Israel*, 27 COMP. LAB. L. & POL'Y J. 3, 3–4 (2005) (defining the "informal economy" as those activities not covered by formal arrangements; that is, they are, in practice, operated outside the formal reach of the law).

204. *See* Maria de los Angeles Moreno, *Women's Rights and International Dialogue,* 16 DICK. J. INT'L L. 191, 194 (1997) (noting that including informal sector activities in the definition of "economic activity" increases female participation rates from 13 percent to 88 percent in India and from 11 percent to 63 percent in Bangladesh). *See generally* Lisa Avery, *Microcredit Extension in the Wake of Conflict: Rebuilding the Lives and Livelihoods of Women and Children Affected by War*, 12 GEO. J. ON POVERTY L. & POL'Y 205, 212 (2005) (positing that although female workers comprise about two-thirds of the world's working hours, they earn only 10 percent of the world's income); Rebouché, *supra* note 202, at 239 (announcing that 80 percent of African women do agricultural work and only a few perform salaried work because they are largely excluded from formal employment).

205. *See* Barbara Bennett Woodhouse, *"It All Depends on What You Mean by Home": Toward a Communitarian Theory of the "Nontraditional" Family,* 1996 UTAH L. REV. 569, 590 (1996) (defining the family as the basic residential unit within which economic production is carried out); *see also* Lee E. Teitelbaum, *The Family as a System: A Preliminary Sketch,* 1996 UTAH L. REV. 537, 550 (1996) (recognizing the role of the family as an economic system or unit). *See generally* GARY S. BECKER, A TREATISE ON THE FAMILY (Harvard University Press 1991).

206. *See* Barnes, *supra* note 198, at 116 (positing further that in 1990, about 41 percent of women, aged 15 and over, were economically active in the global market); *see also* Margaret Plattner, *The Status of Women Under International Human Rights Law and the 1995 U.N. World Conference on Women,* 84 KY. L.J. 1249, 1267 (1995) (indicating that in 1990, women constituted 32 percent of the world's workforce). *See generally* Morton Paglin, *The Underground Economy: New Estimates from Household Income and Expenditure Surveys,* 103 YALE L.J. 2239, 2244 (1994) (asserting that in the United States, household work is estimated to constitute 24 percent of the country's GNP).

Domestic violence prevents women from participating in all realms of society. The result is decreased productivity and female labor participation and reduced wages.[207] Every year, United States employers lose up to $13 billion to absenteeism and sick days resulting from domestic violence.[208] In Chile, women suffering from domestic violence earn one-half that of women who do not.[209] Using economic projections from the information available on the cost of domestic violence, along with the prevalence of women in the global work force in the formal and informal sectors, economic losses are staggering.[210]

There is also a growing "recognition that countries cannot reach their full potential" as long as women cannot fully participate in society."[211] Domestic violence "undermines progress towards human economic development"[212] because hindering the involvement and participa-

207. *See* John E. Matejkovic, *Which Suit Would You Like? The Employer's Dilemma in Dealing with Domestic Violence*, 33 CAP. U.L. REV. 309, 311 (2004) (asserting that one-quarter to one-half of female victims lose their jobs due to domestic violence); *see also* Comment, *Employer Liability for Domestic Violence in the Workplace: Are Employers Walking a Tightrope Without a Safety Net?*, 31 TEX. TECH L. REV. 139, 143 (2000) (noting that domestic violence decreases productivity in the workplace and increases costs to employers); Kapoor, *supra* note 31, at 13 (illustrating that domestic violence has caused a reported 30 percent of abused women to lose their jobs in the U.S. and that in Chile, abused women earn less than one-half in average wages compared to those women who do not suffer from violence at home).

208. *See* Hoctor, *supra* note 14, at 646 (stating that domestic violence costs employers between $3 and 13 billion annually); *see also* Ralph Henry, *Domestic Violence and the Failures of Welfare Reform: The Role for Work Leave Legislation,* 20 WIS. WOMEN'S L.J. 67, 83 (2005) (recognizing that domestic violence victims are often harassed by their batterers at work; prevented from arriving at work on time; and kept from attending work because of serious injuries); Comment, *supra* note 207, at 143 (noting that domestic violence results in a projected 175,000 days of missed employment each year).

209. *See* Kapoor, *supra* note 31, at 13 (stating that in Chile, women who suffer from domestic violence earn an average of $150 USD per month, while women who are not victimized by domestic violence earn an average of $385 USD). *See generally* Michael Selmi & Naomi Cahn, *Women in the Workplace: Which Women, Which Agenda?,* 13 DUKE J. GENDER L. & POL'Y 7, 9 (2006) (commenting that domestic violence disproportionately affects lower-income women and interferes with their work obligations); Wagner, *supra* note 48, at 353 (noting that women who are victimized by domestic violence are less productive, have lower incomes, and spend less money).

210. *See* Ruth Jones, *Guardianship for Coercively Controlled Battered Women: Breaking the Control of the Abuser,* 88 GEO. L.J. 605, 640–41 (2000) (listing the multitude of economic costs of domestic violence); *see also* Lopez, *supra* note 188, at 2–3 (stating that domestic violence costs the United States approximately 67 billion annually); Rios, *supra* note 30, at 715 (claiming that in terms of lost productivity from paid work and household chores, domestic violence in New York alone, costs $90 million in lost productivity per year and $90 million in lifetime lost earnings for victims).

211. *See* Mona Zulficar, *From Human Rights to Program Reality: Vienna, Cairo, and Beijing in Perspective*, 44 AM U.L. REV. 1017, 1023 (1995) (emphasizing that the empowerment of women and the improvement of their political, social, economic, and health status is not merely an important end in itself, but rather an essential condition for the achievement of sustainable development); *see also* Kapoor, *supra* note 31, at 11 (recognizing that countries will not reach their full potential if women cannot fully participate in society); USAID, Women in Development: Achieving Results, *available at* http://www.usaid.gov/our_work/cross-cutting_programs/wid (last visited Sept. 26, 2006) (recognizing that women's economic, social, and political contributions make them essential to the effective development not only of their families and communities, but also of their nations).

212. *See* Lopez, *supra* note 188, at 2 (positing that domestic violence affects individuals, local communities, business, and economic development for generations); *see also* Wagner, *supra* note 48, at 353 (recognizing that domestic violence impedes economic development because women who are abused at home are less productive, have lower incomes, and spend less money); Kapoor, *supra* note 31, at 9 (asserting that domestic violence stymies human development because women's participation is a key ingredient in all realms of social development).

tion of one-half of the population erodes one-half of a country's human capital.[213] Clearly, domestic violence has a huge adverse effect on all sectors of society.

The costs of domestic violence, arising out of both the physical harm to and the marginalization of women, are significant and far-reaching.[214] Violence against women throughout the world is not a private matter. Rather it has a concrete adverse effect on the world economy and the developmental potential of many countries.[215] Failure of states to implement effective policies to combat domestic violence will result in increased costs to society, decreased productivity and a loss of a significant part of its work force. The effect that domestic violence has on the economic sphere should be used to "crack the hard shell that protects private life from public scrutiny."[216] State actors should realize this "private" problem adversely affects many parties, including other individuals, states, and the global community, as well as the victim and perpetrator.

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213. *See* Kapoor, *supra* note 31, at 9 (positing that women's participation in economic activities is necessary to development and that impeding their involvement will only cause a loss of economic potential by one-half). *See generally* Avery, *supra* note 204, at 63 (stressing the valuable economic contributions of women and indicating that although they represent two-thirds of the working population and produce one-half of the world's food, they earn only ten percent of the world's income and own less than one percent of the world's property); Zulficar, *supra* note 211, at 1023 (discussing the need for economic participation of the female population in order to spur development).

214. *See Barnes*, *supra* note 198, at 119 (discussing the healthcare, crime, and employment costs of domestic violence); *see also* Eileen Kaufman, *Women and Law: A Comparative Analysis of the United States and Indian Supreme Courts' Equality Jurisprudence*, 34 GA. J. INT'L & COMP. L. 557, 608 (2006) (suggesting that the United States spends $5 to $10 billion dollars a year on healthcare, criminal justice, and other social costs of domestic violence); Lopez, *supra* note 188, at 11–12 (recognizing the physical and mental consequences of domestic violence, and tracking the effects of those consequences, including contributions to a cycle of domestic violence within families, and serious economic losses).

215. *See* Barnes, *supra* note 198, at 127 (arguing that an economic argument for treating domestic violence as an international issue is most effective because women's participation in their countries' development, particularly in areas of family planning, environmental protection and education, is crucial and that domestic violence prevents women from participating in these and other areas of development); *see also* Smolens, *supra* note 24, at 40 (arguing that in order to address domestic violence as a public matter, countries should address the economic effects of domestic violence on society at large rather than solely the physical or psychological effects on individual victims). *See generally* Hilary Charlesworth, Christine Chinkin & Shelley Wright, *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613, 625 (1991) (addressing the dichotomy between the public and private spheres, and noting that domestic violence has not traditionally been addressed by international law because international law addresses only the "public sphere").

216. *See* Smolens, *supra* note 24, at 40 (arguing that by presenting the effects of domestic violence in terms of economic loss to countries in the EU, European countries can address domestic violence without giving the appearance of police states interfering with the private lives of their citizens). *See generally* John M. Burman, *Lawyers and Domestic Violence: Raising the Standard of Practice*, 9 MICH. J. GENDER & L. 207, 208–09 (2003) (arguing that although domestic violence has recently emerged from the shadows and is now subject to public scrutiny, a trend of apathy still remains); Sack, *supra* note 46, at 1718 (discussing the history of domestic violence policy and suggesting that battered women's advocates still struggle to fight the concept of domestic violence as a private family matter that historically kept domestic violence away from public scrutiny).

THE SOCIO-ECONOMIC COSTS OF DOMESTIC VIOLENCE[217]

(TABLE II)

Direct Costs: Value of goods and services used in treating or preventing violence	• Medical • Police • Criminal Justice System • Housing • Social Services
Non-monetary Costs: Pain and suffering	• Increased morbidity • Increase mortality via homicide and suicide • Abuse of alcohol and drugs • Depressive disorders
Economic Multiplier Effects: Macro-economic, labor market, intergenerational productivity impacts	• Intergenerational transmission of violence • Reduced quality of life • Erosion of social capital • Reduced participation in the democratic process

IV. Domestic Violence: An International Human Rights Violation

As previously noted, domestic violence is a deeply rooted problem in every country of the world.[218] Although formerly perceived as a private concern, it is "now recognized as a serious

217. *See* Kapoor, *supra* note 31, at 13 (outlining the direct costs, non-monetary costs, and the economic multiplier effects of domestic violence). *See generally* Jones, *supra* note 210, at 640 (discussing the economic costs of domestic violence, which involves not only physical and psychological harm, but also imposes economic costs on society in terms of healthcare, shelter, crime prosecution, etc.); Callahan, *supra* note 191, at 119 (recognizing the "enormous" social effects of domestic violence).

218. *See* Vesa, *supra* note 3, at 310 (noting that although domestic violence is an entrenched problem in every nation of the world, the international community has failed to establish effective legal standards to address this problem); *see also* Christina Glezakos, Comment, *Domestic Violence and Asylum: Is the Department of Justice Providing Adequate Guidance for Adjudicators?*, 43 SANTA CLARA L. REV. 539, 540 (2003) (stating that domestic violence is a social problem affecting women in every nation especially those with patriarchal social structures that do not recognize domestic violence as a punishable offense). *See generally* AMNESTY INTERNATIONAL, BROKEN BODIES, SHATTERED MINDS: TORTURE AND ILL-TREATMENT OF WOMEN 10–11 (2001), *available at* http://web.amnesty.org/library/index/engact400012001#download (follow "ACT400012001.pdf" hyperlink) (noting that violence in the home, which predominantly affects poor and socially marginalized women, has been recognized internationally as a human rights violation that infringes on a woman's right to personal integrity, causing physical and psychological effects that linger long after the violence ends).

problem on a global level."[219] As domestic violence emerges from the private, all too often dark realm of domesticity, this formerly taboo issue can no longer be ignored by the international community. States must be held accountable where they fail to protect the fundamental human rights owed to women by passing and enforcing measures that effectively deal with the problem of domestic violence against women. International law can be used to compel and guide this action.[220]

A. Violence Against Women in the International Human Rights Framework

The concept of human rights is "one of the few moral visions ascribed to internationally."[221] The basic tenets of this vision are "the inherent dignity and worth of all members of the human family, the inalienable right to freedom from fear and want,"[222] and equal rights

219. *See* Nancy Kim, *Toward a Feminist Theory of Human Rights: Straddling the Fence Between Western Imperialism and Uncritical Absolutism,* 25 COLUM. HUM. RTS. L. REV. 49, 49 (1993) (arguing that expanding the concept of internationally recognized human rights to include women's rights requires a dismantling of the distinction between public and private action); *see also* Medina, *supra* note 15, at 13–14 (indicating that domestic violence is a global problem that affects international law on many fronts, including international conventions, state domestic laws, and the work of international organizations and non-governmental organizations); Paul, *supra* note 35, at 228 (claiming that domestic violence is now recognized both by its victims and by societies as a serious problem on a global level).

220. *See* Meyersfeld, *supra* note 15, at 373 (using the public/private analysis to suggest that domestic violence should be reconceptualized as torture under international law); *see also* William Paul Simmons, *Remedies for the Women of Ciudad Juárez Through the Inter-American Court of Human Rights,* 4 NW. U. J. INT'L HUM. RTS. 492, at 11 (2006) (arguing that by holding states accountable for failing to investigate and prevent violations by non-state actors will aid in deconstructing the public/private dichotomy in international law and will make courts more willing to expand the definition of human rights abuses to include domestic violence); Stark, *supra* note 153, at 257 (recognizing three grounds under which domestic violence law is relevant to international lawyers: (1) several private international treaties that implicitly address domestic violence have been ratified; (2) domestic violence has been recognized as a violation of women's human rights; and (3) domestic violence has recently been the subject of several important initiatives by a number of international organizations and non-governmental organizations).

221. *See* Dorothy Q. Thomas & Michele E. Beasley, *Domestic Violence as a Human Rights Issue,* 58 ALB. L. REV. 1119, 1120 (1995) (observing that the concept of human rights is one of the few moral visions ascribed to internationally but commenting that despite this recognition, the international community has been consistently unable to conceptualize domestic violence as a human rights issue under international law); *see also* Ryan F. Haigh, Note, *South Africa's Criminalization of "Hurtful" Comments: When the Protection of Human Dignity and Equality Transforms into the Destruction of Freedom of Expression,* 5 WASH. U. GLOBAL STUD. L. REV. 187, 189 (2006) (discussing the Universal Declaration of Human Rights and defining its goal as the creation of a list of "basic rights that the international community agreed were 'inherent' and 'equal' for all human beings). *See generally* Hannah R. Shapiro, *The Future of Spousal Abuse as a Gender-Based Asylum Claim: The Implications of the Recent Case of Matter of R-A-,* 14 TEMP. INT'L & COMP. L.J. 463, 467 (2000) (arguing that although general human rights have been recognized internationally, the concept of women's human rights is a fairly recent phenomenon).

222. *See* Thomas & Beasley, *supra* note 221, at 1120 (arguing that domestic violence violates the basic principles of the moral vision of human rights, which is "the inherent dignity and worth of all members of the human family, the inalienable right to freedom from fear and want, and the equal rights of men and women"); *see also* Richard G. Wilkins & Jacob Reynolds, *International Law and the Right to Life*, 4 AVE MARIA L. REV. 123, 165–66 (2006) (recognizing that "freedom, justice and peace in the world" are founded upon both the "inherent dignity of mankind" and the "equal and inalienable rights of all members of the human family"). *See generally* Elizabeth Dietz, *Violence Against Women in the United States: An International Solution,* 13 ARIZ. J. INT'L & COMP. L. 551, 552 (1996) (arguing that the number of women victimized by men violates the "moral vision" encapsulated in the internationally ascribed concepts of human rights).

under the law.[223] Domestic violence violates these tenets.[224] Although international law focuses on the "public" realm and binds states rather than individuals,[225] international human rights law ensures that individual rights are not infringed upon by the states.[226]

Throughout the world, women predominantly occupy the "private realm" due to "social, political and economic inequalities between men and women."[227] Since domestic violence is an act committed by individuals against women within this "private realm," violence against women was not traditionally included in the international law discussion and framework because "[t]he exclusive focus on the behavior of states confines the operation of international human rights law entirely within the public sphere."[228] Until recently, a "state's failure to prosecute violence against women equally with other similar crimes or to guarantee women the fun-

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223. *See* Patrick McKinley Brennan, *The "Right" of Religious Liberty of the Child: Its Meaning, Measure, and Justification*, 20 EMORY INT'L L. REV. 129, 133 (2006) (discussing international human rights and indicating that a commitment to equality between men and women is reaffirmed by the U.N. Charter); *see also* Surakiart Sathirathai, *Renewing Our Global Values: A Multilateralism for Peace, Prosperity, and Freedom*, 19 HARV. HUM. RTS. J. 1, 1 (2006) (recognizing equality of men and women as a human right to be affirmed globally); Thomas & Beasley, *supra* note 221, at 1120 (arguing that domestic violence violates the basic human rights principle of equal rights for men and women).

224. *See* Vanessa Brocato, *Profitable Proposals: Explaining and Addressing the Mail-Order Bride Industry Through International Human Rights Law*, 5 SAN DIEGO INT'L L.J. 225, 240–41 (2004) (stating that domestic violence is an "assault" on the victim's basic dignity and worth as a human being); *see also* Elizabeth M. Schneider, *Resistence to Equality*, 57 U. PITT. L. REV. 477, 489 n.44 (1996) (remarking that domestic violence is a violation of the basic aspects of human rights); Thomas & Beasley, *supra* note 221, at 1120 (explaining that domestic violence is a violation of the "concept of human rights").

225. *See* Arden B. Levy, *International Prosecution of Rape in Warfare: Nondiscriminatory Recognition and Enforcement*, 4 UCLA WOMEN'S L.J. 255, 261–62 (1994) (stating that the public sphere is the "province of international law"); *see also* A. Yasmine Rassam, *Contemporary Forms of Slavery and the Evolution of the Prohibition of Slavery and the Slave Trade Under Customary International Law*, 39 VA. J. INT'L L. 303, 346 (1999) (explaining that the public realm is distinct from the "familial domain" and international law is properly exercised only in the public realm); Thomas & Beasley, *supra* note 221, at 1126 (arguing that human rights are enforceable against the state, but states are not accountable for the acts of every individual).

226. *See* Universal Declaration of Human Rights, G.A. Res. 217A, pmbl., U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948) (emphasizing that member states pledge not to violate basic human rights); *see also* Thomas & Beasley, *supra* note 221, at 1121 (explaining that under human rights law, it is the states' obligation to refrain from violating the rights of individuals); Michael Thomas, Note, *Teetering on the Brink of Equality: Sexual Orientation and International Constitutional Protection*, 17 B.C. THIRD WORLD L.J. 365, 379 (1997) (stating that international human rights law serves to limit a state's ability to infringe upon individual rights).

227. *See* Suzanne A. Kim, *Reconstructing Family Privacy*, 57 HASTINGS L.J. 557, 569 (2006) (commenting that the "realm of women" has traditionally been confined to the private sphere); *see also* Levy, *supra* note 225, at 262 (explaining that in society, the private realm includes home and family, and that is the place for women); Meyersfeld, *supra* note 15, at 375 (suggesting that women are restricted to the private sphere because of political, social and economic inequalities).

228. *See* Thomas & Beasley, *supra* note 221, at 1121 (reasoning that because international law focuses on the actions of states, it is therefore primarily concerned with the public realm); *see also* Charlesworth, Chinkin & Wright, *supra* note 215, at 625 (revealing that international law relies on the public/private distinction and remains solely focused on the public dimension); Sally F. Goldfarb, *Violence Against Women and the Persistence of Privacy*, 61 OHIO ST. L.J. 1, 1 (2000) (stating that issues important to women, such as domestic violence, traditionally have been deemed private and therefore exempt from legal scrutiny).

damental civil and political right to equal protection of the law without regard to sex have largely escaped international condemnation."[229]

Women's activists first brought attention to the issues of "equality and non-discrimination for women" during the 1960s and 1970s. Recognizing women's rights as human rights, however, was not achieved until the 1980s, when the true severity, pervasiveness, and global dimensions of violence were first recognized and addressed by the international community.[230] In 1985, a report of the United Nations Final Conference of the Decade for Women agreed that violence against women "exists in various forms in every day life *in all societies* . . . (and that) such violence is a major obstacle to the achievement of peace and other objectives and should be given special attention . . . "[231] In 1989, the United Nations Commission on the Status of Women, after compiling domestic violence statistics and analyses by various women's groups, published a report concluding that "[w]omen have been revealed as seriously deprived of basic human rights.[232] Not only are women denied equality with the balance of the world's

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229. *See* Thomas & Beasley, *supra* note 221, at 1123 (arguing that historically, states have failed to impose any legal consequence to those committing violence against women in the same way they have addressed other types of crimes, which has led to women's rights being overlooked in the international arena); *see also* Pamela Goldberg & Nancy Kelly, *International Human Rights and Violence Against Women*, 6 HARV. HUM. RTS. J. 195, 195–96 (1993) (explaining that violence against women within the "intimate sphere" is often seen as a private matter, which is not considered to be significant in the political framework); Hilary Charlesworth, *The Declaration on the Elimination of All Forms of Violence Against Women*, AM. SOC. INT'L L. NEWSL., June 1994, para. 2 (asserting that violence against women is generally thought to be outside the reach of international law and that it is often considered solely the responsibility of domestic authorities).

230. The adoption of the Convention of the Elimination of Violence Against Women (CEDAW) by the United Nations General Assembly in 1979 was a significant step toward recognizing women's rights. *See* Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. Doc. A/34/46 (Dec. 18, 1979), *available at* http://www.ohchr.org/english/law/cedaw.htm (defining what constitutes discrimination against women and setting up an agenda for national action to end such discrimination); *see also* Alison Cole, *Reconceptualizing Female Trafficking: The Inhuman Trade in Women*, 26 WOMEN'S RTS. L. REP. 97, 108 (2005) (identifying the 1993 Vienna Declaration as the "first official recognition that women's rights are human rights," a recognition that came about after conferences concerning women in the 1980s); Paul, *supra* note 35, at 228–29 (explaining that international activism for women's rights began a new phase in the 1980s and CEDAW was a significant step in treating women's rights as human rights).

231. *See* World Conference to Review and Appraise Achievements of the U.N. Decade for Women: Equality, Development and Peace, Nairobi, Kenya, July 15–26, 1985, *The Nairobi Forward-Looking Strategies for the Advancement of Women*, ¶ 258, U.N. Doc. A/CONF.116/28/Rev:1, *available at* http://www.earthsummit2002.org/toolkits/women/un-doku/un-conf/narirobi.htm (quoting the report from the conference); *see also* Culliton, *supra* note 6, at 511 n.18 (reporting that at the conference reviewing the Decade for Women, violence against women was determined to be a "barrier to achieving the Decade's goals of equality, peace, and development for women"). *See generally* Berta Esperanza Hernandez-Truyol, *Gender Politics in Global Governance*, 94 AM. J. INT'L L. 209, 209 (2000) (book review) (explaining that the Nairobi conference, the third in the Decade for Women, was the most successful and specifically addressed the issue of gender violence).

232. *See* JANE FRANCES CONNORS, CTR. FOR SOC. DEV. AND HUMANITARIAN AFFAIRS, VIOLENCE AGAINST WOMEN IN THE FAMILY 3, U.N. Doc. ST/CSDHA/2, U.N. Sales No. E.89.IV.5 (1989) (recognizing that women are significantly denied human rights despite constituting one-half of the world's population and performing more than one-half of its work); *see also* Sana Loue, *Intimate Partner Violence Bridging the Gap Between Law and Science*, 21 J. LEGAL MED. 1, 20–21 (2000) (quoting the study and stating that the U.N. Commission revealed the pervasiveness of violence against women). *See generally* Thomas & Beasley, *supra* note 221, at 44–45 (explaining how the study was conducted and demonstrating its findings that domestic violence is "widespread and gender-specific").

population, men, but also they are often denied liberty and dignity, and in many situations suffer direct violations of their physical and mental autonomy."[233]

The inclusion of women's rights in the international human rights paradigm and the specific inclusion of domestic violence against women as an international human rights violation was first achieved in the 1990s.[234] In 1993, the United Nations Human Rights Commission passed a resolution explicitly integrating women into the United Nations' human rights mechanisms.[235] The United Nations Declaration on the Elimination of Violence Against Women condemns all forms of human rights violations directed specifically at women.[236] This document brought violence against women into the public sphere and established the phenomenon as a "pervasive human rights problem requiring state intervention."[237]

The 1995 Beijing Platform for Action, adopted by 187 United Nations member states, affirms that, "violence against women constitutes a violation of basic human rights." It also "specifies the need to take steps to eliminate violence against women" by instituting a "holistic and multi-disciplinary approach" to promote "communities, families and States that are free of

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233. *See* CONNORS, *supra* note 232, at 3 (quoting the study and demonstrating the degree to which violence violates women's rights); *see also* Loue, *supra* note 232, at 20–21 (reiterating that women are often denied the same rights as men and consequently experience violations of their autonomy); Miccio, *supra* note 8, 662 n.89 (1998) (explaining that the study revealed the extent to which violence against women in the family exists worldwide).

234. *See*, *e.g.*, Beth Stephens, *Problems of Proving International Human Rights Law in the U.S. Courts: Litigating Customary International Human Rights Norms*, 25 GA. J. INT'L & COMP. L. 191, 199 (1996) (identifying two declarations in the 1990s that included private violence, often against women, with public violence as international human rights violations); *see also* Bond, *supra* note 175, at 77 (explaining that success in the 1990s resulted in the view that "women's rights are human rights"); Elizabeth M. Schneider, *Transnational Law as a Domestic Resource: Thoughts on the Case of Women's Rights*, 38 NEW ENG. L. REV. 689, 714 (2004) (discussing the improvements to CEDAW in the 1990s and the committee's achievement of making women a part of international law).

235. *See* Elizabeth M. Bruch, *Models Wanted: The Search for an Effective Response to Human Trafficking*, 40 STAN. J. INT'L L. 1, 30–31 n.167 (2004) (demonstrating that the Human Rights Commission began including women in human rights mechanisms through special rapporteurs and commissions specifically dedicated to women's issues); *see also* John R. Crook, *The Fiftieth Session of the U.N. Commission on Human Rights,* 88 AM. J. INT'L L. 806, 809 (1994) (stating that the Commission adopted a resolution to explicitly include women in human rights mechanisms); Donna J. Sullivan, *Women's Human Rights and the 1993 World Conference on Human Rights*, 88 AM. J. INT'L L. 152, 154 (1994) (explaining that the Commission on Human Rights attempted to integrate women's human rights into "mainstream" human rights through a special rapporteur).

236. *See* Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, *supra* note 38, at arts. 1–2; *see also* Lisa A. Crooms, *Using a Multi-Tiered Analysis to Reconceptualize Gender-Based Violence Against Women as a Matter of International Human Rights*, 33 NEW. ENG. L. REV. 881, 885–86 (1999) (quoting the resolution and stating the conclusion that violence against women is a human rights violation); U.N. Dep't of Pub. Info., *Women and Violence*, *supra* note 2 (explaining that violence against women is very broad and urges states to denounce violence against women in all its forms).

237. *See* Dorothea Beane, *Human Rights in Transition—Freedom from Fear*, 6 WASH. & LEE RACE & ETHNIC ANC. L.J. 1, 6 (2000) (explaining that upon the adoption of the declaration, the traditional notion that violence was not a matter for state intervention was replaced); *see also* U.N. Dep't of Pub. Info., *Women and Violence*, *supra* note 2 (stating that prior to the declaration violence against women was considered mostly a private issue rather than a human rights issue that deserved government attention). *See generally* Elizabeth F. Defeis, *The Role of International Law in the Twenty-First Century: Women's Human Rights: The Twenty-First Century*, 18 FORDHAM INT'L L.J. 1748, 1750 (1995) (commenting that the declaration is not legally binding on states, but it was significant in that it broke down the public/private distinction).

violence against women."[238] In 1998, the United Nations Development Fund for Women established a $1.2 million trust fund solely for eliminating of violence against women, with the "mandate to promote gender equality and [empower] women."[239] Programs under the auspices of this fund include education, "campaigns for effective legislation and sanctions, and specialized training, which represent innovative approaches to the prevention and elimination" of violence.[240] At present, violence against women is recognized as both a pervasive, worldwide problem, and because women's rights are now recognized as human rights, a concern of international magnitude as a ubiquitous human rights violation.[241]

B. Existing International Law: A Tool to Combat Violence Against Women

Various international legal instruments address violence against women, either directly or indirectly.[242] In fact, "every major international human rights instrument, beginning with the United Nations Charter, prohibits discrimination on the basis of sex, and every major human

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238. *See* Armatta, *supra* note 21, at 844–45 (highlighting the conference's idea for a "holistic and multi-disciplinary approach"); *see also* Charlotte Bunch & Susana Fried, *Beijing '95: Moving Women's Human Rights from Margin to Center*, 22 SIGNS 200, 201–02 (1996) (remarking that the conference called for more intervention on behalf of women and focused on interrelated areas of importance in women's rights issues); Paul, *supra* note 35, at 230 (explaining the importance of the conference's comprehensive program).

239. *See* United Nations Development Fund for Women, G.A. Res. 52/94, ¶¶ 3–5, 52d Sess., 70th plen. mtg., U.N. Doc. A/Res/52/94 (Dec. 12, 1997), *available at* http://www.unifem.org/attachments/about/resolutions/a_res_52_94_eng.pdf (highlighting UNIFEM's goal of supporting women through programs that foster equality); *see also* Paul, *supra* note 35, at 230 (explaining that the fund was aimed at eliminating violence against women and promoting equality). *See generally Women and Human Rights: UNIFEM Launches Trust Fund to Eliminate Violence Against Women,* WIN NEWS (Lexington), Spring 1998, at 35 (stating that violence has significant negative effects on women's physical and mental health, and social involvement).

240. *See* Judith Gardam & Michelle Jarvis, *Women and Armed Conflict: The International Response to the Beijing Platform for Action*, 32 COLUM. HUM. RTS. L. REV. 1, 51–52 (2000) (implying that UNIFEM is responsible for programs that give females victims of domestic violence economic and social support); *see also Women and Human Rights*, *supra* note 239, at 35 (enumerating some specific programs that were initiated in various regions). *See generally* Alicia Morris Groos, *International Trade and Development: Exploring the Impact of Fair Trade Organizations in the Global Economy and the Law*, 34 TEX. INT'L L.J. 379, 399–400 (1999) (indicating that through UNIFEM the U.N. addresses issues similar to those addressed by FTO's (fair trade organizations) with programs that assist women economically).

241. *See* U.N. Dep't of Pub. Info., *Women and Violence*, *supra* note 2 (explaining that violence against women has become an important human rights issue through U.N. meetings and conferences); *see also* Paul, *supra* note 35, at 228 (remarking that women's rights traditionally were not part of international discourse, but recent developments have made women's rights human rights); Human Rights Watch, Women's Rights, *available at* http://www.hrw.org/women (last visited Sept. 27, 2006) (referring to the attainment of women's rights as a "global struggle").

242. *See* U.N. Charter, pmbl., (June 26, 1945), *available at* http://www.unhchr.ch/pdf/UNcharter.pdf (referring to the equal rights of men and women, and emphasizing the promotion of "better standards of life"); *see also* Goldberg & Kelly, *supra* note 229, at 204–05 n.51 (explaining that human rights groups have called for international instruments that promote women's rights and identifies The Women's Rights Project of Americas Watch of Brazil as one such attempt); Leila Rassekh Milani, *Human Rights, Corporate Responsibility, and Economic Sanctions: Women's Rights and Corporate Responsibilities*, 8 TULSA J. COMP. & INT'L L. 73, 77–78 (2000) (arguing that the U.N. Commission on the Status of Women made great efforts to address violence against women, but the most "comprehensive" international instrument to address women's rights is CEDAW).

rights instrument ratified after the Charter guarantees the right to equality before the law."[243] Recent instruments explicitly place women's rights, as human rights, within the international law paradigm.[244] Applicable treaties and conventions include, but are not limited to, the Universal Declaration of Human Rights,[245] the International Covenant on Civil and Political Rights,[246] the Convention on the Elimination of All Forms of Discrimination Against Women,[247] the U.N. Declaration of the Elimination of Violence Against Women,[248] and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[249]

1. The Universal Declaration of Human Rights

Adopted by the United Nations in 1948, the Universal Declaration of Human Rights establishes the basic human rights framework. It provides that, " . . . Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms."[250] In no uncertain terms:

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion,

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243. *See* U.N. Charter art. 55, (June 26, 1945), *available at* http://www.unhchr.ch/pdf/UNcharter.pdf (demonstrating a commitment to equal rights by respecting everyone's "fundamental freedoms"); *see also* Universal Declaration of Human Rights, G.A. Res. 217A, art. 2, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 10, 1948), *available at* http://www.un.org/Overview/rights.html (declaring that human rights protections are meant to apply to everyone without discrimination); International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 2, U.N. Doc. A/6316 (Dec. 16, 1966), *available at* http://www.unhchr.ch/html/menu3/b/a_ccpr.htm (reiterating the U.N.'s goal of achieving equal rights without distinctions of race, sex, religion, etc.).

244. *See* Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, art. 1, U.N. Doc. A/34/46 (Dec. 18, 1979), *available at* http://www.ohchr.org/english/law/cedaw.htm (declaring that human rights applies equally to men and women); *see also* Cole, *supra* note 230, at 108 (stating that CEDAW was one of the first instances in which women's rights were recognized as human rights); Sullivan, *supra* note 235, at 154 (explaining that the Commission on Human Rights attempted to integrate women's human rights into "mainstream" human rights).

245. *See* Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 10, 1948), *available at* http://www.un.org/Overview/rights.html.

246. *See* International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Dec. 16, 1966), *available at* http://www.unhchr.ch/html/menu3/b/a_ccpr.htm.

247. *See* Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. Doc. A/34/46 (Dec. 18, 1979), *available at* http://www.ohchr.org/english/law/cedaw.htm.

248. *See* Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, *supra* note 38.

249. *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. Doc. A/39/51 (Dec. 10, 1984), *available at* http://www.ohchr.org/english/law/cat.htm.

250. *See* Universal Declaration of Human Rights, G.A. Res. 217A, pmbl., U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 10, 1948) (stating that member states dedicate themselves to "respect for and observance of human rights"); *see also* Kathryn L. Boyd, *Collective Rights Adjudication in U.S. Courts: Enforcing Human Rights at the Corporate Level*, 1999 BYU L. REV. 1139, 1150 (1999) (explaining that the declaration follows the U.N. Charter's demand for universal respect); Judge Edward D. Re, *The Universal Declaration of Human Rights: Effective Remedies and the Domestic Courts*, 33 CAL. W. INT'L L.J. 137, 141 (2003) (noting that the idea of universal respect for human rights was a basic principle of the U.N. Charter and the same idea is found in the declaration).

national or social origin, property, birth or other status.[251] *Everyone* has the right to life, liberty and security of person.[252] *No one* shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.[253] *All* are equal before the law and are entitled without any discrimination to equal protection of the law. *All* are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.[254] *Everyone* has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.[255]

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251. *See* Universal Declaration of Human Rights, G.A. Res. 217A, art. 2, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 10, 1948) (stressing that the declaration is applicable universally, regardless of personal distinctions); *see also* Robert Charles Blitt, *Who Will Watch the Watchdogs? Human Rights Nongovernmental Organizations and the Case for Regulation*, 10 BUFF. HUM. RTS. L. REV. 261, 266 (2004) (explaining that the declaration focused on individuals rather than the state); Charles I. Lugosi, *Respecting Human Life in 21st Century America: A Moral Perspective to Extend Civil Rights to the Unborn from Creation to Natural Death*, 20 ISSUES L. & MED. 211, 244 (2005) (emphasizing the significance of the word "everyone" in the declaration).

252. *See* Universal Declaration of Human Rights, G.A. Res. 217A, art. 3, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 10, 1948) (indicating that life, liberty, and security of person are rights to which everyone is entitled without distinction); *see also* James Allan & Grant Huscroft, *Constitutional Rights Coming Home to Roost? Rights Internationalism in American Courts*, 43 SAN DIEGO L. REV. 1, 14 (2006) (explaining that the declaration's basic protections are found in other similar documents that followed); Anke Sembacher, *The Council of Europe Convention on Action Against Trafficking in Human Beings*, 14 TUL. J. INT'L & COMP. L. 435, 435–36 (2006) (commenting that liberty and security of person are paramount among internationally recognized human rights).

253. *See* Universal Declaration of Human Rights, G.A. Res. 217A, art. 5, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 10, 1948) (condemning the torture and inhuman treatment of all people); *see also* Vesa, *supra* note 3, at 320 (stressing the importance of the right to be free from torture or inhumane treatment to victims of domestic violence). *See generally* Josephine A. Vining, Note, *Providing Protection from Torture by "Unofficial" Actors: A New Approach to the State Action Requirement of the Convention Against Torture*, 70 BROOK. L. REV. 331, 341–42 (2004) (identifying other documents that have similar prohibitions against torture and cruel treatment).

254. *See* Universal Declaration of Human Rights, G.A. Res. 217A, art. 7, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 10, 1948) (emphasizing that everyone is equal with respect to protections provided by law and under the declaration); *see also* Geoffrey A. Hoffman, *In Search of an International Human Right to Receive Information*, 25 LOY. L.A. INT'L & COMP. L. REV. 165, 169 (2003) (highlighting the declaration's freedom from gender-based distinctions); Neuwirth, *supra* note 105, at 3 (explaining that other international instruments have included comparable provisions).

255. *See* Universal Declaration of Human Rights, G.A. Res. 217A (III), at 8, U.N. Doc. A/810 (Dec. 10, 1948) (stating that all have rights to remedies when constitutional rights are violated); *see also* Steven Swanson, *Enemy Combatants and the Writ of Habeas Corpus*, 35 ARIZ. ST. L.J. 939, 967–68 (2003) (concluding that the United States policy of detaining suspected terrorists at Guantanamo Bay may be challenged under international law because the right to an effective remedy by a national tribunal under the Universal Declaration of Human Rights extends to everybody, including the suspected terrorists); Shellie Park, Comment, *Broken Silence: Redressing the Mass Rape and Sexual Enslavement of Asian Women by the Japanese Government in an Appropriate Forum*, 3 ASIAN-PAC. L. & POL'Y J. 2, ¶ 54 (2002) (claiming that Asian women who were the victims of Japanese abuses during World War II have a fundamental right to bring a claim for redress under Article 8 of the Universal Declaration of Human Rights).

The declaration is gender-neutral.[256] It entitles everyone, regardless of distinction such as sex, to life, liberty and security, and to equal protection before the law, as well as effective remedies for violations of such rights.[257] Domestic violence is a fundamental human rights abuse and as such, states that are parties to the Declaration are responsible for ensuring protection under the law for violating women's basic and fundamental human right to "life, liberty and security," and to enjoy freedom from the "torture," "cruel, inhuman (and) degrading punishment" that results from violence against women.[258] There are 191 member states of the United Nations, all of which are bound to implement the provisions of this instrument.[259]

2. International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (ICCPR),[260] entered into force by the United Nations on May 23, 1976, similarly delineates fundamental human rights and

256. *See* Symposium, *The Future of International Human Rights: An Introduction to the Conference Papers*, 55 WASH & LEE L. REV. 661, 666 (1998) (claiming that even though the Universal Declaration is facially gender-neutral, it is often insensitive to women's needs); *see also* Thomas & Beasley, *supra* note 221, at 1121–22 (stating that the rights granted in the Universal Declaration of Human Rights belong to "'all human beings,' not just to men"); Susan Moller Okin, *Recognizing Women's Rights as Human Rights*, APA NEWSL. (The American Philosophical Ass'n, Newark, Del.), Spring, 1998, at ¶ 1 (declaring that the Universal Declaration of Human Rights' repudiation of distinctions between genders was unprecedented because every other law code in the world at the time made such distinctions).

257. *See* Universal Declaration of Human Rights, G.A. Res. 217A (III), at 2, U.N. Doc. A/810 (1948) (showing the gender neutrality of the declaration, the all-encompassing nature of it and the right to effective remedies); *see also* Theodor Meron, Note*, The Meaning and Reach of the Int'l Convention on the Elimination of All Forms of Racial Discrimination*, 79 AM. J. INT'L L. 283, 290 (1985) (stating that Article 2 of the Universal Declaration of Human Rights entitles everyone to all the rights and freedoms set forth in the declaration). *But see* Symposium, *The Future of Int'l Human Rights: The Mid-Life Crisis of the Universal Declaration of Human Rights*, 55 WASH & LEE L. REV. 781, 783 (1998) (proclaiming that the Declaration only acknowledges women insofar as they are connected to men).

258. *See* Vesa, *supra* note 3, at 310–11 (claiming that a female victim of domestic violence who has exhausted all domestic remedies and finds that the state has not adequately addressed her situation can hold the state liable if the state is a party to the Universal Declaration of Human Rights); *see also* BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW 847 (3rd ed. 1999).

259. *See* CARTER & TRIMBLE, *supra* note 258, at 848 (noting scholars' recognition of the Universal Declaration of Human Rights as "binding customary international law," "legally binding through customary law through their wide acceptance by nations"); *see also* Richard B. Lillich, *Introduction: The Growing Importance of Customary Int'l Human Rights Law*, 25 GA. J. INT'L & COMP. L. 1, 1–2 (1996) (citing the Proclamation of Tehran, in which the U.N. announced "the Universal Declaration of Human Rights . . . . constitutes an obligation for members of the international community" to demonstrate that the Universal Declaration of Human Rights had become customary international law binding on all states). *But see* United Nations Assoc. in Canada, Questions and Answers About the Universal Declaration of Human Rights, *available at* http://www.unac.org/rights/question.html (last visited Oct. 30, 2006) (explaining that the Universal Declaration of Human Rights is not part of binding law, but the United Nations International Conference on Human Rights agreed that the Declaration constituted an obligation for the members of the international community to uphold).

260. International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), at 52, U.N. Doc. A/6316 (Mar. 23, 1976).

can be invoked to compel states to implement mechanisms combating domestic violence.[261] Nearly 150 members of the international community are state parties to the treaty, making it "one of the most fundamental expressions of human rights at the international level."[262] States that ratify this treaty, obligate themselves to ensure that "no one shall be subjected to torture or to cruel, inhuman or degrading punishment"[263] and that "every human has the inherent right to life,"[264] which "*shall* be protected by law."[265] Further, the ICCPR seeks to ensure that "persons are equal before the law and entitled without discrimination to equal protection of the law

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261. *See* Kenneth Roth, *Domestic Violence as an International Human Rights Issue, in* HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 326, 329-33 (Rebecca J. Cook ed., 1994) (arguing that based on the broad language of the International Covenant on Civil and Political Rights and on the trend toward holding state parties accountable for systemic inaction, states may be accountable for failure to combat domestic violence); *see also* Catharine A. MacKinnon, *Disputing Male Sovereignty: On United States v. Morrison*, 114 HARV. L. REV. 135, 167 (2000) (asserting that the ICCPR obligates congressional use of legislative power to address domestic violence under law); Vesa, *supra* note 3, at 320–22 (providing citations to the articles of the International Covenant on Civil and Political Rights that bind Member Nations to enforce the right to be free from domestic violence).

262. *See* Vesa, *supra* note 3, at 318–19 (mentioning the ICCPR as one of the three major United Nations' documents that provide general rights for the victims of domestic violence); *see also* American Bar Association, ICCPR Project at CEELI, *available at* http://www.abanet.org/ceeli/special_projects/iccpr/home.html (last visited Oct. 9, 2006) (summarizing the work of the ICCPR Project, which "promotes making use of the International Covenant on Civil and Political Rights to advance the rule of law and assess respect for fundamental rights and freedoms in the emerging democracies and transitioning states of Central Europe and Eurasia," and could potentially be a viable partner for promoting the protection of women from domestic violence in Central and Eastern Europe); *see also* United Nations Treaty Collection, Declarations and Reservations to the International Covenant of Civil and Political Rights, *available at* http://www.unhchr.ch/html/menu3/b/treaty5_asp.htm (last visited Oct. 30, 2006) (listing the 157 nations that ratified and signed the Covenant).

263. International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), at 7, U.N. Doc. A/6316 (Mar. 23, 1976). *See also* Meyersfeld, *supra* note 15, at 409 (citing the Human Rights Commission, which reaffirmed the International Covenant on Civil and Political Rights prohibitions on torture or cruel, inhuman, or degrading treatment or punishment, and contending that states are increasingly being held liable for the conduct of their citizens); Daniel Rothenberg, Commentary, *"What We Have Seen Has Been Terrible" Public Presentational Torture and the Communicative Logic of State Terror,* 67 ALB. L. REV. 465, 485–86 (2003) (stating that torture is prohibited under the International Covenant on Civil and Political Rights).

264. International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), at 52, U.N. Doc. A/6316 (Mar. 23, 1976). *See* Laurel Remers Pardee, *The Dilemma of Dowry Deaths: Domestic Disgrace or International Human Rights Catastrophe?*, 13 ARIZ. J. INT'L & COMP. L. 491, 506–07 (1996) (arguing that India's failure to curtail dowry deaths—the murder of newly married women—constitutes a violation of the ICCPR, which asserts that every human being has a right to life); Ariane M. Schreiber, Note, *States That Kill: Discretion and the Death Penalty—A Worldwide Perspective,* 29 CORNELL INT'L L.J. 263, 275–76 (1996) (tracing the efforts of the United Nations to shape the scope and dimensions of international human rights with respect to the death penalty, including article 6 of the ICCPR, which reiterated the inherent right to life).

265. International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), at 14–16, U.N. Doc. A/6316 (Mar. 23, 1976) (stating that "[e]ach state to the present Covenant undertakes to respect and ensure to all individuals within its territory . . . without distinction of any kind such as race, colour, *sex*, language religion . . ."; stating in art. 14(1) that "[a]ll persons shall be equal before the courts and tribunals" and stating in art. 16 that "[e]veryone shall have the right to recognition everywhere as a person before the law"); *see also* Timothy L.H. McCormack & Gerry J. Simpson, *The International Law Commission's Draft Code of Crimes Against the Peace and Security of Mankind: An Appraisal of the Substantive Provisions*, 5 CRIM. L.F. 1, 17 (1994) (concluding that the right to life protected by law under the ICCPR has become customary international law); Ralph Ruebner, *Democracy, Judicial Review and the Rule of Law in the Age of Terrorism: The Experience of Israel—A Comparative Perspective*, 31 GA. J. INT'L & COMP. L. 493, 541 (2003).

. . . to guarantee to all persons equal and effective protection against discrimination on the basis of . . . sex . . . ."[266]

Article 2 of the ICCPR imposes an affirmative obligation on states to respect the delineated rights and to implement national laws to protect these rights; states that have signed or implemented this instrument through domestic legislation are legally bound to ensure the human rights of women and to provide effective remedies where these rights are violated through domestic violence.[267]

The Covenant establishes the Human Rights Committee (HRC) to monitor its implementation by considering periodic reports from states' parties.[268] In certain circumstances, the

266. *See* International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), at 26, U.N. Doc. A/6316 (Mar. 23, 1976); *see* Shannon Oliver, *The International Fight for Human Rights: Women Lately Discovered*, 2 HOWARD SCROLL SOC. J. REV. 77, 86 (1993) (asserting that the ICCPR makes the principles of the Universal Declaration of Human Rights binding on state parties, and that the importance of the ICCPR to women lies in the provision that guarantees "persons equal and effective protection against discrimination on any ground such as . . . sex."); *see also* Berta Esperanza Hernandez-Truyol, *Conceptualizing Violence: Present and Future Developments in International Law: Panel I: Human Rights & Civil Wrongs at Home and Abroad: Old Problems and New Paradigms: Sex, Culture, and Rights: A Re/Conceptualization of Violence for the Twenty-First Century,* 60 Alb. L. REV. 607, 610 (1997) (lamenting the short comings of the ICCPR, which promised women equal protection against discrimination based on sex).

267. *See* Audrey R. Chapman, *The Right to Health: Monitoring Women's Right to Health Under the Int'l Covenant on Econ., Soc. and Cultural Rights,* 44 AM. U.L. REV. 1157, 1162 (1995) (summarizing Article 2 of the International Covenant on Civil and Political Rights as specifying an immediate obligation to respect and ensure all of the enumerated rights); *see also* Jon M. Van Dyke, *The Fundamental Human Right to Prosecution and Comp.*, 29 DENV. J. INT'L L. & POL'Y 77, 82–83 (2001) (citing Rodriguez v. Uruguay, which stated that "amnesties for gross violations of human rights . . . are incompatible with the obligations of the State party" under the International Covenant on Civil and Political Rights and that each country has a "responsibility to provide effective remedies to the victims of those abuses" to allow the victims to gain appropriate compensation for their injuries); Vesa, *supra* note 3, at 321 (noting that the ICCPR guarantees the right to effective legal protection of all people, and listing the provision of the ICCPR which sets out the right to be free from gender-based discrimination).

268. *See* Mark S. Ellis, *A Global Legal Odyssey: A Training Manual for the Legal Profession—A Focus on the Judiciary,* 43 S. TEX. L. REV. 355, 358–59 (2002) (describing how the ICCPR established the Human Rights Committee so that state parties can guarantee the benefits of the rights recognized in the ICCPR to all individuals within their jurisdiction through its reporting procedure); *see also* Alison E. Graves, *Women in Iran: Obstacles to Human Rights and Possible Solutions*, 5 AM. U. J. GENDER & LAW 57, 89 (1996) (expounding that the Human Rights Committee, established by ICCPR, considers the state parties' reports to the Covenant on the Parties' compliance to covenant obligations and affords a positive means for states to pressure each other to obtain basic human rights); Lisa C. Stratton, Note, *The Right to Have Rights: Gender Discrimination in Nationality Laws,* 77 MINN. L. REV. 195, 212 (1992) (explaining that the ICCPR established the Human Rights Committee as a mechanism to monitor and enforce its implementation by providing a communications procedure whereby individuals bring complaints to the committee concerning violations of their rights).

HRC may consider complaints from other countries that have ratified the Covenant and from individuals who believe their rights under the Convention have been violated.[269]

3. Convention on the Elimination of all Forms of Discrimination Against Women

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),[270] adopted in 1979 by the United Nations General Assembly, is often described as an international bill of rights for women.[271] As of March 2005, 180 states are party to the Convention.[272] These states agree to take measures to protect women's human rights and fundamental freedoms and are "legally bound to put its provisions into practice."[273]

Although CEDAW does not explicitly prohibit violence against women, it defines discrimination against women as ". . . any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and

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269. *See* International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), at 41 U.N. Doc. A/6316 (Mar. 23, 1976) (officially establishing and delineating the responsibilities of the Human Rights Committee); *see also* Jordan J. Paust, *Avoiding "Fraudulent" Executive Policy: Analysis of Non-Self-Execution of the Covenant on Civil and Political Rights*, 42 DEPAUL L. REV. 1257, 1282–83 (1993) (warning that any state party to the ICCPR can bring a claim to the Committee that certain US policies are void under the Covenant because Article 41 empowers the Committee to receive and consider State party claims that another State party is not fulfilling its obligations under the covenant); John Quigley, *Criminal Law and Human Rights: Implications of the United States Ratification of the International Covenant on Civil and Political Rights*, 6 HARV. HUM. RTS. J. 59, 62 (1993) (reiterating that any state may lodge a complaint to the Human Rights Committee under Article 41 against another state; however, as of 1993 no states had used this procedure for fear of the diplomatic fallout that would result).

270. *See* Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. Doc. A/34/46 (Sept. 3, 1981).

271. *See* Div. for the Advancement of Women, Dep't of Econ. & Soc. Affairs, Convention on the Elimination of Violence Against Women, *available at* http://www.un.org/womenwatch/daw/cedaw/ (last visited Oct. 15, 2006) (referring to the Convention on the Elimination of All Forms of Discrimination Against Women as an international bill of rights for women); *see also* Rebecca J. Cook, *Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women*, 30 VA. J. INT'L L. 643, 643 (1990) (lauding the Convention on the Elimination of All Forms of Discrimination Against Women as "the definitive international legal instrument requiring respect for observance of the human rights of women"); Heidi Gilchrist, Note, *The Optional Protocol to the Women's Convention: An Argument for Ratification*, 39 COLUM. J. TRANSNAT'L L. 763, 763 (2001) (referring to the Convention on the Elimination of All Forms of Discrimination Against Women as "the most comprehensive international human rights treaty to focus on women").

272. *See* Andrea D. Friedman, *Using the Convention on the Elimination of All Forms of Discrimination Against Women to Advocate for the Political Rights of Women in a Democratic Burma*, 28 HARV. J.L. & GENDER 481, 483 (2005) (stating that 180 states are parties to CEDAW, making CEDAW the second-most ratified international convention); *see also* CEDAW: States Parties, U.N. Div. for the Advancement of Women, Dep't of Econ. and Soc. Affairs, *available at* http://www.un.org/womenwatch/daw/cedaw/states (last visited Oct. 30, 2006) (listing the states that are parties to the Convention alphabetically along with their date of signature and date of ratification, and boasting that over 90 percent of the members of the United Nations are party to the Convention); Choike.org, 25 Years of CEDAW, *available at* http://www.choike.org/nuevo_eng/informes/3112.html (last visited Oct. 30, 2006) (verifying that as of March 2005, 180 states had ratified CEDAW).

273. *See* Smolens, *supra* note 24, at 9 (positing that by establishing the standard that domestic violence violates international norms, the U.N. created a legal mechanism for holding states responsible for protecting women's rights within their borders and binding them to prevent domestic violence and provide effective remedies when it occurs); *see also* Madek, *supra* note 93, at 57 (referencing the introduction to CEDAW, which explicitly states that the provisions of CEDAW bind the signatory countries). *But see* Stratton, *supra* note 268, at 215–17 (contending that although CEDAW has a large number of state parties bound to enforce its provisions, it has the weakest implementation of mechanisms of any human rights convention adopted since 1965).

women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."[274] It further mandates that states take steps to "modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women."[275] Failure to implement policies and legislation to end domestic violence and the cultural behaviors that perpetuate domestic abuse is a violation of international legal obligation under CEDAW.[276]

4. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),[277] entered into force by the United Nations on June 26, 1987, "established a complete ban on any form of torture or other inhuman or degrading treatment."[278] It describes torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person . . . when such pain or suffering is with the consent or acqui-

274. Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, at 1, U.N. Doc. A/34/46 (Sept. 3, 1981). *See* Stark, *supra* note 153, at 269 (noting that the Convention on the Elimination of All Forms of Discrimination Against Women does not explicitly prohibit violence, but does have a bar against gender discrimination in general); *see also* Meyersfeld, *supra* note 15, at 396 (observing that the CEDAW makes no reference to violence against women, but states that violence against women is a form of discrimination).

275. Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, at 5, U.N. Doc. A/34/46 (Sept. 3, 1981). *See* Radhika Coomaraswamy, *Identity Within: Cultural Relativism, Minority Rights and the Empowerment of Women*, 34 GEO. WASH. INT'L L. REV. 483, 489 (2002) (contextualizing CEDAW's prescription to eliminate the "idea of the inferiority or the superiority of either of the sexes" as part of the body of international law that accepts equality as the guiding principle that guarantees the human rights of women); *see also* Felipe Gomez Isa, *The Optional Protocol for the Convention on the Elimination of All Forms of Discrimination Against Women: Strengthening the Protection Mechanisms of Women's Human Rights*, 20 ARIZ. J. INT'L & COMP. L. 291, 301 (2003) (lauding Article 5 of CEDAW, which urges states to "modify social and cultural patterns of conduct of men and women" as one of the more radical provisions of the Covenant).

276. *See* Friedman, *supra* note 272, at 483 (claiming CEDAW is embraced because countries that ratify it must bring their domestic laws into accord with the convention, and that compliance with the convention requires states to address the problems that caused inequality); *see also* Arthur M. Weisburd, *The Significance and Determination of Customary International Human Rights Law: The Effect of Treaties and Other Formal International Acts on the Customary Law of Human Rights*, 25 GA. J. INT'L & COMP. L. 99, 117–18 (1996) (maintaining that the language of the substantive provisions of the CEDAW is written in the language of legal obligation); U.N. Div. for the Advancement of Women, Convention on the Elimination of All Forms of Discrimination Against Women, *available at* http://www.un.org/womenwatch/daw/cedaw/cedaw.htm (last visited Oct. 30, 2006) (stating that states that have ratified CEDAW are legally bound to put its provisions into practice).

277. *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. Doc. A/39/51 (June 26, 1987).

278. *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, at 27, U.N. Doc. A/39/51 (June 26, 1987) (establishing a complete ban on torture); *see* Adam Raviv, *Torture and Justification: Defending the Indefensible*, 13 GEO. MASON L. REV. 135, 139 (2004) (summarizing that under CAT, torture is absolutely forbidden, regardless of the situation); *see also* Weisburd, *supra* note 276, at 120 (distinguishing CAT because of its limited scope and because it requires state parties not only to refrain from committing torture, but also to undertake specific obligations to criminalize acts of torture and to take certain steps to prevent torture and redress its victims).

escence of a public official or other person acting in an official capacity."[279] Domestic violence may qualify as torture, as confirmed by various scholars and the former United Nations Special Rapporteur on Violence Against Women, Rhadika Commaraswamy, The World Organization Against Torture, and Amnesty International, when "battered women, because of their domestic situation, live isolated from family, friends and others" similar to a detainee tortured by state officials "at the unsupervised mercy of his interrogators or captors without access to the outside world."[280] Where states systematically fail to prosecute such acts of domestic "torture," CAT may be implemented to enforce state obligations.

State parties to CAT are required to investigate complaints of torture, including allegations of extreme domestic violence that qualifies as torture, and to provide effective legal remedies.[281] CAT provides for the review of complaints from one state against another that is not fulfilling its obligations.[282] Individuals fleeing their countries to seek asylum are further autho-

279. *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, at 1, U.N. Doc. A/39/51 (June 26, 1987) (establishing a ban on torture); *see also* John T. Parry, *What Is Torture, Are We Doing It, and What If We Are?,* 64 U. PITT. L. REV. 237, 239–40 (2003) (emphasizing that while CAT does not define "cruel, inhuman, or degrading torture," it expects the provision to encompass the widest possible protection against abuse); Barrett Breitung, Comment, *Interpretation and Eradication: National and International Responses to Female Circumcision*, 10 EMORY INT'L L. REV. 657, 681 (1996) (arguing that female circumcision may be banned under CAT, which defines torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person" . . . inflicted by or "with the consent or acquiescence of a public official or other person acting in an official capacity").

280. *See* CARIN-BENNINGER-BUDEL & ANNE-LAURENCE LACROIX, VIOLENCE AGAINST WOMEN: A REPORT 43 (1999); Vesa, *supra* note 3, at 333–34 (citing an individual and an organization that agree that domestic violence could qualify as torture); Alexi Nicole Wood, *A Cultural Rite of Passage or a Form of Torture: Female Genital Mutilation from an International Law Perspective*, 12 HASTINGS WOMEN'S L.J. 347, 379 (2001) (referencing commentators who argued that domestic violence is a form of torture and that victims of domestic violence can use CAT to gain redress in international criminal bodies).

281. *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. Doc. A/39/51 (June 26, 1987) (mandating that state parties promptly investigate torture allegations and provide effective legal remedies); *see also* Weisburd, *supra* note 276, at 120 (noting that CAT provides for the establishment of a Committee Against Torture, which would carry out investigations upon receiving reliable complaints that torture is being practiced); Bruce Zagaris, *U.S. Detention Policy Comes Under Growing Pressure*, INT'L ENFORCEMENT L. REP., July 2004, at ¶ 13 (positing that under CAT the United States has responsibility to promptly investigate and prosecute acts of torture committed in the United States).

282. *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, at 21, U.N. Doc. A/39/51 (June 26, 1987) (indicating that state party to this convention may claim that another state party is not fulfilling its obligations under the convention through written communication to that state party); *see* A.M. Weisburd, *Implications of International Relations Theory for the International Law of Human Rights*, 38 COLUM. J. TRANSNAT'L L. 45, 54–55 (1999) (detailing the provisions of CAT, which allows states to make claims against other states for violating the treaty, provided the other states decide to be subjected to such complaints). *But see* Lori A. Nessel, *"Willful Blindness" to Gender-Based Violence Abroad: United States' Implementation of Article Three of the United Nations Convention Against Torture*, 89 MINN. L. REV. 71, 150 n.334 (2004) (documenting that as of 2004, only 50 of the 136 countries that ratified CAT have accepted to submit to Article 21, which allows other countries to submit complaints against it to the Committee Against Torture).

rized to file complaints.[283] States that fail to address domestic violence are complicit in, and have "consented" to, that behavior.[284] Even if the drafters of CAT may not have had domestic violence in mind, "concepts of consent or acquiescence are broad enough to embrace the failure of government to redress domestic violence."[285] Further, CAT might even apply directly against private individuals who have perpetrated acts of domestic violence at the investigation of or with the consent of an official.[286]

5. Declaration on the Elimination of Violence Against Women

The United Nations Declaration on the Elimination of Violence Against Women (DEVAW),[287] adopted by the General Assembly in 1993, was the first international legal

283. *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, at 1035, U.N. GOAR, 39th Sess., Annex, Supp. No. 51, U.N. Doc. A/39/708 (Mar. 9, 1984) (stating that the convention will accept communications by harmed individuals who have not received adequate redress from their home state and when their home state cannot produce sufficient evidence supporting its inaction); *see* Vesa, *supra* note 3, at 337–38 (specifying that a victim of domestic violence who is seeking asylum is "entitled to file communications with the Committee Against Torture"); *see also Two Separate Reports Criticize Mexican Government for Increase in Human Rights Violations in 1996*, SOURCEMEX ECON. NEWS & ANALYSIS ON MEX., May 7, 1997, at 1, *available at* 1997 WLNR 3441566 (maintaining that Article 22 of the Convention Against Torture allows for individual complaints against governments for human rights violations).

284. *See* Miccio, *supra* note 8, at 645 (stating that a government's failure to protect a domestic violence victim and prosecute her attacker signifies the government's consent to the domestic violence); *see* Shauna Curphey, *Amnesty Pushing Nations to End Gender Violence*, WOMEN'S ENEWS, Mar. 19, 2004, ¶ 13 (suggesting that government inaction towards a domestic violence complaint indicates acquiescence to that violence); *see also* Carin Benninger-Budel, Gender-inclusive and Gender-sensitive Interpretation of Article 1 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1, 8–9 (Oct. 2001) (unpublished paper on file with The World Organization Against Torture), *available at* www.omct.org/pdf/vaw/Gendersexarticle1CAT.pdf (noting that under the Convention Against Torture, a state will be held responsible for having consented to domestic violence when that state fails to address the violation).

285. *See* Vesa, *supra* note 3, at 336 (arguing that the drafters did not consider protecting women against domestic violence when preparing the Convention Against Torture); *see* Barbara Cochrane Alexander, Note and Comment, *Convention Against Torture: A Viable Alternative Legal Remedy for Domestic Violence Victims*, 15 AM. U. INT'L L. REV. 895, 908–21 (2000) (suggesting that the drafters of the Convention Against Torture must recognize the similarities between extreme domestic violence and torture). *See generally* Myersfeld, *supra* note 32, at 397–98 (stating that although the Convention Against Violence does not recognize domestic violence as torture, similar international instruments do recognize the severity of domestic violence).

286. *See* Rhonda Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence as Torture*, 25 COLUM. HUM. RTS. L. REV. 291, 356 (1994) (stating that private persons will be held accountable under the Convention Against Torture even if their actions are instigated by a public official); AMNESTY INTERNATIONAL, BROKEN BODIES, SHATTERED MINDS, *supra* note 218, at 3–4 (quoting the U.N. Convention Against Torture, which finds states accountable for private acts of torture "at the instigation of or with the consent or acquiescence of a public official"); *see also* Vesa, *supra* note 3, at 336 (suggesting that the state be held responsible for "encouraging" domestic violence when laws are not adequate or adequately enforced).

287. *See* Declaration on the Elimination of Violence Against Women, G.A. Res. 2263, U.N. GOAR, 22d Sess., U.N. Doc. A/6716 (Nov. 7, 1967).

instrument to specifically address violence against women.[288] "Recognizing the urgent need for the universal application to women of the rights and principles with regard to equality, security, liberty, integrity and dignity of all human beings," and "[n]oting that those rights and principles are enshrined in international instruments, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,"[289] DEVAW established violence against women as a human rights violation.[290] It also further instituted international law as an appropriate forum for discussion on, and elimination of, gender-based violence.[291]

DEVAW defines violence against women as "any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in

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288. *See* Margareth Etienne, *Addressing Gender-Based Violence in an International Context*, 18 HARV. WOMEN'S L.J. 139, 151 (1995) (noting that the Declaration on the Elimination of Violence Against Women was a primary step in "recognizing and condemning" domestic violence internationally); Diana Saso, *The Development of Gender-Based Asylum Law: A Critique of the 1995 INS Guidelines,* 8 HASTINGS WOMEN'S L.J. 263, 270 (1997) (indicating that the Declaration on the Elimination of Violence Against Women was adopted in June 1993 as a necessary impetus in the fight against gender violence). *But see Violence Against Women Takes Centre Stage at the Women's World Forum Against Violence*, HUMAN RTS. TRIB., Dec. 31, 2000, at 33, ¶ 16, *available at* 2000 WLNR 7348680 (recognizing the Declaration on the Elimination of Violence Against Women as an important legal instrument in the international fight against gender violence, but not the first instrument to effect change).

289. *See* Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, at 1050, U.N. GOAR, 48th Sess., 3d Comm. Rep. U.N. Doc. A/RES/48/104 (Feb. 23, 1994) (pointing to the text of the declaration); Elizabeth M. Misiaveg, Note, *Important Steps and Instructive Models in the Fight to Eliminate Violence Against Women,* 52 WASH & LEE L. REV. 1109, 1125–26 (1995) (recognizing that many U.N. instruments overlap in their application toward human rights violations); Funso Abdullahi, *Women: Agenda Outside Kitchen*, THIS DAY (NIGERIA), Sept. 18, 2002, ¶¶ 33–34 (detailing the rights provided and protected by the Declaration on the Elimination of Violence Against Women).

290. *See* Misiaveg, *supra* note 289, at 1109–11 (declaring the Violence Declaration an important instrument in the fight against human rights violations); *see* Stark, *supra* note 153, at 263–65 (stating the Violence Declaration "marks an important achievement in the recognition of domestic violence as a human rights violation"); *see also Outlaw This Gender Violence, Urges UN*, THE NATION (KENYA), Nov. 25, 2000, ¶ 5 (noting that the Violence Declaration is a "positive step" toward reducing human rights violations).

291. *See* Jennifer L. Ulrich, Comment, *Confronting Gender-Based Violence with International Instruments: Is a Solution to the Pandemic Within Reach?*, 7 IND. J. GLOBAL LEGAL STUD. 629, 651–52 (noting that the discussions during the Violence Declaration's General Assembly meeting generated progress on processes toward eliminating violence against women). *See generally* Joan Fitzpatrick, *The Use of International Human Rights Norms to Combat Violence Against Women in* HUMAN RIGHTS OF WOMEN 532, 556 (Rebecca J. Cook ed., 1994) (suggesting that the Violence Declaration can provide instruction to the U.N. for developing other international instruments impacting gender violence); Charlesworth, *supra* note 229, at 1, 2 (stating that the Violence Declaration was a framework for developing other legal instruments).

public or in private life."[292] This definition specifically encompasses domestic violence, and violence implemented or condoned by the state.[293]

The instrument lays out the fundamental human rights that states are obligated to protect and instructs states to "condemn violence against women" and to "pursue by all appropriate means and without delay a policy of eliminating violence against women," including "due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State *or by private persons.*"[294] Article 4 of DEVAW suggests that states can achieve such goals through national criminal legislation to punish and redress wrongs, together with social services and counseling; taking measures to "ensure that law enforcement officers and public officials . . . prevent, investigate and punish violence," providing education to modify social and cultural patterns of conduct . . . and to eliminate . . . practices based on the idea of inferiority or superiority of either of the sexes," and cooperation with NGOs.[295]

While this declaration points out the needs and concerns surrounding violence against women and suggests solutions, it is not by itself a legally binding document absent its adoption into customary international law.[296] When accompanied by the Convention on the Elimina-

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292. *See* Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, at 1050, U.N. GOAR, 48th Sess., 3d Comm. Rep. U.N. Doc. A/RES/48/104 (Feb. 23, 1994) (referring to Article 1 of the Declaration on the Elimination of Violence Against Women); *see also* CHERYL THOMAS, WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW 249–50 (Kelly D. Askin & Dorean M. Koenig eds., 1998) (discussing how the Declaration on the Elimination of Violence Against Women advanced the international perception of gender violence by broadening the definition of gender violence); Podkul, *supra* note 162, at ¶ 5.

293. *See* Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, at 1051–52, U.N. GOAR, 48th Sess., 3d Comm. Rep. U.N. Doc. A/RES/48/104 (Feb. 23, 1994) (delineating the various types of punishable domestic violence); Crooms, *supra* note 236, at 886 (specifying that domestic violence includes that which is "perpetrated or condoned by the state"); Gregory A. Kelson, *Gender-Based Persecution and Political Asylum: The International Debate for Equality Begins*, 6 TEX. J. WOMEN & L. 181, 206 (1997) (quoting the text of Article 2 of the Declaration that enumerates acts of domestic violence, including physical, sexual and psychological violence occurring within the family and or condoned by the state).

294. *See* Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, at 1054, U.N. GOAR, 48th Sess., 3d Comm. Rep. U.N. Doc. A/RES/48/104 (Feb. 23, 1994) (citing Article 4 of the Declaration); *see also* Irene Kahn, *The Rights Idea: Knowledge, Human Rights, and Change*, 2006 HARV. INT'L REV. 70, ¶ 25 (2006) (maintaining that governments must use due diligence to prosecute domestic violence matters); *see also* Stephanie Farrior, *The Due Diligence Standard and Violence Against Women*, INTERIGHTS BULL. (Int'l Ctr. Legal Prot. Human Rts., London, U.K.), 2004, at 150–51 (quoting a Declaration on the Elimination of Violence Against Women statement that governments must use due diligence to punish those who commit acts of domestic violence).

295. *See* Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, at 1054, U.N. GOAR, 48th Sess., 3d Comm. Rep. U.N. Doc. A/RES/48/104 (Feb. 23, 1994) (citing Article 4 of the Declaration); *Beyond the Rhetoric: Strategies For Effecting Change in Women's Human Rights*, 4 YALE HUM. RTS. & DEV. L.J. 131, 132–33 (2001) (suggesting non-governmental organizations work alongside governments to eradicate domestic violence); AMNESTY INTERNATIONAL, BROKEN BODIES, SHATTERED MINDS, *supra* note 218, at 17 (quoting the Declaration on the Elimination of Violence Against Women Article 4(b)-(e)).

296. *See* Fernandez v. Wilkinson, 505 F. Supp. 787, 795–96 (Kan. 1980), *aff'd*, 654 F.2d 1382 (10th Cir. 1981) (noting that international instruments are usually not binding unless ratified by a state's government). *See generally* Surya P. Subedi, *Protection of Women Against Domestic Violence: The Response of International Law*, 6 EUR. HUMAN RTS. L. REV. 587, 598–599 (1997) (stating that "General Assembly resolutions are not legally binding"); Charlesworth, *supra* note 229, at para. 1, 2 (generalizing that General Assembly resolutions are not binding).

tion of Discrimination Against Women and its Optional Protocol, entered into force on December 22, 2000, DEVAW can be used to hold state parties accountable.[297] By signing CEDAW's Optional Protocol, states recognize the "competence of the Committee on the Elimination of Discrimination Against Women, the body that monitors States parties' compliance with the Convention, to receive and consider complaints from individuals or groups within its jurisdiction."[298] As of January 7, 2005, 76 states have signed the protocol.[299]

C. The State's Responsibility to Implement International Norms

Given that domestic violence historically has been treated as a private matter in which governments should not interfere, and for which they should not be held accountable, there has been an accompanying "failure of most countries to address effectively . . . violence against women."[300] As a result of the "widespread absence of intervention in crimes against women" and the "result of governments' failure to enforce laws equitably across gender lines," women across the world are "seriously deprived of basic human rights," "denied equality with . . .

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297. *See* Vesa, *supra* note 3, at 331–32 (noting that a states' commitment to the Declaration entices that state to follow other international agreements); *see also Culliton, supra* note 6, at 528–30 (maintaining that the Declaration supports the Convention on the Elimination of All Forms of Discrimination Against Women); Meghana Shah, Note, *Rights Under Fire: The Inadequacy of International Human Rights Instruments in Combating Dowry Murder in India*, 19 CONN. J. INT'L L. 209, 217–18 (2003) (suggesting that if the Declaration was presented with the Convention on the Elimination of All Forms of Discrimination Against Women, the Declaration would be recognized as law).

298. *See* Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, at 1050–51, U.N. GOAR, 48th Sess., 3d Comm. Rep. U.N. Doc. A/RES/48/104 (Feb. 23, 1994) (noting that a states' correct implementation of the Convention on the Elimination of All Forms of Discrimination Against Women would reduce gender-based violence); U.N. Div. for the Advancement of Women, Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, *available at* http://www.un.org/womenwatch/daw/cedaw/protocol/ (last visited Oct. 30, 2006) (stating that the ratification of the Optional Protocol solidified the states confidence in the Committee on the Elimination of Discrimination Against Women).

299. *See* Press Release, United Nations, Special Advisor on Gender Issues Hopes Financial Woes Will Not Hinder Committee's Work, U.N. Doc. WOM/1351 (May 8, 2002) (stating that the Optional Protocol was signed by 76 states); *Inclusive Security, Sustainable Peace: A Toolkit for Advocacy and Action* (Hunt Alternative Fund, Cambridge, MA), Nov. 2004, at 17, *available at* http://www.huntalternatives.org/pages/7_the_initiative_for_inclusive_security.cfm (noting that by 2004, 76 states had signed the Protocol); U.N. Div. for the Advancement of Women, Women and the U.N., Signatures and Accessions/Ratifications to the Optional Protocol, *available at* http://www.un.org/womenwatch/daw/cedaw/protocol/sigop.htm (last visited Oct. 6, 2006) (recognizing the United States among the listing of 81 states that signed the Optional Protocol).

300. *See* Meyersfeld, *supra* note 15, at 382 (stating that ". . . notwithstanding the nature of the harm committed against women in intimate contexts, as of 2000, only forty-four countries . . . have adopted legislation to address domestic violence"); Merle H. Weiner, *The Potential and Challenges of Transnational Litigation for Feminists Concerned About Domestic Violence Here and Abroad*, 11 AM. U. J. GENDER SOC. POL'Y & L. 749, 786–87 (2003) (recognizing that governments usually do not interfere with domestic violence issues and therefore fail to protect women victims); *see also* Kapoor, *supra* note 31, at 12 (stressing that women's organizations must work to compel governments to institute reform in domestic violence matters).

men," "denied liberty, . . . dignity," and "physical and mental autonomy."[301] The state's refusal to prosecute gender-specific crimes further denies women the "internationally guaranteed right to equal protection of the law"[302] in direct violation of the state's international obligations.[303] Whether the state lacks laws to effectively deal with domestic violence or whether it merely fails to enforce these laws effectively, complicity in domestic violence is an international human rights violation.[304]

Under traditional human rights practice, a state may only be held accountable for direct action or an agent's actions, rendering the acts of private individuals "outside the scope of state responsibility."[305] The pervasiveness and frequent non- or discriminatory prosecution of domestic violence by government, however, amounts to states' "systemic failure" of the state to

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301. *See* CONNORS, *supra* note 232, at 14 (stating that the systematic failure to protect women from violence equals the systematic failure to grant women basic human rights); *cf.* Makau Mutua, *Republic of Kenya Report of the Task Forces on the Establishment of a Truth, Justice, and Reconciliation Commission*, 10 BUFF. HUM. RTS. L. REV. 15, 28 (2004) (noting that the failure of the Kenyan government to enforce prosecution of human rights violations created a "highly repressive and authoritarian, trapped culture"). *See generally* Ericka George, *Scared at School: Sexual Violence Against Girls in South African Schools*, 8 HUMAN RTS. TRIB. 39, ¶ 5 (2001) (asserting that government failure to enforce laws protecting South African school girls from gender violence denies them their constitutional right to education).

302. *See* Jay G. Silverman et.al., *Child Custody Determinations in Cases Involving Intimate Partner Violence: A Human Rights Analysis*, 94 AM. J. PUB. HEALTH 951, ¶ 25 (2004), *available at* 2004 WLNR 11350300 (noting that international human rights law provides for equal protection); *see also* Thomas & Beasley, *supra* note 221, at 1134–35 (suggesting that systematic non-prosecution violates international agreements). *See generally* J.C. Barden, *Marital Rape: Drive for Tougher Laws Is Pressed*, N.Y. TIMES, May 13, 1987, at A16 (arguing that a state's non-prosecution of a husband raping his wife is a violation of equal protection).

303. *See* Dietz, *supra* note 222, at 559–60 (noting that states are to be held accountable for human rights violations); *see* Sullivan, *supra* note 235, at 158–59 (stating that a government's international obligations require them to protect domestic violence victims); *see also* Kenneth Roth, *Getting Away with Torture*, GLOBAL GOVERNANCE, July 1, 2005, at 389, *available at* 2005 WLNR 13917173 (stating that governments violate international laws, which is also a violation of human rights).

304. *See* Megan Annitto, *Asylum for Victims of Domestic Violence: Is Protections Possible After In Re R-A-?*, 49 CATH. U. L. REV. 785, 817–18 (2000) (recognizing domestic violence as a human rights violation even when the law fails to adequately protect the victim); *see also* Hardenbrook, *supra* note 17, at 729–31 (arguing that because women are "underrepresented" in the legal and political community, laws granting equal protection to domestic violence victims may never be enforced). *See generally Violence Against Women Takes Centre Stage at the Women's World Forum Against Violence*, 7 HUMAN RTS TRIB. 33, ¶ 7–8 (2000) (suggesting that on an international level, gender stereotypes reinforce non-prosecution of domestic violence offenders where a "woman's human rights violation is turned into a negotiation").

305. *See* Barnes, *supra* note 198, at 101 (stating that governments recognize domestic violence as a private matter that is of no concern to the state); *see also* Carin Benninger-Budel, *supra* note 284, at 8–9 (asserting that historically, states were not held accountable for protecting victims of domestic violence). *See generally* Patricia J. Freshwater, Note, *The Obligation of Non-Refoulement Under the Convention Against Torture: When Has a Foreign Government Acquiesced in the Torture of Its Citizens?*, 19 GEO IMMIGR. L.J. 585, 587 (2005) (quoting the drafters of the Convention Against Torture that domestic violence issues should be addressed by national laws not an international treaty).

comply with international obligations.[306] A "pattern of non-prosecution of acts that violate human rights," amounts to a "failure to guarantee equal protection of the law to women victims."[307] Where states fail to prosecute acts of domestic violence that violate a woman's human rights, they fail to provide equal protection under the law and can therefore, be held vicariously liable for these private acts.[308]

D. Limitations, Challenges and Recommendations

1. The Limits of International Law

Given that violence against women is inherent in all societies, and given its scope and impact on all sectors of society and the global economy, it can "no longer be dismissed as some-

306. *See* Michael G. Heyman, *Domestic Violence and Asylum: Toward a Working Model of Affirmative State Obligations*, 17 INT'L J. REFUGEE L. 729, 735–36 (2005) (stating that systematic failure of a state government to redress domestic violence issues must exist before that state is seen to have acquiesced to the violent behavior); *see also* Meyersfeld, *supra* note 15, at 407–10 (arguing that "state inaction manifests itself in inadequate preventative measures, police indifference to abuses, police and judicial ignorance of the exigency of intimate violence, failure to criminalize intimate violence, gender bias in the court system and legal/administrative proceedings where women experience hostility from the moment the case is reported to the final hearing"); Thomas & Beasley, *supra* note 221, at 1124–25 (noting that states are in violation of international law when they fail to "prohibit or prosecute" torture as a human rights violation).

307. *See* Dietz, *supra* note 222, at 561 (stating that non-prosecution of domestic violence offenses violates human rights); *see also* Thomas & Beasley, *supra* note 221, at 1124–25 (noting that non-prosecution of gender-based violent crime is a human rights violation); *cf. Zimbabwe; Abusive Policies Disrupt Progress on HIV/AIDS*, AFRICA NEWS, July 27, 2006, ¶ 1–2 (examining government's failure to protect HIV/AIDS-infected women from domestic violence).

308. *See* Acacia Shields, HUMAN RIGHTS WATCH, RECONCILED TO VIOLENCE: STATE FAILURE TO STOP DOMESTIC ABUSE AND ABDUCTION OF WOMEN IN KYRGYZSTAN 13 n.35 (2006), *available at* http://hrw.org/reports/2006/kyrgyzstan0906/ (interpreting a provision in the Inter-American Convention on Human Rights to mean that a government must take reasonable steps to prevent human rights violation even from private persons or groups); *see also* Culliton, *supra* note 6, at 549 (stating that "[u]nder the Inter-American system, states are responsible for their failure to effectively prosecute domestic violence and to protect women from torture . . . [and] could be held responsible where they systematically fail to prosecute domestic violence, or where, in individual cases, they fail to investigate and prosecute the claimed human rights violation or fail to protect the victim from further abuse"); Stephen Kinzer, *O.A.S. Tribunal Finds Honduras Responsible for a Political Killing*, N.Y. TIMES, July 30, 1988, at A1 (discussing the result of the landmark Velasquez Rodriquez case, in which the Inter-American Court of Human Rights, for the first time, issued a direct verdict against a government (the Honduran government) for human rights violations).

thing private and beyond the scope of international responsibility."[309] Implementing international law and holding states truly accountable, however, can be problematic.[310]

First, the approach here will be limited because a state cannot be held accountable for the actions of all perpetrators of domestic violence under international law.[311] The state's international obligation with regard to the acts of private individuals is to ensure that it protects people's lives, liberty, and security against private depredations in a non-discriminatory manner.[312]

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309. *See* WORLD BANK, WORLD DEVELOPMENT REPORT 1993: INVESTING IN HEALTH 50 (1993) (indicating that violence against women in terms of rape and sexual abuse "are widespread in all regions, classes, and cultures"); *see also* WHO MULTI-COUNTRY STUDY, *supra* note 32, at 83–89 (discussing the results from a study based on 24,000 interviews with abused women from 10 countries throughout the world, which supported the conclusion that violence against women is widespread); Thomas & Beasley, *supra* note 221, at 1129 (stating that "[i]f violence against women in the home is inherent in all societies, then it can no longer be dismissed as something private and beyond the scope of state responsibility").

310. *See* Mindie Lazarus-Black & Sally Engle Merry, *The Politics of Gender Violence: Law Reform in Local and Global Places*, 28 LAW & SOC. INQUIRY 931, 937 (2003) (stating that despite international pressure, implementing a treaty is problematic in international and local contexts because at the international level, "governments often fail to write reports, to abide by the terms of the convention, or even to ratify the CEDAW at all[,] [and e]ven countries that have ratified the convention and report regularly often fail to abide by the terms of the treaty"). *See generally* Andrew Brynes & Jane Connors, *Enforcing the Human Rights of Women: A Complaints Procedure for the Women's Convention? Draft Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women*, 21 BROOK. J. INT'L L. 679, 683 (1996*)* (noting that the "implementation procedures provided for under the Convention on the Elimination of All Forms of Discrimination Against Women are limited"); Sally Engle Merry, *Constructing a Global Law—Violence Against Women and the Human Rights System*, 28 LAW & SOC. INQUIRY 941, 942 (2003) (citing Brynes and Connors's discussion that women-specific human rights tend to have less effective implementation procedures than other human rights).

311. *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 435, 446 (4th ed., Oxford Univ. Press 1990) (1966) (indicating that a state's responsibility only arises when the act or omission is imputable to a state); *see also* Miccio, *supra* note 8, at 661 (stating that private conduct by state officials is imputed only if the government repeatedly does not prosecute the conduct and the resulting harm violates a human right that the state agreed to protect); Thomas & Beasley, *supra* note 221, at 1126 (stating that states are traditionally not vicariously liable for a person acting in a private matter (domestic violence) because the state is only liable if its agent acted with apparent authority).

312. *See* Fourth World Conference on Women: Action for Equality, Development and Peace, Sept. 4–15, 1995, Beijing, China, *Beijing Declaration*, ¶¶ 3, 12, 15, U.N. Doc. A/CONF.177/20 (Sept. 15, 1995) (declaring equality, development, advancement and equal opportunities for women); Thomas & Beasley, *supra* note 221, at 1126 (suggesting that although states cannot be held directly accountable for violent acts of all private individuals, the state's international obligation is to ensure protection of people's lives, liberty, and security against private depredations); *see also* International Covenant on Civil and Political Rights, G.A. Res 2200A (XXI), at art. 2(3), 21, U.N. GAOR, Supp. No. 16, at 52, U.N. Doc. A/6316 (*entered into force* Mar. 23, 1976), *available at* http://www.hrweb.org/legal/cpr.html (stating that the Covenant explicitly protects a person's rights to life, liberty and security, and against torture and other cruel inhuman treatment or punishment, which also applies to protection against gender-based violence).

The state would have to be complicit in systematic non-enforcement of criminal law in cases of domestic violence.[313]

Second, international law is only binding in some contexts.[314] Declarations are not meant to be binding but are meant to put forth recommendations and guidelines; treaties and conventions only bind signatory countries. Even among those countries that ascribe to treaties and conventions, "[d]espite international pressure and persuasion, it is often difficult to persuade governments to implement the treaty at the national and local level."[315] National sovereignty is often an issue; states often fail to recognize international law as binding unless it has been

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313. *See* Thomas & Beasley, *supra* note 221, at 1126 (stating that "there would have to be systematic, discriminatory nonenforcement of the domestic criminal law against murder or assault for domestic violence [in order] to constitute a human rights issue"); *see also* International Covenant on Civil and Political Rights, G.A. Res 2200A (XXI), at art. 2(3), 21, U.N. GAOR, Supp. No. 16, at 52, U.N. Doc. A/6316 (*entered into force* Mar. 23, 1976), *available at* http://www.hrweb.org/legal/cpr.html (stating that the law should provide all persons equal protection against discrimination on any ground, including sex discrimination, because of the states' promise of enforcement under ICCPR.); Harvetta Asamoah et al., *International Human Rights*, 32 INT'L LAW. 559, 569 (1998) (indicating that "[w]here there is evidence of a pattern of failure to address [domestic violence] in a serious manner or nonenforcement of applicable criminal laws, state responsibility may be established").

314. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115(2) (1987) (indicating that "[a]ny treaty or other international agreement of the United States . . . is federal law; it supersedes inconsistent State law or policy whether adopted earlier or later."); *see also* Charlesworth, *supra* note 229, at ¶¶ 6, 7 (stating that although General Assembly resolutions "are not, strictly speaking, binding, they are increasingly regarded as a source of international law" and there is a long-term view from initial drafting of a non-binding declaration to an eventual binding treaty); NOW Legal Defense and Education Fund, Universal Adoption of the FVO or Other Protections for Violence Victims on Welfare Advances Human Rights Principles (NOW L.D.E.F., New York, NY), Apr. 30, 2002, at ¶ 8, *available at* http://www.legalmomentum.org/issues/wel/FVO_international.pdf (defining international law to consist of two varieties: binding codified law and customary law, which is customary state practice of a perceived international obligation).

315. *See* Foster v. Neilson, 27 U.S. 253, 314 (1829) (explaining that a treaty is generally like a contract between two nations rather than a legislative act, and in the United States, although a treaty generally is considered the law of the land, some may require legislative approval prior to implementation into domestic laws); ROSEMARY FOOT, RIGHTS BEYOND BORDERS: THE GLOBAL COMMUNITY AND THE STRUGGLE OVER HUMAN RIGHTS IN CHINA 269, 270 (2000) (stating that "in the human rights areas there are important permissible exceptions or reservations that can be entered at the time of treaty," but compliance is up to the states because if the regular monitoring reports are not adequate or not submitted, there is little that the Committee can do). *See generally* Culliton, *supra* note 6, at 510 (indicating that, as of 1993, the "United States has not formally acceded to any of the international enforcement mechanisms that allow for litigation of domestic violence complaints against the state [, but] litigation of complaints against the United States for failure to protect women from domestic violence can proceed in the Inter-American system.").

incorporated into domestic law.[316] Despite the efforts of NGOs and the United Nations, governments frequently fail to abide by the terms of treaties to which they are parties.[317]

In case of state complicity in acts of domestic violence, the duties of these states should be enforced by the international community through the enforcement mechanisms available under the ICCPR, through CEDAW and its protocol, and through CAT.[318] Governments should be reminded of their obligations under international law through pressure by the international community at-large.[319] While prevention and prosecution of domestic violence is ultimately the state's responsibility, this responsibility stems from an international obligation to

316. *See* Neilson, 27 U.S. at 314 (suggesting that certain (non-executing) treaties would be ineffective without Congressional legislative approval); *see also* Miccio, *supra* note 8, at 678 (explaining that the Supremacy Clause of the United States Constitution has been narrowly construed due to the tension between the U.S.'s role in international law and national sovereignty issues, resulting in some treaties requiring Congress to pass legislation prior to implementation within the United States). *See generally* Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) (finding that the United States' ratification of the Covenant Against Torture binds the federal and state courts in prohibiting torture, thus the theory of incorporation makes customary international principles a part of U.S. law).

317. *See* U.N. Dep't. of Econ. & Soc. Affairs, Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW), *General Recommendation No. 19, Violence Against Women*, ¶ 4, 11th Session 1992, U.N. Doc. A/47/38 (1993) (concluding that "not all the reports of States parties adequately reflected the close connection between discrimination against women, gender-based violence, and violations of human rights and fundamental freedoms [; thus] the full implementation of the Convention required States to take positive measures to eliminate all forms of violence against women"); *see also* FOOT, *supra* note 315, at 270 (indicating China's reluctance to conform with international human rights treaties); Culliton, *supra* note 6, at 528 (indicating that CEDAW can only use reports and political persuasion to compel states to comply with General Recommendation No. 19's provisions and reporting requirements, and once a state has submitted a report, CEDAW cannot compel a state to comply with its findings).

318. *See* Pena-Irala, 630 F.2d. at 884 (finding that the United States' ratification of the Covenant Against Torture, binds the federal and state courts in prohibiting torture); *see also* International Covenant on Civil and Political Rights, G.A. Res 2200A (XXI), at art. 2(3), 21, U.N. GAOR, Supp. No. 16, at 52, U.N. Doc. A/6316 (*entered into force* Mar. 23, 1976), *available at* http://www.hrweb.org/legal/cpr.html (stating that each state party to the Covenant is to ensure effective remedy and to enforce such remedy for any person whose rights or freedoms were violated); Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, at art. 17–30, 34, U.N. GAOR, Supp. No. 46, U.N. Doc. A/34/46 (*entered into force* Sept. 3, 1981), *available at* http://www.unhchr.ch/html/menu3/b/e1cedaw.htm (establishing the Committee "for the purpose of considering the progress made in the implementation of (CEDAW)").

319. *See* Fourth World Conference on Women: Action for Equality, Development and Peace, Sept. 4–15, 1995, Beijing, China, *Beijing Declaration*, ¶¶ 3, 12, 15, U.N. Doc. A/CONF.177/20 (Sept. 15, 1995) (reaffirming the governments commitment to ensure equal rights for women); *see also* Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, at art. 17–30, 34, U.N. GAOR, Supp. No. 46, U.N. Doc. A/34/46 (*entered into force* Sept. 3, 1981), *available at* http://www.unhchr.ch/html/menu3/b/e1cedaw.htm (mandating reform of state legal and political systems and requiring state parties to enact legislative, judicial, administrative, and other measures to eliminate all forms of discrimination against women, including both intentional and de facto discriminatory treatment of women victims of domestic violence). *See generally* Organization of American States: Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, Belem do Para, Brazil, June 9, 1994, 33 I.L.M. 1534 (1994), *entered into force* Mar. 5, 1995, *available at* http://www1.umn.edu/humanrts/instree/brazil1994.html#4 (affirming international resolve to prevent and control violence against women).

practice due diligence to prevent and combat the problem,[320] and to provide equal protection to women under the law.[321]

2. Getting to the Root of the Problem

Another challenge in changing the practices of states through international law arises out of the variables inherent in a cultural and societal problem, influenced and bolstered by religious, historical and cultural factors.[322] State responsibilities to eliminate the *causes* of domestic violence are "less clearly prescribed by international law than prohibitions against certain abuses, even where the state may be domestically obligated to undertake such functions."[323] Asking the state to adopt social programs and to change discriminatory attitudes is more of a

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320. *See* Inter-American Court of Human Rights: Judgment in Velasquez Rodriquez Case, 28 I.L.M. 294, 324, 326 (1989) (describing the states' affirmative duty to investigate, prosecute and punish human rights violators and that this duty must be implemented by domestic courts); *see also* Kapoor, *supra* note 31, at 10 (indicating that due diligence was addressed by the Inter-American Court of Human Rights in the case of Velasquez Rodriguez, where the Court required the government to "take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out an investigation" and to "impose appropriate punishment"). *See generally* U.N. Dep't. of Econ. & Soc. Affairs, Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW), *General Recommendation No. 19, Violence Against Women*, ¶ 4, 11th Session 1992, U.N. Doc. A/47/38 (1993) (indicating protective measures that CEDAW recommends by creating state liability for private conduct when a state fails to act with due diligence to prevent violations of rights, or to investigate and punish acts of violence, and to provide compensation).

321. *See* International Covenant on Civil and Political Rights, G.A. Res 2200A (XXI), at art. 2(3), 21, U.N. GAOR, Supp. No. 16, at 52, U.N. Doc. A/6316 (*entered into force* Mar. 23, 1976), *available at* http://www.hrweb.org/legal/cpr.html (guaranteeing equal protection of the laws, and equal and effective protection against discrimination on any grounds, including discrimination based on sex); *see also* Brief for International Law Scholars & Human Rights Experts et al., as Amici Curiae Supporting Petitioners, at 4, 7, United States v. Morrison, 529 U.S. 598 (2000) (No. 99-0005, 99-0029) (analogizing the International Covenant on Civil and Political Rights (ICCPR) with the Fourteenth Amendment rights that Article 26 of the ICCPR guarantees not only equal protection of the laws, but also equal and effective protection against discrimination, which encompass the right to be free from gender-based violence"); Kapoor, *supra* note 31, at 10 (discussing the doctrine of equal protection of the law).

322. *See* Culliton, *supra* note 6, at 507–508 (indicating that throughout Latin America and the Caribbean, "states have violated women's fundamental human rights by failing to prosecute domestic violence, to sanction batterers, or to protect women from further serious injuries"); *see also* WORLD BANK, WORLD DEVELOPMENT REPORT: INVESTING IN HEALTH 50 (1993) (indicating that violence against women in terms of rape and sexual abuse "are widespread in all regions, classes, and cultures"); Claudia Garcia-Moreno et al., *Public Health: Violence Against Women*, SCIENCE, Nov. 25, 2005, at 1282 (suggesting policies that include promoting social awareness, changing cultural norms and expanding women's access to economic and social resources as some measures to combat the violence against women).

323. *See* Thomas & Beasley, *supra* note 221, at 1143 (stating that international law provides guidance for a state to prohibit certain abusive acts but not as to how to eliminate the causes of domestic violence, even though the state may be domestically obligated to eradicate such acts); *see also* Kirsten M. Backstrom, Note, *The International Human Rights of the Child: Do They Protect the Female Child?*, 30 GEO. WASH. J. INT'L L. & ECON. 541, 547 (1996-1997) (providing examples of some causes of domestic violence, which include "alcohol and drug abuse, generational cycles of violence, economic and social factors such as poverty and unemployment, cultural factors, and structural inequality within society"). *See generally* Cantalupo et al., *supra* note 68, at 575 (providing an example from Ghana, that without state action and effective measures to protect domestic violence victims' rights, the rights specified in the State Constitution and International obligations are just theoretical).

challenge than prohibiting discriminatory application of their legal system.[324] International human rights organizations and instruments may have more influence with deterrence than with spurring positive social and cultural change.[325]

3. A Holistic Approach

Eliminating domestic violence in the world will require more than the enforcement of international legal instruments. While these instruments can be used to hold governments accountable to implement and apply the law deterring violence against women at the domestic level, they cannot address the causes of such violence.[326] Although CEDAW advocates states' responsibility to "take positive measures to end legal, social, and economic gender inequality,"[327] the measures necessary to achieve this objective will vary by state depending on the

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324. *See* Thomas & Beasley, *supra* note 221, at 1143 (indicating that "it is one thing for a human rights organization to address the state's discriminatory application of law; it is quite another to direct a state to adopt a particular social program to change discriminatory attitudes"); *see also* SHIELDS, *supra* note 308, at 19–22 (stating that domestic violence interventions that involve a fully coordinated community response rooted in strong law enforcement are most promising, however, the police often remain unsympathetic to the victims of domestic violence because of cultural discriminatory attitude). *See generally* Minnesota Advocates for Human Rights, Domestic Violence—Law and Policy: International Legal Framework (2003), *available at* http://www1.umn.edu/humanrts/svaw/domestic/laws/international.htm (summarizing the various international legal instruments and policies that specified states' duty under international law to prevent domestic violence and punish the offenders; however, local legal and legislative measures, along with fragmented and reactive preventive strategies are still weak in many countries).

325. *See* Fourth World Conference on Women: Action for Equality, Development and Peace, Sept. 4–15, 1995, Beijing, China, *Beijing Declaration*, ¶¶ 3, 12, 15, U.N. Doc. A/CONF.177/20 (Sept. 15, 1995) (declaring equality, and development, advancement and equal opportunities for women); *see also* Miccio, *supra* note 8, at 667 (stating that the European Court on Human Rights found that "there may be positive obligations inherent in an effective respect for private and family life, [and that] effective deterrence is indispensable in sexual assault cases, where fundamental values and essential aspects of private life are at stake"); *cf.* Organization of American States: Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, Belem do Para, Brazil, June 9, 1994, 33 I.L.M. 1534 (1994), at arts. 7, 8, *entered into force* March 5, 1995, *available at* http://www1.umn.edu/humanrts/instree/brazil1994.html#4 (listing the duties of the states parties to condemn all forms of violence against women and agree to pursue policies to prevent, punish and eradicate such violence).

326. *See* Kapoor, *supra* note 31, at 7 (stating that there is no single factor that accounts for violence against women, but some of the factors discussed were cultural, economical, legal and political in nature); *see also* Paul, *supra* note 35, at 244 (concluding that "simply identifying problems and responding to crises will not solve the problem" because of the complexity of family violence and therefore, initial interventions are tremendously important in helping countries understand the causes of family violence); Thomas & Beasley, *supra* note 221, at 1143 (documenting "government's failure to prosecute domestic violence does not directly address the causes of that violence, which are rooted in social, economic, and legal structures that discriminate against women, and in widely-held attitudes about women's lesser status").

327. *See* Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, at art. 17–30, 34, U.N. GAOR, Supp. No. 46, U.N. Doc. A/34/46 (*entered into force* Sept. 3, 1981), *available at* http://www.unhchr.ch/html/menu3/b/e1cedaw.htm (stating that "State parties shall take . . . in the social, economic and cultural fields, all appropriate measures, . . . to ensure full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men."); *see also* Paul, *supra* note 35, at 227 (describing the many positive steps taken in the last few years to combat domestic violence, such as "[g]overnment aid, legal reform, shelters for battered women, women's rights organizations, and empowerment programs for women and awareness training for police officers, medical professionals and judges"); *Fact Sheet No. 4*, *supra* note 1 (listing the important steps taken at the international level towards eliminating violence against women and discussing the responses to the Beijing Platform for Action by U.N. member states and the international community to address domestic violence).

severity of domestic violence; the prevailing cultural attitudes toward and traditional roles of women; the economic situation of the country; and other unique socio-cultural and historical factors.[328]

Ending violence against women will only be achieved at the domestic level through reforming judicial systems; educating police, prosecutors, judges, and the general public; and bringing domestic violence into public discourse as it has been at the international level.[329] An integrated, multi-disciplinary approach is needed. Cooperation between "governments and civil society," including social services, such as battered women's shelters and the promotion of public awareness through various means, is essential.[330] An approach that "emphasizes prevention, control and elimination" of the causes of domestic violence, instead of "merely focusing on the punishment," will have a much broader and deeper effect.[331] While violence against

328. *See* Burney, *supra* note 54, at ch. V (describing the prevailing cultural attitudes of the supremacy of male over female and the sanction of religion in Pakistan that makes domestic violence a pervasive feature of domestic life in that country); *see also* Paul, *supra* note 35, at 241 (concluding that "from an international perspective, domestic violence is a nearly universal phenomenon, and it exists in countries with varying political, economic, and cultural structures and its pervasiveness signifies that the problem does not originate with the pathology of an individual person"); Klomegah, *supra* note 145 (discussing domestic violence against women in Russia, which the law does not consider a crime, as a hidden but pervasive human rights abuse exacerbated by Russia's political and economic changes over the past decade).

329. *See* U.N. Div. for the Advancement of Women, *Good Practices in Combating and Eliminating Violence Against Women*, Vienna, Austria, May 17–20, 2005, *Report of the Expert Group Meeting*, § 3.1 (hereinafter Good Practices), *available at* http://www.un.org/womenwatch/daw/egm/vaw-gp-2005/docs/FINALREPORT.good practices.pdf (recommending that governments educate their employees and others, including judges, prosecutors, police officers, border guards, healthcare workers and teachers, to better understand and respond to violence targeting women); CHEYWA SPINDEL, ELISA LEVY & MELISSA CONNOR, WITH AN END IN SIGHT: STRATEGIES FROM THE UNIFEM TRUST FUND TO ELIMINATE VIOLENCE AGAINST WOMEN 117 (The United Nations Development Fund for Women 2000), *available at* http://www.unifem.org/resources/item_detail.php?ProductID=14 (reporting that more than 40 U.N.-funded projects have implemented advocacy and training of the judiciary, prosecutors, healthcare workers, and teachers, reflecting state's efforts to prevent violence against women). *See generally* WORLD REPORT ON VIOLENCE AND HEALTH 111 (Etienne G. Krugg et al. eds., World Health Organization 2002), *available at* http://whqlibdoc.who.int/publications/2002/9241545615_eng.pdf (suggesting that a multisectoral approach involving police, the judiciary, and social services is needed to end domestic violence).

330. *See Good Practices*, *supra* note 329, at § 4.5 (asserting that civil organizations have amassed much experience handling domestic violence and should train government agencies); SPINDEL, LEVY & CONNOR, *supra* note 329, at 117 (expressing the need for governments to forge partnerships with civil society in combating domestic violence). *See generally* WHO MULTI-COUNTY STUDY, *supra* note 32, at 90 (recommending an integrated approach by implementing policy that increases education about domestic violence, strengthens the healthcare system's response, sensitizes the criminal justice system to the problem, and creates better support systems for victims of domestic violence).

331. *See* Kapoor, *supra* note 31, at 10 (claiming that states have obligations to take preventive measure in domestic violence cases); WORLD HEALTH ORGANIZATION (WHO), WORLD REPORT ON VIOLENCE AND HEALTH 112 (Etienne G. Krugg et al. eds., 2002), *available at* http://whqlibdoc.who.int/publications/2002/9241545615_eng.pdf (suggesting that state programs should focus more on primary prevention of domestic violence); Lori Michau, *Good Practice in Designing a Community-Based Approach to Prevent Domestic Violence* 3, *in* VIOLENCE AGAINST WOMEN: GOOD PRACTICES IN COMBATING AND ELIMINATING VIOLENCE AGAINST WOMEN (United Nations, Division for the Advancement of Women 2005), *available at* http://www.un.org/womenwatch/daw/egm/vaw-gp-2005/docs/experts/michau.community.pdf (advising that governments must take a "proactive rather than a reactive" position to have a long-term effect on the problem of domestic violence).

women has gained international attention, it also requires attention at the local level.[332] For instance, South Africa's domestic legislation not only provides for addressing domestic violence through criminal law, it involves "police officers, prosecutors, magistrates, counselors, health practitioners and victim assistant officers."[333] This type of comprehensive legal and social approach is the only way to deal effectively with such a deeply rooted, pervasive and complex issue as violence against women.[334]

V. Conclusion

Ultimately, domestic violence will continue to plague societies throughout the world until state actors take steps to reform their legal systems, punish offenders, and educate the actors responsible for recognizing and combating domestic violence. A comprehensive legal approach is needed that includes prevention and punishment. State actors are responsible, under every major international legal instrument, to provide equal human rights to women and equal treatment under the law.[335] Recent international law recognizes the endemic proportions of domestic violence and as such specifically names violence against women as a human rights

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332. *See* Anne F. Bayefsky, *General Approaches to the Domestic Application of Women's International Human Rights Law*, *in* HUMAN RIGHTS OF WOMEN 351, 351 (Rebecca J. Cook ed., 1993) (recognizing that the international communities' eagerness to adopt human rights standards for women masks a deeply rooted reluctance to implement these standards at the local level); Rebecca J. Cook, *State Accountability Under the Women's Convention*, *in* HUMAN RIGHTS OF WOMEN 228, 251 (Rebecca J. Cook ed., 1993) (explaining that while international treaties offer the architecture for equal human rights for women, further legal construction is required to ensure that local officials give effect to these international instruments); Gilchrist, *supra* note 271, at 764 (suggesting that while women's rights need to be secured on the national level for them to have an impact on women on a daily basis, it is also necessary to establish international human rights standards for women).

333. *See* Mantau, *supra* note 180 (noting the multisectoral South African approach to addressing domestic violence); *see also* Domestic Violence Act 116 of 1998 s. 2, 3, 5, 18 (S. Afr.) (defining roles for South African police officers, courts, prosecutors, counselors, health service providers, social workers, and teachers to eliminate domestic violence). *See generally* Felicity Kaganas & Christina Murray, *Law and Women's Rights in South Africa: An Overview*, *in* GENDER AND THE NEW SOUTH AFRICAN LEGAL ORDER 1 (Christina Murray ed., 1994) (discussing how the emphasis on equality for women in South African law can be seen in the law's shift in approach to women and the enhancement of women's legal status).

334. *See* WHO MULTI-COUNTY STUDY *supra* note 32, at 92 (stressing the importance of developing a multisectoral approach to fighting domestic violence); Kapoor, *supra* note 31, at 13 (instructing that strategies to end domestic violence should be developed in an integrated, multi-layered manner allowing for the structural cause to be addressed while providing services to victims); *see also* Isa, *supra* note 275, at 300–01 (discussing how the Convention on the Elimination of Discrimination Against Women addresses both governments and the private sphere).

335. *See* Universal Declaration of Human Rights, G.A. Res. 217A (III), at 72, U.N. Doc A/810 (Dec. 10, 1948) (declaring freedom and equal rights for "all human beings"); *see also* Cheryl Thomas, *Domestic Violence*, *in* 1 WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW 219, 243 (Kelly D. Askin & Dorean M. Koenig eds., 1999) (stating that under international human rights law, states are required not to discriminate against women and provide remedies for violations of human rights). *See generally* Isa, *supra* note 275, at 294–300 (providing a survey of the United Nations' role in the development of human rights law and its application to women).

violation.[336] Accordingly, a state's failure to implement laws dealing with domestic violence amounts to complicity in these violations and is a breach of their international obligations.[337] These international obligations should be enforced utilizing the available enforcement mechanisms under the ICCPR, CAT, and CEDAW. Since law is both derived from and reinforces social mores, legal and cultural reform through education and social services efforts should accompany this obligation.

Since domestic violence stems from cultural bias against women and is based on its private nature, heightening awareness, educating the public about the problem and implementing social programs through cooperation with non-governmental organizations will be a necessary part of the remedy.[338] Domestic violence is a structural and cultural problem and not only an individual one.[339] As a result, it requires structural and cultural solutions.

Although the problem of domestic violence and violence against women remains a preeminent issue of concern in the international community, it still remains a global pandemic;[340] states should realize the staggering costs of domestic violence, recognize the human rights viola-

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336. *See* World Conference on Human Rights, June 14–25, 1993, *Vienna Declaration and Programme of Action*, ¶ 18, U.N. Doc A/CONF.157/23 (July 12, 1993) (declaring that "[g]ender-based violence . . . including [that] resulting from cultural prejudice . . . [is] incompatible with the dignity and worth of the human person, and must be eliminated"); *see also* Catharine A. MacKinnon, *Women's September 11th: Rethinking the International Law of Conflict*, 47 HARV. INT'L L.J. 1, 29 n.114 (2006) (recommending that while alternative approaches should be explored, the international community should implement the proposals in the Beijing Platform for Action that specifically address domestic violence). *But see* Thomas, *supra* note 335, at 241 (reporting that the Convention on the Elimination of All Forms of Discrimination Against Women does not specifically address domestic violence).

337. *See* Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 54/4, at 3, U.N. Doc. A/RES/54/4 (Oct. 15, 1999) (providing a mechanism for victims of domestic violence to bring a claim against a state alleging the state has violated the victim's rights); Cook, *supra* note 332, at 229 (asserting that it is a fundamental principle of international law that a state is held accountable for its human rights violations); Roth, *supra* note 261, at 329–30 (explaining that a state's failure to abdicate domestic violence is a tacit approval of that violence and through this complicity domestic violence can be viewed as a human rights issue).

338. *See* WHO MULTI-COUNTY STUDY, *supra* note 32, at 92–93 (positing that preventing domestic violence will require changing "gender-related attitudes, beliefs and values" and therefore we must raise awareness to challenge these constructs); *see* Jane Connors, *Violence Against Women*, *in* SOURCEBOOK ON FEMINIST JURISPRUDENCE 558, 569 (Hillaire Barnett ed., Cavendish Publishing Limited 1997) (discussing strategies to prevent domestic violence that aim to address educational and societal portrayals of women by having governments work with non-governmental agencies). *See generally* Delpha Moran Barrera, *International Concerns Commission: Ending Domestic Violence from the Global Frontlines*, CATHOLIC WOMAN, Oct. 31, 1999, at 9 (reporting cultural biases against women in different societies around the world).

339. *See* Connors, *supra* note 338, at 575 (revealing that violence against women stems from the status of women in society and the traditional values that define relations between genders); Rose Garrity, *Domestic Violence: What to Do?*, HERA (Binghamton), Oct. 31, 1990, at 4 (suggesting that our culture of dominance perpetuates and legitimizes domestic violence); Tania Tetlow, *Abuse Is More Than a Character Flaw*, THE TIMES-PICAYUNE (New Orleans), May 24, 2006, at B7 (positing that domestic violence exists, in part, because society accepts it).

340. *See* WHO MULTI-COUNTY STUDY *supra* note 32, at 83 (finding that in a study of 10 countries around the world more than one-quarter of the women polled in every country with the exception of Japan, had been abused at least once since the age 15 and that more than one-half of the women in 5 of the 10 countries included in the study had been assaulted since that age); WHO, *supra* note 331, at 89 (reporting that 27 percent of women in the United States, who have ever had an ongoing sexual partner, have been assaulted by their partner); *see also* Cook, *supra* note 332, at 229 (asserting that international and regional human rights conventions have been applied minimally to tackle violations of women's rights).

tions that it embodies, and implement effective policies and legislation accordingly. International law can be used to encourage and compel change.[341]

Violence against women will not be eliminated quickly or easily. Its causes are rooted in cultural, religious and legal mechanisms and the continued privatization of the issue.[342] With an integrated, cooperative and cross-disciplinary approach involving enforcement and encouragement at the international and domestic levels, the international community may more fully achieve the ideals embodied in international human rights law. Only then will this shameful and pervasive violation of human rights be overcome and "real progress towards equality, development, and peace" will be made.[343]

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341. *See* WHO MULTI-COUNTY STUDY, *supra* note 32, at 83 (maintaining that significant progress could be achieved in eliminating domestic violence if states complied with human rights treaties they ratified); Stark, *supra* note 153, at 257 (commenting that in the realm of domestic violence, international law has helped to shape the domestic norms by encouraging education and prevention). *But see* Hilary Charlesworth, Christine Chinkin & Shelly Wright, *Feminist Approaches to International Law*, *in* SOURCE BOOK ON FEMINIST JURISPRUDENCE 537, 552 (Hillaire Barnett ed., Cavendish Publishing Limited 1997) (arguing that modern international law is ineffective in combating domestic violence because of its patriarchal nature).

342. *See* HILAIRE BARNETT, SOURCE BOOK ON FEMINIST JURISPRUDENCE 404 (Cavendish Publishing Limited 1997) (remarking that when analyzing domestic violence it is important to keep in mind the cultural, historical, and traditional explanations for domestic violence); Isa, *supra* note 275, at 293 (attributing part of the difficulty addressing domestic violence to the fact that most violence against women takes place in the private sphere and governments are reluctant to intrude on matters involving the family and the home); Kapoor, *supra* note 31, at 7 (explaining that there are many social and cultural causes of domestic violence and that all of them stem from the historical inequality between men and women).

343. *See* Connors, *supra* note 338, at 575 (calling for an integrated approach that makes domestic violence a critical issue for all levels of government, the private sector, and every individual); *see also Fact Sheet No. 4*, *supra* note 1 (summarizing the U.N.'s recent efforts to combat domestic violence and provide global statistics on the prevalence of domestic violence); *Good Practices*, *supra* note 329, at § 6.1 (stressing the necessity of a comprehensive, fully integrated, multisectoral strategy to prevent domestic violence).

Gemological Institute of America, Inc. v. Zarian Co., Ltd.

2006 U.S. Dist. LEXIS 54102 (S.D.N.Y. 2006)

The Federal District Court, in an interpleader action, denied ownership of a stolen diamond to the corporate purchaser, rejecting the corporation's claim that its purchase fell within an exception in Israeli law that grants title to a good faith purchaser of stolen property in certain circumstances.

I. Holding

In *Gemological Institute of America, Inc. v. Zarian Co., Ltd.*,[1] an interpleader action, the District Court for the Southern District of New York ruled in favor of the original owner of a stolen diamond, rather than a subsequent purchaser. The court found that the sale likely took place in Israel and that Israeli law was thus applicable.[2] However, it rejected the purchaser's argument that it satisfied the requirements for recognition as a good faith purchaser[3] because the purchaser failed to prove that the seller of the diamond dealt in property of that kind,[4] that the sale occurred in the seller's ordinary course of business,[5] and that the defendant buyer purchased the diamond in good faith.[6]

II. Facts and Procedural History

Siyance Brothers' Diamond Corp. ("S.B."), the purchaser of the diamond, is an international corporation with businesses located in Israel, Italy, and New York. Gemological Institute of America, Inc. ("GIA"), a corporation employed in analyzing and grading diamonds and gemstones, received the diamond from S.B. for grading.[7] GIA found from its record that it had previously graded the same diamond and traced its ownership to Zarian Company, Ltd. ("Zarian"), and thus, informed S.B. that it would hold the diamond until title was determined.[8]

GIA filed an interpleader proceeding on June 5, 2003, to resolve ownership of the diamond.[9] Zarian moved for summary judgment, which the District Court granted, in part, and denied, in part.[10] In that decision, the court found that the diamond held by GIA was, in fact,

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1. 2006 U.S. Dist. LEXIS 54102 (S.D.N.Y. 2006) (*GIA II*).
2. *Id.* at *15.
3. *Id.*
4. *Id.* at *17.
5. *Id.* at *22.
6. *Id.* at *30–31.
7. *Id.* at *6.
8. *Id.*
9. *Id.* at *2.
10. Gemological Inst. of Am., Inc. v. Zarian Co., 349 F. Supp. 2d 692, 693 (S.D.N.Y. 2004) (*GIA I*).

stolen from Zarian, but that a material issue of fact existed as to the location of sale, which determines the applicable law.[11]

In its assertion of its claim of title, S.B. argued that it purchased the diamond in Israel and that Israeli law, which allows for purchasers of stolen property to receive title in certain circumstances, was applicable. Michael Sianes ("Sianes"), brother of S.B.'s founders and in some unclear way a member of the family business, testified that he purchased the diamond from Shemesh Zevulun ("Zevulun") in Sianes' office at the Ramat-Gan Diamond Exchange ("the Exchange") in Israel.[12] Zevulun, whose testimony corroborated the location of the sale, was the Vice President of the Israeli Precious Stones and Diamond Exchange.[13] The value exchanged was a *petek*, a note, for $370,000, which was later destroyed upon settlement of the debt, according to custom.[14] After acquiring the diamond, Sianes sent it to S.B. in New York, where Meyer Sommer ("Sommer"), a diamond broker with a history of business with S.B., took the diamond to GIA for grading.[15]

Zarian also claimed title to the diamond, arguing that it was not established that Sianes was acting for S.B. when he purchased the diamond from Zevulun in Israel, so that Sianes should be considered to have sold it to S.B. in New York,[16] and that a transfer of possession to Sommer also occurred in New York.[17] If the sale of the diamond took place in New York, then New York law, which rejects any claim of title by the purchaser of stolen property, ought to apply.[18]

III. Discussion

A. Choice of Law

Under New York law, applicable in diversity actions brought in New York federal courts, the "validity of a transfer of personal property [is] governed by the law where the property is located at the time of transfer."[19] Thus, the dispute over where S.B., in fact, purchased the diamond was of great significance in determining ownership. This significance was explained in greater detail as the court discussed the relevant differences between New York and Israeli law. When New York rules are applied, the purchaser of stolen personal property does not receive title.[20] While Israeli law begins from that same proposition, it does carve out an exception for

11. *Id.* at 697.
12. *GIA II*, 2006 U.S. Dist. LEXIS 54102, at *7.
13. *Id.* at *5.
14. *Id.* at *5–6.
15. *Id.* at *6.
16. *Id.* at *12.
17. *Id.* at *14–15.
18. *Id.* at *12–15.
19. Wertheimer v. Cirker's Hayes Storage Warehouse, 2001 N.Y. Misc. LEXIS 693, at *12 (N.Y. Sup. Ct. 2001). *See* Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941) (stating the rule that the choice of law rules applied by a federal court in a diversity action are those of the state in which the court sits).
20. *GIA II*, 2006 U.S. Dist. LEXIS 54102, at *7.

stolen goods when: (1) a sale or contract has been made; (2) the property at issue is movable property; (3) the seller deals with the sale of property of the kind of item sold; (4) the sale was made in the ordinary course of the seller's business; (5) the buyer takes possession of the goods; and (6) the buyer acted in good faith.[21] The court, in its explanation of the Israeli exception, notes that the first five requirements are objective, while the sixth requirement—demanding the purchaser's good faith—is subjective in nature.[22]

In determining the location of the sale, the court was forced to rely on the testimony of Sianes and Zevulun. Neither party was able to produce documentation that would substantiate the allegation that the sale, in fact, occurred in Israel.[23] Faced with an absence of documented facts, as well as Zarian's arguments about the nature of the purchase, the court chose to assume *arguendo* that the sale occurred in Israel.[24] For reasons explained below, the court found the choice of law to have no bearing on the outcome because S.B. failed to meet its burden of proving that Sianes' purchase fulfilled the requirements for the exception in Israeli law.[25]

B. Application of Israeli Law

Having assumed that Sianes purchased the diamond in Israel as an agent of S.B., the court proceeded to hold that S.B.'s purchase did not fulfill the requirements for the exception under Israeli law.[26] Specifically, it found that Zevulun, the seller, did not deal in goods of the kind sold, that the sale did not occur in the ordinary course of his business, and that S.B., acting through Sianes, did not act in good faith.[27] Since it failed to sufficiently prove the required elements, S.B. was denied the exception for a purchaser of stolen goods and Zarian was held to have title to the diamond.

1. Seller Did Not Deal in Goods of the Kind Sold

The court found that Zevulun did not deal in diamonds like the one he sold to Sianes because he had not sold a diamond of that size before the sale at issue.[28] While the court conceded that Zevulun had a long record of participation in the diamond industry and that this supported a conclusion that he dealt in diamonds,[29] it found the evidence insufficient to conclude that his experience was in diamonds of the same kind.[30] To reach this conclusion, the court strictly interpreted Israeli law to demand that the goods dealt in previous to the sale of

21. *See* Eyal Zamir, *Market Overt in the Sale of Goods: Israeli Law in a Comparative Perspective*, 24 ISR. L. REV. 83, 99 (1990) (setting forth the Israeli Sales Law exception for purchasers of stolen property); *see also GIA II*, 2006 U.S. Dist. LEXIS 54102, at *10 (citing Zamir's explanation of the rule).

22. *GIA II*, 2006 U.S. Dist. LEXIS 54102, at *10.

23. *Id.* at *11–12.

24. *Id.* at *15.

25. *Id.*

26. *Id.* at *16.

27. *Id.*

28. *Id.* at *18.

29. *Id.* at *16–17.

30. *Id.* at *18.

stolen goods be of similar character.[31] It cited authority from the District Court of Tel Aviv,[32] which found that a diamond seller dealt in goods of that kind because its partners were employed as diamond brokers and it had a history of dealing with diamonds of a similar size to the one at issue.[33]

Applying this reasoning to the similar circumstances surrounding S.B.'s purchase, the court found that Zevulun's experience in selling diamonds did not include any that were comparable to the size of the diamond at issue.[34] In *Shetah v. Bilder*, the Israeli appellate court was able to find that the diamond at issue was of the same kind, because the seller was experienced in the diamond trade, including documented sales of diamonds larger than the one sold.[35] Here, the District Court noted that Zevulun did not provide any documentation that would support a finding that the diamond sold to Sianes was of comparable size to the diamonds previously sold by Zevulun.[36] The court, in making this distinction, made an implicit reference to the case history, during which the court found that the stolen diamond was 11.60 carats and was part of a setting that weighed a total of 12.20 carats.[37] Here, the District Court, reluctant to extend the concept of "same kind" to a diamond of such substantial size, was also led to its finding by the absence of documentary evidence that might have proven that Zevulun's dealings did include diamonds of comparable size.[38]

The court chose this path of strict interpretation in the face of cited Israeli authority that suggested the opposite conclusion.[39] "The degree of identity or similarity between the item sold and the goods that are ordinarily sold by the seller may vary according to the situation. The word 'kind' does enable flexibility in the application of the rule."[40] Despite this seeming latitude to disregard the difference in the size of past diamonds sold and the present diamond at issue, the court held that a difference in size of this magnitude was, in fact, a difference in kind.[41]

2. The Sale Did Not Occur in the Ordinary Course of the Seller's Business

The court next found that Sianes' purchase of the diamond was not in the ordinary course of Zevulun's business.[42] Referring again to its chosen authority on Israeli law, the court observed that the test for this element was "not a technical test of the place" that the sale event,

31. *Id.* at *17–18.

32. Shetah v. Bilder, C.A. 582/89 (Dist. Ct. Tel Aviv 1991).

33. *Id.* at *3.

34. *GIA II*, 2006 U.S. Dist. LEXIS 54102, at *18.

35. C.A. 582/89, at 3; *see also GIA II*, 2006 U.S. Dist. Lexis 54102, at *18 (referring to the facts of *Shetah*).

36. *GIA II*, 2006 U.S. Dist. LEXIS 54102, at *18.

37. *GIA I*, 349 F. Supp. 2d at 693.

38. *Id.*

39. *See* Zamir, *supra* note 21, at 106.

40. *GIA II*, 2006 U.S. Dist. LEXIS 54102, at *16 (citing Zamir, *supra* note 21, at 106).

41. *Id.* at *18.

42. *Id.* at *20–21.

or some part of it, occurred.[43] Instead, the analysis must focus on "all the surrounding circumstances of the sale" and "examine the ordinary features of the seller's trade and whether or not they are present in the particular transaction."[44]

In its evaluation of the facts, the court was again forced to rely solely on oral testimony, which it found to be completely deficient in proving both the nature of the sale and the nature of Zevulun's ordinary course of business.[45] Sianes and Zevulun both testified as to the prior existence of the *petek*, which would tend to prove the existence of some exchange, and as to the *petek*'s destruction.[46] The court found this explanation credible in explaining the lack of initial documentation, though it was troubled by the absence of any explanation from either of the men as to how their account was settled.[47]

The court also found that there was no evidence establishing how Zevulun's business ordinarily ran.[48] Thus, while the testimony of Sianes and Zevulun tended to explain the lack of documentary evidence as consistent with the way business was normally conducted on the Exchange, the court could not find such consistency without any documentary evidence of what is that ordinary course.[49] In *Shetah*, the Israeli court was able to find that the sale occurred in the normal course of the seller's business because it was provided with sufficient, documented proof of that "normal course."[50] In contrast, in the present action, no documentation was provided to establish how Zevulun typically did business.[51] "No matter how credible these witnesses may appear on these points, the Court simply must conclude that nothing but self-serving statements supports their claim that those aspects of the transaction are routine."[52] Thus, the court found that the sale was not in the ordinary course of Zevulun's business.[53]

3. S.B. Did Not Purchase in Good Faith

In its analysis of the subjective element of S.B.'s burden, the court held that S.B. did not purchase in good faith.[54] Good faith is used in this context to establish that the purchaser of stolen property acted with a sense that the seller is "entitled to transfer the thing sold free of every charge, attachment, or other right."[55] While this standard does not equal the absence of

43. *Id.* at *18 (citing Zamir, *supra* note 21, at 108).
44. *Id.* at *18–19 (citing Zamir, *supra* note 21, at 108).
45. *Id.* at *20–21.
46. *Id.* at *5–6.
47. *Id.* at *19.
48. *Id.* at *22.
49. *Id.* at*20.
50. *Shetah*, C.A. 582/89, at 1–3.
51. *GIA II*, 2006 U.S. Dist. 54102, at *22.
52. *Id.* at *20–21.
53. *Id.* at *22.
54. *Id.* at *31.
55. *Id.* at *23 (citing Zamir, *supra* note 21, at 110).

negligence, as the court pointed out,[56] there remains a duty on the purchaser to investigate in circumstances that appear clearly suspicious.[57]

The court, citing Israeli authority, laid out five factors to be applied in its determination of whether the purchaser ought to have suspected the seller's right to sell: (1) the price of the chattel; (2) the character of the seller and nature of his business; (3) the circumstances of sale; (4) the purchaser's behavior; and (5) the nature of the item sold.[58] Thus, in applying this subjective standard, the court was clear that there needed to be objective proof tending to establish the buyer's good faith.[59]

Conceding that the testimony of Sianes and Zevulun appeared to support some parts of a finding of good faith—for example, that Sianes appeared to have paid near market price and that the diamond was submitted for grading[60] —the court nevertheless, concluded that the deficiency of documentary evidence precluded S.B. from making a showing of good faith.[61] The court found that S.B.'s proof of good faith was deficient as to the manner of payment,[62] the circumstances of the transaction,[63] and the buyer's behavior.[64] As to the first two of these factors, the court linked much of its conclusion to its prior findings concerning the nature of the sale and Zevulun's business.[65]

The third factor, relating to S.B.'s behavior, was important because it established the state of mind surrounding the purchase, including whether the purchaser made efforts to remain ignorant as to whether the chattel was stolen.[66] In *Shetah*, the Israeli court accepted the buyer's good faith, in part, because the buyer paid full price and gave the diamond to a broker for appraisal.[67] In its analysis of S.B.'s allegations, the District Court conceded that the facts were similar and that this might lend itself to a finding of good faith.[68] However, the court distinguished S.B.'s claim, based on the lack of documentation proving two significant events: the transportation of the diamond from Israel to New York by courier, and the diamond's arrival at S.B.'s New York office.[69] As to the first event, the court was troubled by the absence of docu-

56. *GIA II*, 2006 U.S. Dist. LEXIS 54102, at *23–24.

57. *Id.* at *24.

58. *Id.* at *24–25.

59. *See* Zamir, *supra* note 21, at 115 ("[W]hile the test for the existence of good faith is totally subjective, usually there is no alternative but to determine it and prove it by way of external evidence.").

60. *GIA II*, 2006 U.S. Dist. LEXIS 54102, at *26.

61. *Id.* at *27.

62. *Id.* at *26–27.

63. *Id.*

64. *Id.* at *27.

65. *Id.* at *26–27.

66. *Id.* at *26; *see also* Zamir, *supra* note 21, at 116 (explaining that "shutting one's eyes" to the nature of the stolen property is inconsistent with a demonstration of good faith in purchase).

67. *Shetah*, C.A. 582/89, at 6.

68. *Id.* at *26 (noting that the diamond was bought for near-market value and that it was given to the diamond broker in New York for appraisal).

69. *Id.* at *28.

ments verifying the transport by courier through U.S. Customs.[70] For the second event, the court was again unwilling to accept the lack of documentation, as well as the complete failure of S.B.'s witnesses to explain why these seemingly important documents were missing.[71] Thus, the court was again forced to hold in Zarian's favor, due to S.B.'s inability to meet its burden through either documentary evidence or more thorough testimony.[72]

IV. Conclusion

The District Court's holding in *GIA II* was founded, in large part, on evidentiary concerns. It was willing to give a certain amount of deference to S.B. in meeting its burden, possibly a necessary concession given the international nature of the dispute and the foreign business customs that surrounded it, but this goodwill extended only so far. Particularly while working under its initial assumption concerning the location of sale and appropriate choice of law, the court was unwilling to allow the exception carved out of Israeli law to be applied to a case so devoid of documentary evidence.[73]

While this approach was certainly prudent in a reading of the opinion as a whole, the court's treatment of the first element—that the seller deal in goods of the same kind—may put too heavy a burden on the purchaser. If the purpose of this element is to establish that the transaction seemed, to a purchaser acting in good faith, to be of a normal nature, a distinction between the sizes of the goods sold is irrelevant. Such a distinction would likely be unknown to any given purchaser, as any knowledge of the seller's business dealings would be unavailable. If, under different facts, a good faith purchaser were to be precluded from claiming this exception simply due to such unknown facts about the seller, the exception in Israeli law might lose much of its intended effect.

Nevertheless, the court's arguably semantic distinction did not decide the case for Zarian. That conclusion was made all too easy by the failure of S.B. to provide sufficient documentation or explanatory testimony. While the case certainly stands for the proposition that testimony alone must be substantially detailed in order to corroborate the facts of a sale of goods, the absence of documented facts means that its holding has little value in determining how a court may decide on a transaction clearly evidenced.

Matthew Weir

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70. *Id.*
71. *Id.* at *28–29.
72. *Id.* at *31.
73. *Id.*

I.D.R.P., BVBA v. Worldwide Diamonds Group, Inc.

10 Misc. 3d 1064A, 814 N.Y.S.2d 561 (Sup. Ct. 2005)

The foreign judgment was not recognized because service of process by mail, rather than in accordance with the Hague Service Convention, was insufficient to establish the foreign court's personal jurisdiction over a defendant not in that country; and the defendant's assets could not be attached because the lack of personal jurisdiction disqualified the foreign judgment for comity recognition.

For the 51 party nations, the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters ("Hague Service Convention"),[1] provides internationally recognized procedures for service of process relating to a lawsuit in a country other than that where process is to be served. In addition:

Provided the State of destination does not object, the present Convention shall not interfere with—

a) the freedom to send judicial documents, by postal channels, directly to persons abroad;

b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination;

c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination.[2]

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1. Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Art. 10, Feb. 10, 1969, 20 U.S.T. 361, T.I.A.S. 6638 [hereinafter "Hague Service Convention"]; *see also I.D.R.P.,* 10 Misc. 3d at 1064A, 814 N.Y.S.2d at 561 (citing Reynolds v. Koh, 109 A.D.2d 97, 98 (N.Y. App. Div. 1985) (quoting Tamari v. Bache & Co., 431 F. Supp. 1226, 1228, *aff'd*, 565 F.2d 1194) (describing the Hague Service Convention as a treaty designed "to simplify service of process abroad so as to ensure that documents are brought to the notice of the addressee in sufficient time")).

2. Hague Service Convention, Art. 10.

In many cases, parties have attempted to serve process by mail, relying on paragraph (a) above.[3] Some countries have filed formal statements specifying whether they will allow service by mail.[4] In the cases involving countries that have not filed such statements, courts in the United States are divided on whether or not service by mail is valid. An interesting aspect of the subject case is that it was a Belgian court, rather than an American court, that accepted jurisdiction and entered judgment in a case where process was served by mail.

I. Holding

In *I.D.R.P., BVBA v. Worldwide Diamonds Group, Inc.*,[5] the Supreme Court of New York, New York County, denied a motion for summary judgment to enforce a Belgian judgment and for attachment of defendant's assets in New York. The court held that: (1) service of process by mail was not sufficient to give the Belgian court personal jurisdiction over the defendant;[6] and (2) due to the lack of personal jurisdiction, the foreign judgment was not entitled to recognition, which consequently barred attachment of defendant's assets.[7]

II. Facts and Procedural Posture

Plaintiff was I.D.R.P., BVBA and the Defendant was Worldwide Diamonds Group, Inc.;[8] the underlying claim involved the sale of diamonds by Plaintiff to Defendant.[9] Process was served on Defendant by mail and the action was tried in 2004 by the Commercial Court in the Judicial District of Antwerp, Belgium.[10] The Belgian court awarded Plaintiff damages in the amount of $254,954.57.[11]

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3. "Perhaps the issue is best understood as a conflict between seeking to carry out the intent of the Convention and seeking to get by with the minimum tolerated by a strict interpretation of its words." Houston Putnam Lowry & Peter W. Schroth, *Survey of 2000-2001 Developments in International Law in Connecticut*, 76 CONN. B.J. 217, 247 (2002).

4. Canada and Cyprus have declared that they will accept service of process by mail. According to the State Department's web site http://travel.state.gov/law/info/judicial/judicial_686.html (last visited Oct. 28, 2006), Argentina, China, the Czech Republic, Egypt, Germany, Greece, the Republic of South Korea, Latvia, Lithuania, Luxembourg, Norway, Poland, the Slovak Republic, Sri Lanka, Switzerland, Turkey, Ukraine and Venezuela have declared that they will not. However, as pointed out several years ago by Lowry and Schroth, *supra* note 3 at 250–51, "we note that Bulgaria filed its objection to the use of 10(a) in 1999; that Mexico objects unless certain apparently difficult conditions are met; and that Luxembourg withdrew its objection in 1978." *See generally* http://hcch.e-vision.nl/index_en.php?act=conventions.status&cid=17 (last visited Oct. 28, 2006).

5. 10 Misc. 3d 1064(A), 814 N.Y.S.2d 561 (N.Y. Sup. Ct. 2005).

6. *Id.* Neither party's nationality or address was stated in the New York judgment but it must have been necessary to serve Defendant outside Belgium or the Hague Service Convention would not have been relevant. The New York court did not state whether Defendant appeared in the Belgian proceedings. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

Plaintiff subsequently brought an action in New York for recognition of the Belgian judgment pursuant to Article 53 of the New York Civil Practice Law and Rules[12] and to recover the outstanding balance of $211,919.77 remaining on the same.[13] Plaintiff moved for summary judgment and sought attachment of Defendant's assets within the State of New York.[14]

III. Discussion

The Defendant resisted enforcement of the Belgian judgment on the grounds that the Belgian court did not have personal jurisdiction over the Defendant and that Antwerp was an inconvenient forum. According to CPLR 5302,[15] a foreign judgment granting or denying money damages is conclusive and enforceable between the parties, except as provided in CPLR 5304.[16] CPLR 5304(a)(1) provides that a foreign judgment is not conclusive where the foreign court did not properly establish personal jurisdiction over the defendant.[17]

The New York court held that because the Belgian writ was served by mail, the Belgian court lacked personal jurisdiction over Defendant.[18] The Hague Service Convention procedures were not used, leaving Plaintiff to rely on Article 10(a), which provides that, absent objection from the state of destination, the Hague Service Convention "shall not interfere with . . . (a) the freedom to send judicial documents, by postal channels, directly to persons abroad."

The court relied on the Third Department's interpretation of Article 10(a)[19] in *Reynolds v. Koh*:[20]

> That article 10(a) refers to "send," whereas the Hague Convention repeatedly refers to "service" of documents, indicates to us that article 10(a) was meant to authorize something other than "service" in the legal sense, such as the mere transmittal of notices and legal documents which need not be "served" in the legal sense.

Noting that the First Department likewise adopted this reasoning in *Sardanis v. Sumitomo Corp.*,[21] the court concluded that Article 10(a) does not, in fact, permit service of process by mail, but permits only the exchange of notices and legal documents that "need not be 'served'

12. N.Y. CPLR Art. 53 (McKinney 2006) [hereinafter "CPLR"].
13. *I.D.R.P.*, 10 Misc. 3d at 1064(A), 814 N.Y.S.2d at 561.
14. *Id.*
15. CPLR 5302 (McKinney 2006).
16. CPLR 5304 (McKinney 2006).
17. CPLR 5304(a)(1) (McKinney 2006).
18. *I.D.R.P.*, 10 Misc. 3d at 1064(A), 814 N.Y.S.2d at 561.
19. *Id.*
20. *Id.* (quoting *Reynolds*, 109 A.D.2d at 99).
21. 279 A.D.2d 225 (N.Y. App. Div. 2001) (affirming the interpretation of Article 10(a) of the Hague Service Convention that finds service of process by mail to be insufficient to acquire personal jurisdiction over defendant, especially since Japan had specified its preference for personal service).

in the legal sense"[22] by mail.[23] As a result, service of process by mail in the underlying Belgian action was insufficient to establish personal jurisdiction over Defendant.[24] Accordingly, the court held that the Belgian judgment was not conclusive and, therefore, was unenforceable.[25]

The Defendant raised CPLR 5304(b)(7), which provides that where a foreign judgment is based solely on personal jurisdiction, the judgment need not be recognized if the foreign court was a seriously inconvenient forum for trial.[26] The court recognized that the standard for inconvenience that qualifies for nonrecognition is whether "New York in an analogous situation would have dismissed the case under its own forum non conveniens doctrine."[27] New York's doctrine of forum non conveniens allows a court with proper jurisdiction to stay or dismiss an action when the action would be better adjudicated in another forum.[28] In such instances, the defendant bears the burden of presenting the public or private interest factors that would compel a New York court to exercise its discretion in the defendant's favor, such as "the burden on the New York courts, the potential hardship to the defendant, and the availability of an alternative forum in which plaintiff may bring suit."[29] In light of all this, however, the court found that Defendant did not meet its burden when it simply asserted that "because of Worldwide's total absence of activities in Belgium, to defend this action in Belgium would be severely inconvenient."[30]

Further, the court denied Plaintiff's motion for an order for attachment, because the grant of the same follows only where the claim is based on a judgment that is recognized under CPLR Article 53 or entitled to full faith and credit.[31] Because the court determined that the Belgian court lacked personal jurisdiction over Defendant,[32] it accordingly found that: (a) the judgment was unenforceable pursuant to CPLR Article 53;[33] and (b) the same lack of jurisdiction "disqualifies the judgment for full faith and credit."[34] Consequently, the court held that Plaintiff did not present sufficient grounds for attachment of Defendant's assets.[35]

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22. *Reynolds*, 109 A.D.2d at 99.
23. *I.D.R.P.*, 10 Misc. 3d at 1064(A), 814 N.Y.S.2d at 561.
24. *Id.*
25. *Id.*
26. CPLR 5304(b)(7) (McKinney 2006).
27. *I.D.R.P.*, 10 Misc. 3d at 1064(A), 814 N.Y.S.2d at 561 (citing Wimmer Canada v. Abele Tractor & Equip. Co., 299 A.D.2d 47, 52 (N.Y. App. Div. 2002)).
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *I.D.R.P.*, 10 Misc. 3d at 1064(A), 814 N.Y.S.2d at 561.
34. *Id.*
35. *Id.*

IV. Conclusion

The Full Faith and Credit Clause,[36] compelling American states to honor the judgments of other states, applies only to judgments of another state, not to those of a foreign country. The case cited by the *I.D.R.P.* court, *Matter of Farmland Dairies v. Barber*,[37] involved a New Jersey judgment. The *I.D.R.P.* court should have said that the Belgian judgment was not entitled to enforcement as a matter of comity because the Belgian court did not have personal jurisdiction over Defendant.[38] New York's rules of procedure dictate that where a foreign court cannot acquire personal jurisdiction, the foreign judgment in question is not conclusive,[39] and several decisions at the Supreme Court and Appellate Division levels have now held that personal jurisdiction over defendants in foreign countries that are parties to the Hague Service Convention cannot be established through service of process by mail.[40]

The court in *I.D.R.P.* agreed with what appears to be the majority view in the controversy surrounding whether service of process by postal delivery results in a court acquiring proper personal jurisdiction over a defendant in another country when both countries are parties to the Hague Service Convention.[41] Prior to *I.D.R.P.*, *Reynolds* dealt with a Japanese judgment arising from a cause of action brought by an American citizen against Nissan Motor Company.[42] The court there considered the argument that service of process by mail was an effective means to establish personal jurisdiction, based on the California court's rationale in *Shoei Kako Co. v. Superior Ct.*[43] that "[t]he reference to 'the freedom to send judicial documents by postal channels, directly to persons abroad' would be superfluous unless it was related to the sending of such documents for the purpose of service."[44] In contrast, *Ordmandy v. Lynn*[45] offered the interpretation of Article 10(a) that the *Reynolds* court ultimately accepted,[46] where postal service of process was held ineffective for purposes of a New York court acquiring personal jurisdiction over a defendant in Japan: "Accordingly, defendant's motion is granted on the grounds that jurisdiction was obtained in violation of an applicable international treaty."[47]

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36. U.S. Const. art. V, § 1.

37. 65 N.Y.2d 51, 478 N.E.2d 1314, 489 N.Y.S.2d 713 (1985).

38. *See* Aetna Life Ins. Co. v. Tremblay, 223 U.S. 185, 190 (1912). The Court's dismissal of writ of error to review a state's highest court's ruling left standing the ruling that a Canadian judgment was not automatically entitled to full faith and credit.

39. CPLR 5304(a)(1) (McKinney 2006).

40. I.D.R.P., BVBA v. Worldwide Diamonds Group, Inc., 10 Misc. 3d 1064(A), 814 N.Y.S.2d 561; Reynolds v. Koh, 109 A.D.2d 97; Sardanis v. Sumitomo Corp., 279 A.D.2d 225; Ordmandy v. Lynn, 122 Misc. 2d 954, 472 N.Y.S.2d 274 (N.Y. Sup. Ct. 1984).

41. *I.D.R.P.*, 10 Misc. 3d 1064(A), 814 N.Y.S.2d at 561.

42. *Reynolds*, 109 A.D.2d at 98.

43. Shoei Kako Co. v. Superior Ct., 33 Cal. App. 3d 808, 109 Cal. Rptr. 402 (1st Dist. 1973).

44. *Reynolds*, 109 A.D.2d at 99 (quoting *Shoei*, 33 Cal. App. 3d at 821).

45. *Ordmandy*, 122 Misc. 2d at 955.

46. *Reynolds*, 109 A.D.2d at 99.

47. *Ordmandy*, 122 Misc. 2d at 956.

Judge Leland's deference to the deliberate construction of the Hague Service Convention and the resulting affirmation of the distinction between "serve" and "send"[48] erased doubt over whether service of process by mail was effective to establish personal jurisdiction by a foreign court.[49] Not only can it ultimately lead to non-enforcement of a foreign judgment, but personal jurisdiction is also a determinative factor in the grant of an order to attach assets.[50] Given the magnitude of personal jurisdiction's role in domestic judicial proceedings involving foreign judgments, it is worthwhile to acknowledge that New York will not recognize service of process by mail as an effective means to establish foreign personal jurisdiction over a defendant located in another Hague Service Convention country.

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48. *I.D.R.P.*, 10 Misc. 3d at 1064(A), 814 N.Y.S.2d at 561.

49. *Id.*

50. *Id.*

Sanchez-Llamas v. Oregon

126 S. Ct. 2669 (2006)

The United States Supreme Court held, in a case involving a violation of the Vienna Convention on Consular Relations, that suppression of evidence is not an appropriate remedy, and the procedural rules that govern the claim are the same procedural rules that the states regularly apply to all federal question claims.

I. Holding

In *Sanchez-Llamas v. Oregon*,[1] the Supreme Court granted certiorari and affirmed the decisions of the Oregon Supreme Court[2] and the Virginia Supreme Court.[3] The Court assumed, without deciding the issue, that Article 36 of the Vienna Convention on Consular Relations[4] ("VCCR") grants foreign nationals arrested in the United States an enforceable right to request that their consular officers be notified of their arrest and the foreign national must be notified by the authorities that he or she has this right.[5] However, the Court also held that suppression of evidence is not an appropriate remedy when a defendant's Article 36 rights are violated.[6] Furthermore, the Court held that when a state is faced with a VCCR claim, it may apply the same procedural rules that apply to all federal law claims,[7] thereby forfeiting a defendant's claim of an Article 36 violation if it had not been raised at trial.[8]

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1. 126 S. Ct. 2669 (2006).
2. State v. Sanchez-Llamas, 338 Ore. 267 (2005) (affirming an Oregon Court of Appeals decision denying Sanchez-Llamas's motion to have statements he made to police officers suppressed because he had not been informed of his rights under Article 36 of the VCCR).
3. Bustillo v. Johnson, 65 Va. Cir. 69 (2004) (finding no reversible error in the state court's dismissal of Bustillo's habeas corpus petition on the grounds that his claim was procedurally barred because Bustillo failed to raise the issue of violation of his rights under Article 36 of the VCCR during trial).
4. Vienna Convention on Consular Relations, art. 36, April 24, 1963, entered into force March 19, 1967, entered into force for the United States, Dec. 24, 1969, 21 U.S.T. 77, T.I.A.S. No. 6820.
5. *Sanchez-Llamas*, 126 S. Ct. at 2677–78.
6. *Id*. at 2681.
7. *Id*. at 2687.
8. *Id*. at 2682.

II. Facts and Procedural History

A. *Sanchez-Llamas v. Oregon*

Petitioner Moises Sanchez-Llamas is a Mexican national who, in December 1999, was involved in a police shootout where a police officer was shot in the leg.[9] Sanchez-Llamas was arrested and read his *Miranda* rights in both English and Spanish.[10] However, he was not informed that he could request that the Mexican consulate be notified of his arrest.[11] During the police interrogation, Sanchez-Llamas made several incriminating statements regarding the shootout.[12] Shortly thereafter, he was charged with attempted aggravated murder and attempted murder, along with several other crimes.[13] Before trial, Sanchez-Llamas moved to have the statements he made during the police investigation suppressed, on the theory that they had been made involuntarily, because Sanchez-Llamas was not informed of his VCCR Article 36 right to have the Mexican consulate notified of his arrest.[14] The trial court denied this motion and Sanchez-Llamas was convicted.[15] The Oregon Court of Appeals,[16] and subsequently the Oregon Supreme Court,[17] affirmed the trial court's ruling, with Oregon's highest court concluding that Article 36 did not grant detained individuals an enforceable right to consular access or notification.[18] The United States Supreme Court granted certiorari to consider whether the Vienna Convention grants any rights to individuals, as opposed to consulates, and whether suppression of evidence is an appropriate remedy for the violation of those rights.[19]

B. *Bustillo v. Johnson*

Petitioner Mario Bustillo is a Honduran national who was at a restaurant on the night of December 10, 1997.[20] James Merry was standing outside the restaurant that evening, smoking a cigarette, when he was struck in the head with a baseball bat, a blow that later caused his death.[21] Bustillo was arrested and eventually charged with murder, after several individuals identified him as the attacker.[22] Bustillo was never informed that he had the right to request that the Honduran consulate be notified of his arrest.[23] At trial, Bustillo presented evidence that he was not the attacker, but that a man named Sirena, who had fled to Honduras after the

9. *Id*. at 2675–76.
10. *Id*. at 2676. *See* Miranda v. Arizona, 384 U.S. 436 (1966).
11. *Sanchez-Llamas*, 126 S. Ct. at 2676.
12. *Id*.
13. *Id*.
14. *Id*.
15. *Id*.
16. *Id*.; State v. Sanchez-Llamas, 191 Ore. App. 399 (Or. Ct. App. 2004).
17. *Sanchez-Llamas*, 126 S. Ct. at 2676; State v. Sanchez-Llamas, 338 Ore. 267 (2005).
18. *Sanchez-Llamas*, 126 S. Ct. at 2676.
19. *Id*.
20. *Id*.
21. *Id*.
22. *Id*.
23. *Id*.

incident, was the attacker.[24] Nevertheless, Bustillo was convicted of first-degree murder, and this conviction was affirmed on appeal.[25] Thereafter, Bustillo filed a petition for a writ of habeas corpus in Virginia State Court, arguing for the first time that his Article 36 rights had been violated.[26] Bustillo argued that had the Honduran Consulate been notified of his arrest, the consulate could have assisted him in locating Sirena prior to trial.[27] Newly acquired evidence, such as Sirena's videotaped confession and a police report indicating that Sirena was at the scene at the time of the attack with what appeared to be ketchup on his pants, was also presented, supporting Bustillo's position that Sirena was the real attacker.[28] Furthermore, ineffective assistance of counsel was argued, because Bustillo believed that his attorney, who was aware of Bustillo's Article 36 rights, should have advised him of his right to notify the Honduran Consulate of his situation.[29] The state court dismissed Bustillo's habeas petition,[30] on the ground that Bustillo was "procedurally barred" from bringing his Article 36 claim, because he had not raised it at trial or on appeal.[31] Furthermore, the court found Bustillo's ineffective assistance of counsel claim to be not only barred by statute of limitations, but also meritless.[32] On appeal, the Supreme Court of Virginia found no reversible error in the dismissal of the habeas petition VCCR claim.[33] The United States Supreme Court granted certiorari to consider whether a VCCR claim was subject to ordinary state procedural rules.[34]

III. The Court's Analysis

A. The Rights Granted by Article 36

While the Court merely assumes that Article 36 grants individuals judicially enforceable rights,[35] Justice Breyer, in a dissenting opinion joined by Justice Stevens, Justice Souter, and, with regard to this issue, Justice Ginsburg, argues that given the importance of the question, it deserves to be decided by the Court.[36] Justice Breyer contends that since all treaties signed and ratified by the United States become the "[S]upreme Law of the Land," the individual states are

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24. *Sanchez-Llamas*, 126 S. Ct. at 2676.
25. *Id*.
26. *Id*.
27. *Id*. at 2676–77.
28. *Id*. at 2677. Bustillo argued that the "ketchup" on Sirena's pants may in fact have been the blood of the victim. However, the state habeas court found no evidence that the victim's blood had transferred to the persons who attacked him and therefore the encounter between the police and Sirena was not material. *Id*. at 2677 (citing App. to Pet. for Cert. in No. 05-51, p. 167).
29. *Id*.
30. *Id*.; Bustillo v. Johnson, 65 Va. Cir. 69 (2004).
31. Sanchez-Llamas v. Oregon, 126 S. Ct. at 2677.
32. *Id*. The court found no merit to this claim under Strickland v. Washington, 466 U.S. 668 (1984). *Id*.
33. *Id*.; *Bustillo*, 65 Va. Cir. at 69 (2004).
34. *Sanchez-Llamas*, 126 S. Ct. at 2677.
35. *Id*. at 2677–78. The Court finds it to be unnecessary to resolve this question and therefore simply assumes, without deciding, that Article 36 grants individuals judicially enforceable rights. *Id*. at 2677–78.
36. *Id*. at 2694.

therefore bound by them.[37] Breyer compares the provision in the VCCR granting foreign nationals detained by their host country certain rights to a hypothetical pre-*Miranda* federal statute granting detained individuals the right to be informed of their right to counsel.[38] He argues that this statute would undoubtedly be read to grant criminal defendants rights that could be invoked at trial.[39] Furthermore, Breyer notes that in previous cases the Court has recognized the rights of foreign nationals that have been conferred on them by treaties, even when they did not specifically mention that the rights would be judicially enforceable in U.S. courts.[40] And the International Court of Justice (the "ICJ") twice ruled that foreign nationals arrested in the United States who had not been informed of their Article 36 rights could raise the issue in an American court.[41] As a result, the dissent considers that Article 36 grants individuals judicially enforceable rights.

B. Suppression of Evidence as a Remedy for a Violation of Article 36

1. The Court's Opinion

While Article 36 grants foreign nationals the right to have their consulate notified if they are detained abroad, it does not prescribe any specific remedy for a violation of that right.[42] Therefore, Sanchez-Llamas argued that suppression of any statements made before he was informed of all his Article 36 rights was an appropriate remedy under United States law for an Article 36 violation.[43] The State of Oregon, and the United States as *amicus curiae*, argued that the federal courts do not have the power to suppress evidence in a state court proceeding unless that power is conferred on the federal government by the convention at issue.[44]

The Court, in an opinion written by Chief Justice Roberts and joined by Justices Scalia, Kennedy, Thomas and Alito, agrees with the State of Oregon and the United States that it does not have supervisory power over state courts and therefore cannot force the Oregon court to suppress Sanchez-Llamas's statements.[45] The Court also holds that any judicial remedy for an Article 36 violation must come from the VCCR itself.[46] The Court reasons that if it created a

37. *Id*. at 2694–95 (citing U.S. CONST. art. VI, cl. 2).

38. *Id*. at 2695.

39. *Id*. at 2696.

40. *Sanchez-Llamas*, 126 S. Ct. at 2696. The dissent cites the court's decisions in United States v. Rauscher, 119 U.S. 407, 410–411 (1886) (finding that a defendant in a criminal trial could raise the violation of an extradition treaty as a defense); Kolovrat v. Oregon, 366 U.S. 187, 191, n.6 (1961) (holding that a foreign national could invoke an international treaty regarding property rights to challenge a state law limiting their right to recover an inheritance); and Asakura v. Seattle, 265 U.S. 332 (1924) (allowing a foreign national to invoke a treaty granting citizens of all parties the right to "carry on trade . . . as native citizens of subjects" when challenging a city ordinance forbidding non-citizens from working as pawnbrokers) to prove that under U.S. law, international treaties can grant individual citizens judicially enforceable rights. *Id*.

41. *Id*. at 2696–97.

42. *Id*. at 2678. The implementation of Article 36 is left up to the domestic law of the receiving states. *Id*. (citing VCCR art. 36(2)).

43. *Id*.

44. *Id*. at 2679.

45. *Id*. (citing Dickerson v. United States, 530 U.S. 428 (2000)).

46. *Sanchez-Llamas*, 126 S. Ct. at 2679.

remedy not expressly written in the convention, it would be "enlarging the obligation of the United States under the Convention,"[47] which is outside the bounds of the judicial function.[48] The Court goes as far as to say that since no other countries provide a remedy for an Article 36 violation, it does not read the VCCR as requiring any kind of remedy for a violation of its terms.[49]

Furthermore, the Court holds that excluding evidence from trial is a remedy unique to the American legal system.[50] The Court states that suppression of evidence under the exclusionary rule is not a remedy that is applied lightly.[51] The exclusionary rule is deemed to have high social costs and, therefore, is applied only in extreme cases, where a defendant's constitutional rights have been violated.[52] It is pointed out that here no constitutional rights had been violated,[53] and the right to have a consulate notified of one's arrest has very little bearing on the interrogation process, because Article 36 does not grant individuals the right to have an investigation put on hold until their consulate has been notified.[54] Moreover, the absence of consular notification is unlikely to produce a forced confession or to grant the police any sort of advantage over the defendant.[55] And, like every other person in the United States, Sanchez-Llamas was entitled to an attorney and was granted the protection of the Due Process Clause, protecting him from making any involuntary self-incriminating statements.[56]

The Court considers that a more appropriate remedy for an Article 36 violation would be raising an Article 36 claim as part of a larger challenge to the voluntariness of the defendant's confession.[57] It also notes that the primary means of enforcing the VCCR, diplomatic avenues, always remains open as a means of achieving some sort of redress.[58]

2. The Concurrence

In her concurring opinion, Justice Ginsburg highlights the fact that Sanchez-Llamas was given his *Miranda* warnings in both English and Spanish and indicated that he understood the

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47. *Id*.

48. *Id*. (citing The Amiable Isabella, 19 U.S. (6 Wheat.) 1 (1821)) (holding that "[t]o alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe a treaty").

49. *Id*. at 2680. The Court reasons that, in cases where a treaty does not provide either an express or implied remedy for violation, it is not the job of the federal courts to impose one on the states. *Id*. at 2680.

50. *Id*. at 2678.

51. *Id*. at 2680.

52. *Sanchez-Llamas*, 126 S. Ct. at 2680. The court found that suppression is only warranted when its "remedial objectives are thought most efficaciously served." *Id.* (citing United States v. Leon, 468 U.S. 897, 908 (1984) (quoting United States v. Calandra, 414 U.S. 338 (1974)).

53. *Id*. The court suppresses evidence primarily in an effort to deter constitutional violations, particularly violations of the Fourth Amendments. *Id*.

54. *Id*. at 2681.

55. *Id*. at 2680.

56. *Id*. at 2681–82.

57. *Id*. at 2682.

58. *Sanchez-Llamas*, 126 S. Ct. at 2682.

warnings being given to him, giving the police the green light to interrogate him.[59] She further notes that, unlike *Miranda*, Article 36 of the VCCR does not have an immediacy requirement, nor does it require that all police interrogation be put on hold until a consular office has been notified of the detained individual's situation.[60] As such, Justice Ginsburg agrees with the Court that suppression is not an appropriate remedy for the failure of a state's authorities to notify a foreign national of his Article 36 rights.[61]

C. Failure to Raise an Article 36 Claim at Trial

1. The Court's Opinion

The general rule for habeas cases in federal courts is that a defendant cannot raise a claim on collateral review that he failed to raise at trial or on direct appeal, unless he can show that he had cause for not raising the claims and he was prejudiced as a result.[62] Using a similar rule, the State of Virginia barred Bustillo's Article 36 claim, which, in the view of the court, provides adequate grounds preventing the federal courts from reviewing the claim.[63] Bustillo argues that because this affords him no remedy for a violation of his Article 36 rights, state procedural rules cannot apply to Article 36 claims.[64]

In its decision, the court relies heavily on its decision in *Breard v. Greene*,[65] a case in which a defendant failed to raise his Article 36 claim until a federal habeas proceeding.[66] The *Breard* Court found that even though a treaty is the "supreme law of the land," international law recognizes that absent a clear indication to the contrary, the procedural rules of the forum country govern implementation of a treaty in that country.[67] The *Breard* Court reasoned further that a treaty, although it may be "supreme law of the land," does not trump the United States Constitution.[68]

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59. *Id*. at 2688. Sanchez-Llamas indicated that he had lived in the United States for approximately eleven years and fully understood the warnings being given to him. *Id*. at 2688.

60. *Id*. at 2688–89.

61. *Id*. at 2689.

62. *Id*. at 2682. *See* Massaro v. United States, 538 U.S. 500, 504 (2003) (concluding that a defendant may bring an ineffective assistance of council claim on collateral review because if forced to bring his claim earlier he may be unduly prejudiced by bringing a claim before his counsel had fully developed his argument); *see also* Bousley v. United States, 523 U.S. 614, 621 (1998) (quoting Reed v. Farley, 512 U.S. 339, 354 (1994) (quoting Sunal v. Large, 332 U.S. 174, 178 (1947)) explaining that habeas review is an extraordinary remedy and "will not be allowed to do service for an appeal").

63. *Id*. Generally, when the Supreme Court reviews state-court judgments state procedural rules constitute adequate grounds to prevent the Court from reviewing a federal claim. *Id*.

64. *Id*. Bustillo's argument is based on Article 36 requiring that "full effect" be given to the provisions of the treaty, and Virginia's procedural default rules prevent him from having the "full effect" of his treaty rights realized. *Id*.

65. 523 U.S. 371 (1998) (per curiam).

66. *Sanchez-Llamas*, 126 S. Ct. at 2682 (citing Breard v. Greene, 523 U.S. 371, 375).

67. *Id*. (citing Breard v. Greene, 523 U.S. at 375). Bustillo contends that *Breard* is not controlling because the petitioner in *Breard* could not show prejudice from state default rules and a subsequent federal statute superseded the petitioner's Article 36 rights; however, the Court finds these arguments to be unpersuasive. *Id*.

68. *Id*. (citing Breard v. Greene, 523 U.S. at 375).

The court uses this framework to dismiss Bustillo's argument that ICJ interpretations[69] of the VCCR bar the use of state procedural default rules to Article 36 claims.[70] Bustillo argued that the ICJ decisions rendered after the court's decision in *Breard* created a reason for the court to revisit its holding in *Breard*.[71] In its decisions, the ICJ held that the application of procedural default rules to Article 36 claims prevented foreign nationals from receiving the "full effect" of their conventional rights and prevented any legal significance from being attached to the treaty.[72] However, Justice Roberts states that the ICJ no longer holds jurisdiction over United States courts.[73] Furthermore, he says, ICJ opinions are binding only with respect to the particular cases decided and are not binding on the ICJ itself and are not held as precedent even within the ICJ.[74]

As a result, the court argues that that the ICJ's interpretation of the treaty is not strong enough to overcome the fact that domestic procedural rules (the procedural default rules in the United States) govern the implementation of a treaty.[75] Moreover, the ICJ's reasoning that the procedural default rule did not give "full effect" to the treaty and prevents any legal significance from being attached to it overlooks the importance of procedural default rules and the adversarial system in the United States.[76] The adversarial system employed in the United States is markedly different from the inquisitorial systems used in most other countries; in the adversarial system the failure to raise a claim is the error of the party itself, and not a third party investigator or even the state.[77] If the ICJ's interpretation were to stand, the adversarial system would be severely disadvantaged, as Article 36 would trump many of the rules that keep the system running smoothly.[78]

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69. *Id*. at 2683 (citing the LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. 466 (Judgment of June 27), and the Case Concerning Avena and other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. No. 128 (Judgment of March 31) *(Avena)*) (interpreting Article 36 as prohibiting the application of state procedural default rules). *LaGrand* is discussed at length in Houston Putnam Lowry & Peter W. Schroth, *Survey of 2000-2001 Developments in International Law in Connecticut*, 76 CONN. B.J. 217, 227-237 (2002). *Avena* is discussed in Houston Putnam Lowry & Peter W. Schroth, *Survey of 2002-2003 Developments in International Law in Connecticut*, 77 CONN. B. J. 171, 174-177 (2003); and Houston Putnam Lowry & Peter W. Schroth, *Survey of 2004-2005 Developments in International Law in Connecticut*, 79 CONN. B.J. 131 (2005).

70. *Sanchez-Llamas*, 126 S. Ct. at 2683.

71. *Id*. The ICJ explained that the defendants are put in situations where they procedurally default on their claims when the United States fails to comply with its obligations under Article 36 and inform defendants of their consular rights without delay, therefore preventing any real significance from being attached to Article 36. *Id*.

72. *Id*.

73. The United States has withdrawn from the Optional Protocol Concerning the Compulsory Settlement of Disputes, which provides that the ICJ hold compulsory jurisdiction over all questions of convention application or interpretation. *See* Letter from Condoleezza Rice, Secretary of State, to Kofi A. Annan, Secretary-General of the United Nations (Mar. 7, 2005) (giving notice of United States' withdrawal from the Optional Protocol).

74. *Sanchez-Llamas*, 126 S. Ct. at 2684. The Court does, however, state that ICJ's interpretations deserve "respectful consideration." *Id*. at 2684 (quoting Breard v. Greene, 523 U.S. 371, 375).

75. *Id*. at 2685. Under the United States Constitution, only the Supreme Court and other courts established by Congress have the power to "say what the law is" and that includes determining the meaning under United States law of treaties to which the United States is a party. *Id*.

76. *Id*.

77. *Id*. In fact, procedural default rules are of great importance to an adversarial system. *Id*.

78. *Id*. Many rules requiring parties to bring legal claims at the appropriate time for adjudication would be trumped by the ICJ's ruling. *Id*.

Just at it did with Sanchez-Llamas's claim, the court looks toward a defendant's *Miranda* rights in its determination that an Article 36 claim can be barred if it was not raised at trial or on direct appeal.[79] If a defendant fails to argue that his *Miranda* rights had been violated at trial or on appeal, procedural default rules may bar that defendant from bringing his claim.[80] The Court did not see any grounds for it to reverse state procedural rules for several reasons. First, it was possible for Bustillo to know, as a factual matter, that he had rights under Article 36.[81] Secondly, Bustillo is asking the federal courts to force the State of Virginia to hear his claims in a state proceeding, and no such requirement is stated in the convention.[82] As a result, the decision of the Virginia Court barring Bustillo's claim stands.

2. The Concurrence

Justice Ginsberg agrees with the court's determination that states should not have to relax their procedural default rules when a federal court, faced with a similar question, would not have to.[83] She believes that a situation such as this should be avoided, especially when there is a reasonable interpretation of the federal law and international treaty that would avoid such a conflict.[84] Furthermore, Justice Ginsberg notes that Bustillo's attorney was aware of his Article 36 rights and failed to raise them at trial: therefore, it is the fault of Bustillo's attorney, not the state, that he is now precluded from raising the violation of his rights.[85] As a result, Justice Ginsberg agrees with the Court in its holding that the state procedural default rules were properly applied in this case.

IV. The Dissent

The dissent, written by Justice Breyer and joined by Justice Stevens and Justice Souter (and by Justice Ginsburg as to Part II), argues that, in some cases, state procedural default rules must give way to the rights granted by Article 36, and when those rights are violated, suppression of evidence is sometimes an appropriate remedy.[86] In light of this, the dissent argues for the cases before the Court to be remanded, in order for the lower courts to determine whether they fit the instances in which suppression of evidence and an exception to state procedural default rules apply.

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79. *Id*. at 2687. In her concurring opinion, Justice Ginsberg agrees with this argument: she does not see a reason why a defendant who had his Article 36 rights violated should have more avenues of legal recourse than a defendant whose *Miranda* rights were violated. *Id*. at 2689.

80. *Sanchez-Llamas*, 126 S. Court at 2687.

81. *Id*. Bustillo's attorney was aware that he had rights under Article 36 and could have raised the issue at trial or on direct appeal. *Id*. at 2690.

82. *Id*. at 2687.

83. *Id*. at 2689. The federal courts have the benefit of a "later-in-time" statute codifying federal procedural default rules as superseding any inconsistent provisions in a convention. *Id*.

84. *Id*.

85. *Id*. at 2690. There was nothing preventing Bustillo from raising an ineffective assistance of council claim once he became aware of his convention rights and his attorney's failure to assert a violation of those rights. *Id*. at 2690 n.3.

86. *Sanchez-Llamas*, 126 S. Court at 2691.

A. Suppression of Evidence

While the dissent agrees with the Court that failure to inform a defendant of his Article 36 rights does not create an automatic exclusion rule, the dissent argues that there are some cases in which exclusion of evidence may be appropriate.[87] The dissent sees exclusion as a circumstantial remedy that is appropriate only in the rare cases, where the evidence obtained by the police was a direct result of its failure to inform the defendant of his Article 36 rights.[88] The dissent asserts that a person may fully understand his *Miranda* rights, but may not understand the implications of those rights in the American legal system and, in that case, suppression of a confession may be the only appropriate remedy.[89] Because the VCCR leaves determination of a remedy for a violation up to the individual states and suppression is a remedy used in U.S. courts, it would not be surprising for suppression to be used as a remedy for an Article 36 violation when it provides the only effective remedy.[90] Therefore, the dissent would remand this case for a determination whether the defendant understood his *Miranda* rights, as they pertain to the American legal system, and whether suppression is the only remedy available if he did not.

B. Procedural Default Rules

With regards to the use of state procedural default rules, the dissent argues that included in the VCCR are provisions limiting that convention's intrusion on a country's legal system, while at the same time safeguarding a foreign national's rights to consular access.[91] The dissent argues that the states should create an exception to their procedural default rules for instances where a defendant's failure to make a timely claim was the result of the state failing to notify him of his rights and there is no other procedural remedy available under state law to redress that claim.[92]

The interpretation of the VCCR proposed by the dissent is consistent with the ICJ's interpretation and, in the eyes of the dissenting justices, does not impose any significant burden on the states.[93] In the view of the dissent, the Court merely looked at Article 36 in light of the federal/state relationships of the American legal system, which gives the states the ability to deny any relief under Article 36 when the United States has promised to afford some type of relief under the VCCR.[94] This interpretation, the dissent argues, will weaken the respect foreign

87. *Id*. at 2706.

88. *Id*.

89. *Id*.

90. *Id*. at 2706–07. Furthermore, the dissent points out that suppression is not a uniquely American remedy, but rather was developed in common law English cases. *Id*. at 2707.

91. *Id*. at 2708 (quoting VCCR art. 36(2), 21 U.S.T. at 101, stating that the convention rights shall "be exercised in conformity with the laws and regulations of the receiving State," provided that those laws and regulations give "full effect" to Article 36(1)'s purposes).

92. *Sanchez-Llamas*, 126 S. Court at 2708.

93. *Id*. at 2709.

94. *Id*.

countries have for the United States, as well as the United States' ability to insure the fair treatment of its citizens around the world.[95]

V. Conclusion

The Supreme Court has concluded that, assuming that Article 36 of the Vienna Convention on Consular Relations grants an individual rights that are judicially enforceable, suppression of evidence is never a remedy for a violation of those rights, and claims of an Article 36 violation are always barred by a state's procedural default rules if they have not been brought up at trial or on direct appeal.[96] Although the Court mentions that its decision is in no way meant to belittle the importance of the VCCR,[97] the effect the decision will have on the application of the VCCR in the future is likely an undesirable one. The Court has, in effect, blatantly disregarded recognized international law, as established by the ICJ, in favor of an interpretation that leaves individuals who have had their rights violated with no viable avenue of redress. And, as the dissent rightly points out, the Court's decision leaves all parties to the VCCR open to denying any effective relief to VCCR violations.[98] As a result, this decision will likely create tensions for U.S. citizens detained abroad[99] as well as further hardships for foreign nationals arrested in the United States and not informed of their rights.[100]

Elizabeth Rabinowitz

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95. *Id*.

96. *Id*. at 2681. Interestingly, in Jogi v. Voges, 425 F.3d 367, 370 (7th Cir. 2005), the court recognized the right of a defendant to bring a private civil claim under the Alien Tort Statute, 28 U.S.C. § 1350, for violation of Article 36 rights. *See* Anthony Jones, Comment, *Jogi v. Voges: Has the Seventh Circuit Opened the Floodgates to Vienna Convention Litigation in U.S. Courts?* 15 MINN. J. INT'L L. 425, 426–27 (2006).

97. *Sanchez-Llamas*, 126 S. Court at 2687. *See* Rosanna Ruiz, *High Court Axes Foreigners' Plea; Denial of Suspects' Claims of Consular Rights Violations Could Affect Texas Case,* HOUS. CHRONICLE, June 29, 2006, at B3 (noting that Justice Roberts made a point to mention that this decision is in no way meant to disparage the importance of the VCCR).

98. *Sanchez-Llamas*, 126 S. Court at 2709. *See* M. Todd Parker, "*Review and Reconsideration": In Search of a Just Standard of Review for Violations of Article 36 of the Vienna Convention on Consular Relations*, 12 U.C. DAVIS J. INT'L L. & POL'Y 225, 255 (2006) (alleging that defendants claiming Article 36 violations are left without any chance of a remedy under the current standard of review).

99. *Sanchez-Llamas*, 126 S. Court at 2709. *See* Rebecca Romani, *Rights-U.S.: High Court to Hear Case on Foreign Suspects' Rights*, INTER PRESS SERVICE, May 24, 2006 (revealing that it was the United States that added the provision to the VCCR requiring police to notify foreign governments when their citizens were arrested and the U.S. is the most frequent user of the provision to aid the roughly 6,000 Americans arrested abroad every year); *see also* Mani Sheik, *From Breard to Medellin: Supreme Court Inaction or ICJ Activism in the Field of International Law?* 94 CAL. L. REV. 531, 532 (2006) (discussing how many U.S. citizens rely on their consular rights for protection when traveling abroad).

100. *See* Romani, *supra* note 99 (indicating that there are an estimated 120 foreign nationals currently on death row who were not informed of their Article 36 rights and as a result, were afforded only less than adequate representation).

Al-Koronky v. Time-Life Entertainment Group Ltd.

[2006] EWCA Civ. 1123, [2006] All ER (D) 447 (July)

The Court of Appeal, Civil Division of England and Wales, dismissed the appeal of claimants because the enforcement of an order for costs in Sudan in defendants' favor would be impractical. It consequently upheld the trial court's order for security costs.

I. Holding

In *Al-Koronky v. Time-Life Entertainment Group Ltd.,*[1] the Court of Appeal, Civil Division of England and Wales, dismissed the appeal of claimants, the Al-Koronkys,[2] and upheld the order for security costs in favor of the defendants.[3] The Court of Appeal arrived at its decision by concluding that the enforcement of the security cost order in defendants' favor would be impractical in Sudan.[4] The court went on to hold that the issuance of the order for security costs in favor of the defendants was proper.[5] Finally, the court held that the amount set in the order for security costs was suitable based on the sound discretion of the trial judge.[6]

II. Facts and Procedural Posture

From 1994 to 2002, claimants Mr. and Mrs. Al-Koronky resided in London, where beginning in June 2000, they had a domestic servant, Zainab Nazer.[7] At the time, Mr. Al-Koronky was a diplomat for the Sudanese government, and his wife was a qualified civil engineer.[8] In September 2000, Nazer left claimants' household and claimed asylum, on the ground that she had been brought and kept there against her will.[9] Very soon thereafter, the *Sunday Telegraph* published an article reporting Nazer's fleeing as an escape of a slave.[10] As a result, the Al-Koronkys initiated libel proceedings against the newspaper, which were settled by June 2002 with a public apology and payment of £ 100,000 by the newspaper to the Al-Koronkys.[11] However, this did not prevent the publication of the book, *Slave*, which is the subject matter of the present claim.[12] The book was written by the second defendant, Damien Lewis, and was

1. Al-Koronky v. Time-Life Entertainment Group Ltd., [2006] EWCA Civ. 1123 (Court of Appeal, Civil Division) (U.K.).
2. *Id.* ¶ 50.
3. *Id.* ¶ 48.
4. *Id.*
5. *Id.*
6. *Id.* ¶ 49.
7. *Id.* ¶ 3.
8. *Id.* ¶ 2.
9. *Id.* ¶ 3.
10. *Id.* ¶ 4.
11. *Id.*
12. *Id.*

published by the first defendant, Time-Life Entertainment Group.[13] The book alleges that the claimants kept Nazer as a slave at their London home.[14]

Slavery is considered a crime in Sudan.[15] As a result of the publication of the book, claimants initiated the present libel action.[16] Defendants asserted the defense of truth,[17] while claimants asserted that defendants had fabricated the entire story.[18]

Defendants had the option to apply for security for their costs pursuant to CPR 25.13,[19] which they did before the trial judge for the sum of £ 433,028.[20] Claimants had obtained after-the-event insurance to protect themselves against possibly paying for defendants' costs.[21] However, this insurance policy was voidable or the cover ineffective if their eventual liability for costs was consequent upon their not having told the truth.[22] The trial judge held that claimants had not shown that there was a strong likelihood of success at trial and thus were required to put up £ 375,000 as security for defendants' costs down to completion of disclosure.[23] He further held that the cost order would not, in practice, be enforceable in Sudan.[24] The second part of the holding was based on defendants' evidence relating to advice received from an unidentified Sudanese lawyer,[25] who was said to have told defendants that any judgment, the basis of which was that slavery existed in Sudan, would not be enforced because it would offend the government.[26] The trial court concluded that this evidence alone, with no rebuttal from claimants, was sufficient to sustain defendants' case that any award for costs for defendants would not be enforceable in Sudan.[27] Claimants appealed.

III. The Court's Analysis

A. Issuance of an Order for Security Costs Based on Impracticability of Enforcement

In the Court of Appeal, claimants sought to introduce new evidence to disprove 1) that they had not shown a strong likelihood of success at trial, and 2) that they had not shown by adequate evidence that they could not afford the sum of defendants' costs.[28] The court said

13. *Id.*
14. *Id.* ¶ 5.
15. *Id.*
16. *Id.* ¶ 4.
17. *Id.* ¶ 5.
18. *Id.*
19. *Id.* ¶ 7.
20. *Id.*
21. *Id.* ¶ 35.
22. *Id.* ¶ 36.
23. *Id.* ¶ 8.
24. *Id.*
25. *Id.* ¶ 46.
26. *Id.* ¶ 44.
27. *Id.* ¶ 46.
28. *Id.* ¶ 11.

that three conditions must be satisfied in order to admit new evidence in the Appeal Court.[29] The conditions are: 1) it must be shown that the evidence could not have been obtained with reasonable diligence for use at trial; 2) the evidence must be such that, if given, it would probably have an important influence on the result of the case; and 3) the evidence must be credible.[30]

The court rejected claimants' new evidence tending to prove that they had shown that they could not afford the sum of defendants' costs, because claimants had ample time to provide full evidence as to their financial resources.[31] As to the new evidence claimants sought to introduce to disprove their scant likelihood of success at trial (demonstrating that defendants' defense of justification was ill-founded), the court decided not to admit this evidence either because claimants had ample time to bring it in at the hearing before the trial judge[32] and the credibility of the evidence was strongly questioned.[33] Therefore, the court held that the trial judge, based on his discretion and the evidence in front of him, was entitled to issue an order for security costs.[34] The court's justification for this was based on the statement attributed to the Sudanese lawyer that any judgment asserting that slavery existed in Sudan or was practiced by a Sudanese official would not be enforced because it would offend the government.[35] The court said that this was not a generalized assertion of corruption, but was rather a specific assertion that any such judgment would not be enforced due to public policy considerations.[36] This evidence from the defendant was not rebutted by the claimants[37] and consequently, the trial judge made a ruling that an order for security costs would not be enforceable on claimants in Sudan.[38] In evaluating the trial judge's conclusion, the Court of Appeal considered it proper for the trial judge to base his conclusion on the "evidence which did exist, not on the basis of evidence which did not exist."[39]

The court also reasoned that although claimants had an after-the-event insurance policy that might protect them from putting up security for the defendant's costs,[40] the policy was voidable or the cover ineffective if their eventual liability for costs was consequent upon their not having told the truth.[41] The court concluded its reasoning by stating that if claimants lost, it likely would be attributed to their dishonesty and thus, would negate any protection that the insurance policy might have afforded them.[42]

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29. *Id.* ¶ 15.
30. *Id.*
31. *Id.* ¶ 17.
32. *Id.* ¶ 23.
33. *Id.* ¶ 22.
34. *Id.* ¶ 48.
35. *Id.* ¶ 44.
36. *Id.*
37. *Id.* ¶ 46.
38. *Id.*
39. *Id.*
40. *Id.* ¶ 35.
41. *Id.* ¶ 36.
42. *Id.*

B. Suitable Amount Set in Order for Security Costs

The Court of Appeal held that the trial judge set a suitable amount in his order for security costs.[43] The court said that one principle that is clear, based on authority as it relates to security for costs, is that a claimant resident abroad who wants to ensure that any security he is required to raise is within his means must be complete and candid in setting out his actual means.[44] The court found that the trial judge had not been provided with a complete and candid account of claimants' actual and potential means[45] and thus, had the authority to set a suitable sum in the exercise of his discretion.[46] This court felt that the trial judge did not abuse his discretion, for he included defendants' estimate of costs and excluded any other extraneous considerations from entering his mind in arriving at a figure.[47]

IV. Conclusion

The Court of Appeal, Civil Division, held that an order for security costs was properly issued in favor of defendants.[48] The court decided this due to the fact that any judgment that was based on slavery would not be enforced by the government in Sudan because of public policy considerations. Furthermore, the court held that the amount set in the order for security costs was suitable and that the trial judge did not abuse his discretion in arriving at such a figure.[49] The trial judge included only relevant considerations in calculating the sum.

This case dealt with a very sensitive and controversial issue—the allegation of partiality of the judiciary of a foreign state. This court outlined cautious ways of addressing such an issue without offending foreign states. Many foreign observers may easily imagine that an adverse judgment was due to partiality of the foreign judiciary.[50] This issue must be addressed with proper diligence, for it will have tremendous impact internationally.[51] A reputation for dishonesty among a foreign judiciary will have substantial effects on the foreign country's international affairs with other foreign nations.[52]

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43. *Id.* ¶ 48.

44. *Id.* ¶ 27.

45. *Id.* ¶ 49.

46. *Id.*

47. *Id.*

48. *Id.* ¶ 48.

49. *Id.*

50. *See* Michael G. Collins, *Judicial Independence and the Scope of Article III—A View from the* Federalist, 38 U. RICH. L. REV. 675, 704 (2004) (asserting that a judgment that may have not been erroneous will be determined to be erroneous by a foreign citizen due to partiality of a foreign judiciary).

51. *See Interview— Better Corp Governance Must Be Part of Indonesia Privatization*, AFX NEWS LIMITED, Nov. 7, 2001, § Econ. News (addressing Indonesia's foreign investors' concern about their interests due to the partiality of Indonesia's judiciary).

52. *Id.* (citing a World Bank report showing that businesspeople view Indonesia as the worst country for enforcement of court decisions and dishonesty in the legal system).

The issuing of an order for security costs was proper in this case because, without such an order, defendants would not have had any recourse in recouping costs to which they were entitled. Furthermore, the court allowed claimants to come forward with evidence rebutting the assertion that any judgment based on slavery would not be enforced by the Sudanese government. Claimants did not come forward with such evidence, so it can be inferred that the assertion was correct and a just result was obtained for the defendants.

Ashesh Patel

Saadi v. The United Kingdom

Appl. No. 13229/03, [2006] Eur. Ct. H.R. 732

In an action under the European Convention on Human Rights against the UK: (1) no violation of the Convention occurred by the UK's detention of a refugee for one week, beginning three days after he entered the country; (2) the UK's failure to inform the detainee within a reasonable time of the reasons for detention violated the Convention; (3) the court dismissed refugee's additional challenges; (4) the violation merited non-pecuniary compensation, payable by the State.

I. Facts and Procedural History

On December 30, 2000, Shayan Baram Saadi ("Saadi"), who was a medical doctor, an Iraqi citizen and a Kurd, arrived at the Heathrow Airport in London, England, seeking asylum.[1] United Kingdom Immigration Officials granted Saadi temporary admission into the country with the stipulation that he must return to the Immigration Office the next day.[2] Saadi complied with this request and again received another temporary admission with the same next-day return requirement.[3] Saadi returned and received yet another twenty-four-hour temporary admission to the country.[4] However, when he returned in compliance with this third temporary admission, immigration officials detained and transferred him to the Oakington Reception Centre.[5]

Saadi spent approximately two days at Oakington Reception Centre before he had the opportunity to consult with legal representatives.[6] It was at this point, on January 4, 2001, that he inquired of his representative why he was detained at Oakington.[7] The representative contacted the Chief Immigration Officer on January 5, 2001, who informed him that Saadi's detention at Oakington was because Saadi was an Iraqi who met the detention requirements of Oakington.[8] On the same day, an official of the Secretary of State for the Home Department interviewed Saadi regarding his application for asylum.[9]

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1. Saadi v. United Kingdom, Appl. No. 13229/03 [2006], Eur. Ct. H.R. 732, ¶ 8. Saadi's asylum application was based on his incarceration by the Patriotic Union of Kurdistan after he had treated three injured members of the Iraqi Workers' Communist Party. *See* R on the application of Saadi & Ors v. Secretary of State for the Home Dept. [2002], 1 W.L.R. 356, 364.
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.* ¶ 9.
7. Saadi v. United Kingdom, Appl. No. 13229/03 [2006], Eur. Ct. H.R. 732, ¶ 9.
8. *Id.* Detention at Oakington is reserved for those applicants whose determination can be quickly decided and who pose no risk of absconding. *See id.* ¶ 13.
9. *Id.*

Saadi's application for asylum was denied on January 8, 2001.[10] Saadi promptly filed notice of appeal on January 9, 2001.[11] This appeal was granted on July 9, 2001, because the Home Department had failed to specify how Saadi could be returned to Iraq.[12] The Secretary of State for the Home Department appealed from this ruling to the Immigration Appeal Tribunal, which remitted the case for further processing on October 22, 2001.[13] Saadi was subsequently granted asylum on January 4, 2003, when this final adjudicator found him to be a refugee within the meaning of the 1951 Refugee Convention.[14] The adjudicator further found that compelling Saadi's return to Iraq would subject him to unfavorable treatment.[15]

After this grant of asylum, Saadi and three other Kurdish Iraqi detainees applied for judicial review of their detainment at Oakington Reception Centre.[16] The English court found that the European Convention for Human Rights[17] had not been violated.[18] This ruling was upheld in Saadi's subsequent appeals to both the Court of Appeal[19] and the House of Lords.[20] From these decisions, Saadi petitioned the European Court of Human Rights on April 18, 2003,[21] and on September 25, 2005, the Court granted him the right to be heard.[22]

The European Court of Human Rights decided four issues on appeal: (1) whether the State's detention of Mr. Saadi violated Article 5(1)(f) of the European Convention on Human Rights, since Saadi posed no risk of absconding or other misconduct;[23] (2) whether the State's 76-hour delay in informing Saadi of the reasons for his detainment violated Article 5(2) of the

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10. *Id.*

11. *Id.*

12. *Id.* ¶ 10.

13. *Id.*

14. *Id*; *see also* Convention Relating to the Status of Refugees, G.A. Res. 429(V), U.N. Doc. A/1775, 189 U.N.T.S. 150 (Dec. 14, 1950) (establishing the convention on refugee status); *as amended* Protocol Relating to the Status of Refugees, July 28, 1951, 606 U.N.T.S. 267 *available at* http://www.unhcr.org/protect/PROTECTION/3b66c2aa10.pdf at 48 (last visited Oct. 30, 2006) (establishing the definition of refugee); *see also* T. Alexander Aleinkoff, *Protected Characteristics and Social Perceptions: An Analysis of the Meaning of "Membership of a Particular Social Group," in* REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR'S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION, 264 (Erika Feller et al. eds. 2003) (analyzing the definition of refugee under the 1951 Refugee Convention).

15. *See* Saadi v. United Kingdom, Appl. No. 13229/03 [2006], Eur. Ct. H.R. 732, ¶ 10.

16. *Id.* ¶ 11.

17. European Convention on Human Rights, Nov. 4, 1950, Europ. T.S. No. 5, *available at* http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm (last visited Oct. 30, 2006) (representing the original European Convention on Human Rights as amended by various protocols most notably Protocol 11, which entered into force on Nov. 1, 1998).

18. Saadi v. United Kingdom, Appl. No. 13229/03 [2006], Eur. Ct. H.R. 732, ¶¶ 11–15. The opinion of Collins J. is reprinted as an annex to the opinion of the Court of Appeal, *infra* note 19.

19. Saadi v. United Kingdom, Appl. No. 13229/03 [2006], Eur. Ct. H.R. 732, ¶ 18. R on the application of Saadi & Ors v. Secretary of State for the Home Dept. [2001], EWCA Civ 1512.

20. Saadi v. United Kingdom, Appl. No. 13229/03 [2006], Eur. Ct. H.R. 732, ¶ 18. R v. Secretary of State for the Home Dep't ex parte Saadi [2002], UKHL 41.

21. Saadi v. United Kingdom, Appl. No. 13229/03 [2006], Eur. Ct. H.R. 732, ¶ 1.

22. *Id.* ¶ 5.

23. *Id.* ¶ 47 (holding that the detention was not a violation of Article 5(1)(f)).

European Convention on Human Rights;[24] (3) whether an alleged violation under Article 14 of the European Convention on Human Rights occurred;[25] and (4) whether finding of one or all of the above alleged violations merited damages.[26]

II. The Court's Analysis

A. A State May Detain a Potential Asylum Seeker or Immigrant in Circumstances Where There Is No Risk of His Absconding or Other Misconduct Without Violating the Convention

The applicant, Saadi, argued that his detention at Oakington Reception Centre was a violation of Article 5(1)(f) of the European Convention on Human Rights,[27] because, while the Convention allows for the detention of individuals to prevent unauthorized entry into the country, Saadi was attempting to effect authorized entry, for which the Convention does not allow detention.[28] He pointed out that he had been temporarily admitted to the country three times prior to detention[29] and furthermore stressed that the Court should read a necessity clause into the Convention, because detention is such a severe measure that all other possibilities should be exhausted first.[30]

The British Government, in response, accepted that the applicant's detention at Oakington Reception Centre temporarily deprived Mr. Saadi of liberty;[31] however, it argued that this was an acceptable deprivation under Article 5(1)(f) of the Convention.[32] The Government pointed out that, under Saadi's concept, a government would never be allowed to detain any refugees unless they attempted to enter the country covertly.[33] The Government also argued that "necessity" should not be judicially read into the Convention under this section and noted that other enumerated situations under Article 5(1) explicitly listed necessity,[34] so that the

24. *Id.* ¶¶ 55–56 (finding that a 76-hour delay violates Article 5(2)).

25. *Id.* ¶¶ 57–58 (holding it unnecessary to discuss an alleged Article 14 violation, because of the Court's holding of no violation of Article 5(1)(f)).

26. *Id.* ¶¶ 64–65 (discussing damage calculations and ordering payment by the State to Saadi).

27. Article 5(1)(f) provides, "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law . . . the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition." *See* European Convention on Human Rights, art. 5(1)(f); *see also* Saadi v. United Kingdom, Appl. No. 13229/03 [2006], Eur. Ct. H.R. 732, ¶ 24 (restating the relevant rights granted under Article 5(1)(f) of the Convention).

28. *See* Saadi v. United Kingdom, Appl. No. 13229/03 [2006], Eur. Ct. H.R. 732, ¶ 28.

29. *Id.* ¶ 29.

30. *Id.* ¶ 30.

31. *Id.* ¶ 25.

32. *Id. (*arguing that Article 5(1)(f) allows detention to prevent unauthorized entry into a country and that until formal admission is granted, any attempt of entry into the country is technically unauthorized irrespective of an immigrant's flight risk).

33. *Id.* ¶ 26.

34. *See, e.g.,* European Convention on Human Rights, art. 5(1)(c) (requiring necessity before detaining under this provision).

absence of a reference to necessity under the section in question should be given weight.[35] Finally, the Government stressed that detaining the applicant had not been disproportionate given the circumstances and that the detention allowed for more efficient processing of asylum requests.[36]

The Court, upon hearing both the applicant's petition and the State's defense, concluded that Article 5(1)(f) of the Convention provides for lawful arrest and detention in two unique situations: detention to prevent unauthorized entry and detention of deportation candidates.[37] The Court quickly dismissed the second situation by relying on its own precedent to conclude that the Government must simply be engaged in the process of assessing deportation in order to detain the individual; there is no need for an additional necessity requirement.[38]

Turning to the first allowable situation, that of preventing unauthorized entry, the Court considered whether the three temporary admissions prior to detention had in effect made entry to the country authorized.[39] The Court refused to accept the concept that surrendering to immigration officials automatically makes the entrance authorized.[40] This point was embraced and argued by the three dissenting judges to stress that Article 5(1)(f) was violated because the British Government was not detaining Saadi to prevent unauthorized entry into the country as it had in essence allowed entry on three distinct occasions.[41] Instead, the Court stressed that countries have an undeniable right to control their borders and that within that right is the ability to detain individuals until formal admission to the country is authorized.[42] The Court further rejected the assertion that the three temporary authorizations amounted to authorized entry and stressed that formal admission is the determinative factor that changes the status from unauthorized to authorized.[43] Therefore, the Court found no violation of Article 5(1)(f).

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35. Saadi v. United Kingdom, Appl. No. 13229/03 [2006], Eur. Ct. H.R. 732, ¶ 26 (arguing that the lack of necessity in Article 5(1)(f) when it is explicitly contained in Article 5(1)(c) should be taken into consideration in light of the Court's ruling in Chahal v. The United Kingdom, Appl. No. 22414/93 [1996], ECHR 54, ¶ 112). *Compare* The European Convention on Human Rights, art. 5(1)(c), Nov. 4, 1950, Europ. T.S. No. 5 (containing a necessity element) *with* The European Convention on Human Rights, art. 5(1)(c), Nov. 4, 1950 (lacking an explicit necessity element).

36. *Id.* ¶ 27.

37. *Id.* ¶ 31. It must be noted that the Court was represented by a 4-3 majority with Judge Sir Nicolas Bratza concurring in the holding of no violation of Article 5(1)(f) but writing separately to stress the viewpoint expressed by the House of Lords that irrespective of Saadi's intention to effect an authorized entry he remained unauthorized and therefore subject to Article 5(1)(f) until he received formal admittance from the British Government. *Id.* ¶ 66.

38. *Id.* ¶¶ 32–38 (citing Chahal v. The United Kingdom, Appl. No. 22414/93 [1996], ECHR 54, ¶ 112 (holding that necessity is not required when the detention is pursuant to Article 5(1)(f)) and Kolompar v. Belgium, Appl. No. 11613/85 [1992], ECHR 59, ¶ 36 (determining the rights of a detainee facing extradition without consideration of necessity).

39. *Id.* ¶¶ 39–40.

40. Saadi v. United Kingdom, Appl. No. 13229/03 [2006], Eur. Ct. H.R. 732, ¶ 40.

41. *Id.* ¶¶ 72–73 (Judges Casadevall, Traja, and Sikuta dissenting) (arguing that instead of detaining Saadi to prevent unauthorized entry, the Government allowed admission on three occasions and that the subsequent detention violated Article 5(1)(f) because it was not to prevent unauthorized entry as the chance to do that had passed).

42. *Id.*

43. *Id.* ¶¶ 40–41.

B. A 76-Hour Delay in Informing a Detainee of the Reasons for Detainment Violates the Convention's Requirement of Prompt Disclosure

Saadi further argued that, irrespective of the Government's right to detain him, its failure to inform him of the reasons for his detention until 76 hours later violated Article 5(2) of the Convention,[44] because 76 hours is not prompt disclosure, and that mere reference to a general intention is not sufficient to meet the disclosure requirement.[45]

The Government argued that the general statement of intent for Oakington provided notice and furthermore that it orally notified Saadi's representative of the reasons for his detainment, giving Saadi sufficient ability to challenge his detention under Article 5(4).[46]

The Court first dealt with the Government's contention that general statements of intent are enough. It rejected this contention based on the plain wording of the statute, which calls for the State to furnish specific information on why the person is being detained to either the detainee or his legal representative.[47] The Court further accepted the applicant's contention that 76 hours is too long a delay to be informed of the reasons for detention.[48] However, the Court suggested that the result might have been different if general notification had been given at the time of Saadi's detention and then a detailed reason in writing had followed a few days later.[49] Finding that 76 hours was not prompt disclosure, the Court held that the Government had violated Article 5(2) of the Convention.[50]

C. The Court Refuses to Consider Other Alleged Violations of the Convention

The applicant also alleged violations of other parts of the Convention, most notably Article 14,[51] because the Government, by using lists of nationalities, had in effect detained him because he was an Iraqi.[52]

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44. Article 5(2) provides, "Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and the charge against him."

45. Saadi v. United Kingdom, Appl. No. 13229/03 [2006], Eur. Ct. H.R. 732, ¶ 50.

46. *Id.* ¶ 49. Article 5(4) provides, "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful." *Id.*

47. Saadi v. United Kingdom, Appl. No. 13229/03 [2006], Eur. Ct. H.R. 732, ¶ 53.

48. *Id.* ¶ 52.

49. *Id.*

50. *Id.* ¶¶ 55–56.

51. Article 14 provides, "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status." *See* European Convention on Human Rights, art. 14.

52. Saadi v. United Kingdom, Appl. No. 13229/03 [2006], Eur. Ct. H.R. 732, ¶ 57.

The Court, finding that the Government had the right to detain under Article 5(1)(f), refused to consider further this Article 14 allegation by simply saying that it has been answered under their considerations of the Government's right to detain.[53]

D. Assessment of Damages and Costs

The applicant argued that, pursuant to Article 41 of the Convention, damages should be awarded, because the Court found a violation of Article 5(2).[54] The applicant further argued that the amount should be EUR 5,000 in compensation for non-pecuniary damages related to the distress imposed by detainment[55] and the total of GBP 15,305.56 in court and attorney's fees.[56]

The Government argued that the period of detainment—seven days—was relatively short.[57] It argued also that if the violation found had been in the actual detention under Article 5(1)(f), EUR 2,000 of compensation would have been appropriate,[58] but that a finding of a violation of Article 5(2) in itself would provide sufficient just satisfaction.[59] The Government also sought a reduction of the attorney fees, arguing that, to the extent violations were not found, the costs should be reduced proportionately.[60]

The Court found only the one violation under Article 5(2), agreeing with the Government that the holding itself was just satisfaction and that the bulk of the litigation and associated fees had been incurred regarding an alleged violation of Article 5(1)(f).[61] Therefore, the Court awarded only EUR 1,500 in respect to the costs and expenses incurred in litigating the Article 5(2) violation.[62] The Court further assessed interest to be paid if the EUR 1,500 had not been paid within three months of the order.[63] This being ordered, the Court dismissed all other claims for just satisfaction.[64]

III. Conclusion

This appears to be a case of the European Court of Human Rights forgetting about the rights of immigrants and embracing a much more authoritarian theory of State sovereignty and

53. Saadi v. United Kingdom, Appl. No. 13229/03 [2006], Eur. Ct. H.R. 732.

54. *Id.* ¶¶ 58–59.

55. *Id.* ¶ 59.

56. *Id.* ¶ 62.

57. *Id.* ¶ 60.

58. *Id.*

59. *Id.* ¶ 61.

60. *Id.* ¶ 63.

61. *Id.* ¶ 64.

62. *Id.*

63. *Id.* ¶ 65.

64. *Id.* ¶ 66 (referring to holding point 5).

police power.[65] The Court seems to be unconcerned about the fact that Saadi posed no threat of running away, demonstrated by his voluntary reappearance before immigration officials on three consecutive days.[66] The Court stresses only that governments have always had the power to control their borders and that detention logically arises from this power, irrespective of the facts of the given case.[67] The Court further gives little to no weight to the Government's exercise of temporary authorization before finally detaining Saadi.[68] Under this ruling, Saadi could have been compelled to return repeatedly before the Government finally decided that it would detain him. Moreover, even once Saadi was detained, the Government could continue the detainment as long as it was engaged in a deportation proceeding.[69] This opens the possibility for long-term deprivations of personal liberty, just because the person attempts to escape an oppressive government regime or even just simply attempts to change countries.

Further, the Court, although finding a violation of Article 5(2), does nothing to remedy it.[70] The Court says that the government was wrong and should not have held Mr. Saadi without telling him the reasons for his detainment, but, besides this acknowledgment, there is nothing that the Court authorizes be done about it.[71] The Court gives no relief for what it acknowledges as a violation of human rights. This would be comparable to arresting persons without informing them of the criminal charges against them and then telling their attorney right before trial. There are safeguards for the extradition of criminals,[72] and yet under the Court's ruling in this case, the Court does not extend those same safeguards to an innocent person whose only "crime" is being an immigrant. The European Court of Human Rights has sided with Government to the detriment of immigrant refugees.

Jason Strauss

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65. This is not the first time that the European Court for Human Rights has coldly embraced State interests to the detriment of innocent humans. *See* Sara A Rodriguez, *Exile and the Not-So-Lawful Permanent Resident: Does International Law Require a Humanitarian Waiver of Deportation for the Non-Citizen Convicted of Certain Crimes?*, 20 GEO. IMMIGR. L.J. 483, 537–38 (2006) (noting that the European Court of Human Rights has held that a compassionate or humanitarian hearing is not required for the consideration of family hardship with regard to the deportation of a family member).

66. Saadi v. United Kingdom, Appl. No. 13229/03 [2006], Eur. Ct. H.R. 732, ¶ 8. Although this factors into the dissent's argument that the detention was not to prevent Saadi effecting unauthorized entry but rather a violation of Article 5(1)(f) for which the majority of the Court disregards in favor of the State's right to control its borders. *See Id.* ¶¶ 72–73 (Judges Casadevall, Traja, and Sikuta dissenting).

67. *Id.* ¶ 40. The Court forgets, as the dissent points out, that while a State has the right to control its borders it also can be restricted in its usage of such sovereign rights when it agrees to do such under international law, which is what Article 5(1)(f) does. *Id.* ¶ 71 (Judges Casadevall, Traja, & Sikuta dissenting).

68. *Id.* ¶ 41 (dismissing the three authorized entries as *only* temporary admissions).

69. *Id.* ¶ 40 (holding that "until a potential immigrant has been granted leave to remain in the country, he has not effected a lawful entry, and detention can reasonably be considered to be aimed at preventing unlawful entry").

70. *Id.* ¶ 61 (finding that recognition of a violation of Article 5(2) is just satisfaction in itself and requires no further compensation).

71. *Id.* (recognizing a violation of Article 5(2) but doing nothing further by way of damages).

72. *See, e.g.,* Extradition Act, 2003, c. 41, § 8 (Eng.) (requiring reasonable cause to be shown for detainment of individual, otherwise judicial decree for release required).

MSF Holding Ltd. v. Fiduciary Trust Company International

435 F. Supp. 2d 285 (S.D.N.Y. 2006)

Plaintiff, a Bahamian corporation, claims that it had a right to collect under a letter of credit pursuant to the International Chamber of Commerce's Uniform Customs and Practice for Documentary Credits. The claim was denied and summary judgment was granted *sua sponte* in favor of Defendant.

In "letter of credit" practice, "transfer" means that some or all of the rights and obligations under the credit are transferred to a different beneficiary, notably the right to draw or to present documents.[1] This may amount to what is usually called "novation" in the general contracts law of common law jurisdictions. "Assignment," in contrast, means that only the right to receive some or all of the payments under the credit are transferred to a different party.[2]

I. Holding

MSF Holding Ltd. ("Plaintiff") sued Fiduciary Trust Co. International ("Defendant") for wrongful dishonor of a letter of credit ("LOC 649"), originally issued in favor of Philips Medical Systems D.V. ("Philips"), which was not a party to this action. Plaintiff claimed that it was entitled to draw under LOC 649 as a result of an Assignment Agreement, by which Philips assigned certain accounts receivable and any sureties relating thereto to MSF-HSF Nederland B.A. ("MSF-HSF"), a subsidiary of Plaintiff.

The District Court for the Southern District of New York held that transfer of LOC 649 by Philips to Plaintiff was prohibited, because, by its own terms, LOC 649 limited transfer solely to MSF-HSF, Plaintiff's subsidiary. Although an assignment was effectuated between Philips and MSF-HSF, Plaintiff was barred from drawing under LOC 649 because it is a distinct entity from MSF-HSF. The court granted summary judgment to Defendant *sua sponte* because no genuine issue of material fact existed as to Philips's assignment of LOC 649 to MSF-HSF.

II. Facts

Plaintiff is a Bahamian corporation with its principal place of business outside the United States.[3] Defendant is a New York corporation with offices in the Southern District of New York.[4] Plaintiff alleged that under a contract between two nonparties to this action,[5] Philips

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1. *See* N.Y. Uniform Commercial Code (UCC) § 5-112 (2000).
2. *See* UCC § 5-114 (2000).
3. MSF Holding Ltd. v. Fiduciary Tr. Co. Int'l, 435 F. Supp. 2d 285, 288 (S.D.N.Y. 2006).
4. *Id.*
5. *Id.* The contract was for the sale of hospital equipment from Philips to HP.

and Hospital Privado de Occidente C.A. ("HP"), the latter, as partial security for its performance, had Defendant issue LOC 649 in favor of Philips in the amount of $250,000.[6]

Philips assigned a number of accounts receivable, including the receivables owed under the Philips Contract and any additional sureties acquired by Philips in association with those receivables, to MSF-HSF[7] (the "Assignment Agreement"). Although both parties agreed that the assignment was made to MSF-HSF, Plaintiff argued that it was the assignee of LOC 649, because MSF and its subsidiary MSF-HSF were "identical entities," while Defendant differentiated between the two entities and claimed that MSF-HSF was the sole assignee of LOC 649.[8]

The facts recited by the court were complex, but not all of the details affected the result. On March 14, 2002, Plaintiff faxed a copy of LOC 649 to Defendant in an attempt to draw the proceeds.[9] Defendant denied Plaintiff's request by letter the next day, on the ground that Defendant had received the "original Letter of Credit" from Philips on May 15, 2001, Philips had not assigned LOC 649 to Plaintiff prior to its cancellation, and a replacement credit was not issued on behalf of Plaintiff or any designee of Philips.[10]

The "original Letter of Credit" was dated May 21, 1999 ("LOC 648"). Defendant said it issued LOC 648 to Vontobel USA Inc. ("Vontobel"), HP's agent, then faxed a copy to Philips.[11] Philips claimed non-receipt of the original credit, and Defendant agreed to issue LOC 649 as a replacement in return for certain statements and undertakings of Vontobel and Philips. The court did not address the arguments concerning the satisfaction of Defendant's conditions in depth[12] because "even in the event that LOC 649 was properly issued in replacement of LOC 648, Plaintiff lacks standing to draw under LOC 649."[13]

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6. *Id.*
7. *Id.* at 288-89.
8. 435 F. Supp. 2d at 289.
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.* at 290 (disregarding assertions by both parties that a letter written by Vontobel which satisfied the first condition for replacement had been produced in discovery because the letter could not be located anywhere in the record, and noting that "neither party has produced a copy of a letter from Philips that would have satisfied Defendant's second requirement for cancellation and reissuance of the credit").
13. *Id.*

In response to Defendant's denial letter, Plaintiff wrote to Defendant seeking proof that LOC 649 had in fact been cancelled.[14] Subsequently, an employee of Plaintiff met with Defendant's in-house counsel to inspect LOC 649. The parties disagreed on the outcome of the meeting.[15]

On August 2, 2002, Defendant provided Plaintiff with written instructions on the necessary measures it must follow in order to receive payment. Plaintiff subsequently presented Defendant with LOC 649 and a request for a replacement credit.[16] Defendant claimed that Plaintiff's "fraudulent concealment" of the existence of the Assignment Agreement induced Defendant's instructions.[17]

Plaintiff alleged that the Defendant breached its obligations under LOC 649 by informing Plaintiff that it had no record of issuance of LOC 649[18] and claiming to have only a record of LOC 648, which had been cancelled in May 2001 at the request of Philips, the named beneficiary.[19] Plaintiff later sought reconsideration of Defendant's prior dishonor of LOC 649.[20]

Pursuant to Federal Rule of Civil Procedure 56, Plaintiff moved for summary judgment, claiming it was the beneficiary of a "letter of credit" that Defendant refused to honor.[21] Defendant, "arguing primarily that Plaintiff lacks standing to enforce the credit," cross-moved for summary judgment.[22] Although Defendant's motion was denied for failure to comply with Local Rule 56.1,[23] the court granted summary judgment *sua sponte* in Defendant's favor.[24]

III. Summary Judgment Standards

The court recognized that "letter of credit" cases are well suited for summary judgment motions, or resolution without trial, because they normally present solely legal issues relating to an exchange of documents.[25] Summary judgment is used to avoid frivolous claims and merit-

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14. 435 F. Supp. 2d at 290.
15. *Id.* at 290, n.9 (addressing Plaintiff's claim that after inspecting LOC 649, Defendant's representative stated that it was "genuine, and therefore, would be honored" and acknowledging Defendant's claim that its representative "only told Plaintiff that the document *appeared to be an original*").
16. *MSF*, 435 F. Supp. 2d at 291.
17. *Id.* (arguing that the agreement's existence "eviscerates the Plaintiff of the 'ownership or authority' to transfer LOC 649").
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.* at 287.
22. *MSF*, 435 F. Supp. 2d at 287.
23. *Id.* (stating that Local Rule 56.1(a) of the Southern District of New York requires the moving party to submit a separate numbered statement of material facts as to which it contends there are no genuine issues to be tried, while Local Rule 56.1(b) allows the non-moving party to submit a counterstatement responding to the moving party's assertions).
24. *Id.*
25. *MSF*, 435 F. Supp. 2d at 293.

less litigation.[26] It is granted when the moving party has proven[27] that no genuine issue of material fact exists between the parties.[28]

IV. Choice of Law

In cases like the one at hand, where the court's subject matter jurisdiction rests on the diversity of the parties, "the Court is obligated to apply the choice-of-law rules of the state in which it sits—*viz.*, New York."[29] New York law calls for the enforcement of an express choice-of-law provision in a contract, as long as the law selected is "that of a state with sufficient contacts to the transaction,"[30] and provided that no fraud or violation of public policy exists.[31]

The parties expressed their intent in LOC 649 to be governed by the International Chamber of Commerce's Uniform Customs and Practice for Documentary Credits (1993 Revision), Publication No. 500 (" UCP 500"), and to be bound by New York state law in areas not governed by the UCP.[32] UCP 500 is not a law, but is incorporated by reference as part of the contract that is the "letter of credit." The credit was governed by New York law as it existed at the time the contract was made.[33]

V. Transfer and Assignment Under the Letter of Credit Doctrine

The court quoted a definition of a "letter of credit" as "a common payment mechanism in international trade that permits the buyer in a transaction to substitute the financial integrity of a stable credit source (usually a bank) for its own."[34] By providing the seller with a letter of credit in his favor, which he can use as a method of payment in case the buyer defaults, the buyer will ease the concerns of a seller who has identified a potential buyer but is unsure about his ability to pay.[35]

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26. *Id.* at 292 (citing Perma Research & Dev. Co. v. Singer Co., 410 F.2d 572 (2d Cir. 1969) (quoting Cmty. Of Roquefort v. William Faehndrich, Inc., 303 F.2d 494, 498 (2d Cir. 1962)) (stating the purpose of summary judgment, which is to discover "whether one side has no real support for its version of the facts").

27. *MSF*, 435 F. Supp. 2d at 292–93 (claiming that the burden of proving that no genuine issue of material fact rests with the party moving for summary judgment, and the court is required to draw all inferences in favor of the non-moving party in deciding summary judgment motions).

28. Fed. R. Civ. P. 56(C); *MSF*, 435 F. Supp. 2d at 292 (stating that although materiality depends on the applicable substantive law in a given case, the disputed fact must be material and "the mere existence of *some* alleged factual dispute" will not be enough for a court to grant summary judgment).

29. *MSF*, 435 F. Supp. 2d at 292 (citing Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487, 496–97).

30. *Id*. at 295 (stating that New York has sufficient ties to the transaction because it is where the Defendant is located and where LOC 649 was issued). *Id.*

31. *Id.* at 293.

32. *Id*. A new version of the Uniform Customs and Practice has already been published as ICC Publication No. 600, to take effect in 2007.

33. *Id.* at 294. The court makes this important distinction because a different version of UCC Article 5 was in effect at the time of the formation of this contract.

34. *Id.* at 295 (citing Bouzo v. Citibank, N.A., 96 F.3d 51, 56 (2d Cir. 1996) (quoting Ala. Textile Co. v. Chase Manhattan Bank, N.A., 982 F.2d 813, 815 (2d Cir. 1992)).

35. *MSF*, 435 F. Supp. 2d at 295 (citing *Ala. Textile Co.*, 982 F.2d at 815).

The "letter of credit" transaction involves three independent relationships, which are important to the utility and efficiency of "letters of credit"—(1) a commercial transaction between buyer and seller; (2) an agreement between a bank and its customer, the buyer; and (3) an obligation of the bank to pay the beneficiary of the letter of credit if the demand to pay is accompanied by documents that conform with the terms of the letter of credit.[36]

An important characteristic of the "letter of credit" is the fact that "the bank's payment obligation to the beneficiary is primary, direct and completely independent of any claims which may arise in the underlying sale of goods transaction."[37] Thus, regardless of the seller's non-performance, as soon as the beneficiary presents the conforming documents to the bank-issuer,[38] "the bank's obligation to pay is triggered."[39]

The principles of transfer and assignment are applied differently under the UCP than under general contract law.[40] Under the UCP, a "letter of credit" may be assigned by the beneficiary to a third party, who will essentially replace the beneficiary and become the sole party entitled to draw proceeds under the credit.[41] A transfer under the UCP "effectuates a more complete change"[42] than an assignment. The assignee becomes entitled to the proceeds of the credit, but the original beneficiary retains all duties and obligations under the credit, including the obligation to present the necessary documentation to the issuer before payment to the assignee.[43] Although "letters of credit" are "freely assignable," they can be transferred only when they are expressly designated as "transferable."[44]

VI. The Court's Analysis

A. Transfer of LOC 649

The court repeatedly noted that there was "what appears to be confusion about the differences between a transfer and assignment under the UCP."[45] LOC 649 provided that it could be transferred or assigned to Plaintiff if certain conditions were satisfied.[46] Namely, the beneficiary must (1) execute an "Agreement Assigning Irrevocable Letter of Credit" and (2) surrender LOC 649 to the Defendant and submit a written request directing the Defendant to issue a

36. *Id.* at 295 (citing 3Com Corp. v. Banco do Brasil, S.A. 171 F.3d 739, 741 (2d Cir. 1999)).

37. *MSF*, 435 F. Supp. 2d at 296 (quoting Voest-Alpine Int'l Corp. v. Chase Manhattan, N.A., 707 F.2d 680, 682 (2d Cir. 1983)).

38. *MSF*, 435 F. Supp. 2d at 296 (stressing that even slightly non-conforming documents will bar the beneficiary from drawing under the letter of credit, and therefore the beneficiary must "strictly adhere" to the letter of credit's requirements).

39. *Id.*

40. *Id.* at 296–97.

41. *Id.*

42. *Id.* at 297 (citing Algemene Bank Nederland, N.V. v. Soysen Tarim Urnleri Dis Ticaret Ve Sanayi, A.S., 748 F. Supp. 177, 181–82 (S.D.N.Y. 1990)).

43. *MSF*, 435 F. Supp. 2d at 297.

44. *Id.*

45. *Id.* at 296, 298.

46. *Id.* at 297.

replacement irrevocable "letter of credit" in favor of Plaintiff.[47] However, the court found that because the conditions "call for a new beneficiary to *replace* the original beneficiary and accede all of its rights and obligations under the credit," they affected only the beneficiary's right to transfer the credit, not its right to assign the right to receive the proceeds.[48] The court further noted that, despite the misleading title of the "Agreement Assigning Irrevocable Letter of Credit," it too referred to a transfer of LOC 649, because it required the original beneficiary to accept all rights and obligations under the credit.[49]

The court concluded that Philips did not transfer LOC 649 to MSF-HSF under the Assignment Agreement, because, by its own terms, LOC 649 limited its transfer to Plaintiff and no other party.[50] The court further concluded that any analysis of whether the conditions under the credit were satisfied was unnecessary, because MSF-HSF was a separate entity from Plaintiff, and any attempt to transfer the credit to any entity other than Plaintiff, namely MSF-HSF, failed.[51]

B. Assignment of LOC 649

The UCP and New York law do not strictly construe restrictions on the assignment of a "letter of credit's" proceeds.[52] The most crucial issue for the resolution of this motion was whether the Assignment Agreement under LOC 649 effectuated the assignment of LOC 649's proceeds to MSF-HSF. Since the UCP is silent on the issue, the court applied the parties' choice of law provision and relied on the well-developed law in New York's UCC.[53]

UCC § 5-116(2) is the provision that governed letters of credit at the time of the formation of the contract.[54] The court interpreted the various provisions of § 5-116(2) to allow the beneficiary of a credit to assign his right to proceeds under a credit before performance of the conditions of the credit, even though "the credit specifically states that it is nontransferable or nonassignable."[55] "Under the UCC, therefore, a credit's own restriction on the assignability of its proceeds is void, provided an assignment is made and the credit is delivered to the assignee."[56] Such an assignment under a credit is effective except (a) the assignment is ineffective until the credit is delivered to the assignee, which delivery constitutes perfection of the security interest under Article 9; (b) the issuer is not bound to the assignee until notification is received and contains a request to pay the assignee; and (c) the issuer can refuse to pay without dishonor until the credit is exhibited to the issuer.[57] The court also discussed the various pro-

47. *Id.*

48. *Id.* at 297–98.

49. *Id.* at 298. The court stated that, unlike a transfer, an assignment under the UCP "does not include the transfer or delegation of any duties." *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at 299.

55. *Id.*

56. *Id.* at 301.

57. *Id.* at 299.

tections offered by the provisions of this section, such as the protection to the assignee from "double dealing" and to the issuer from double payment.[58]

The court found that the question whether a contract effectuates an assignment involves construction of the contract, which is purely a question of law for the court to decide.[59] It next turned to the language of the Assignment Agreement, which "clearly assigned to MSF-HSF a number of receivables, including the 'contract of sale' between Philips and HP," but did not explicitly name LOC 649 as part of the agreement.[60] The court could not find as a matter of law that the agreement unambiguously assigned the right to LOC 649's proceeds to MSF-HSF.[61] The language in the Assignment Agreement implied a broad assignment and, under New York law, summary judgment may be granted only when a contract conveys definite and unambiguous meaning.[62]

In addition to granting summary judgment when a contract conveys a definite and unambiguous meaning, a court may also grant summary judgment where the contract terms are ambiguous but the parties have pointed to extrinsic evidence that dispels any genuine issue of material fact.[63] In order to dispel issues of material fact, the parties pointed to extrinsic evidence to demonstrate their intent.[64] The court concluded that LOC 649 was "physically delivered by Philips to MSF-HSF along with other assigned documents," and that the "Assignment Agreement conferred to MSF-HSF the receivables due owing to Philips and 'their security for that amount.'"[65] The court found that the extrinsic evidence proved that the requirements of the UCC were satisfied.[66]

The court ultimately concluded that the assignment from Philips to MSF-HSF gave only MSF-HSF a right to the proceeds of LOC 649. Philips remained obligated to draw the proceeds from Defendant in MSF-HSF's favor, but the assignment prevented Philips from presenting drafts under the credit or transferring the credit to another—i.e., Plaintiff.[67]

Plaintiff argued that although LOC 649's proceeds were rightfully assigned to MSF-HSF, Plaintiff nevertheless had the right to enforce the credit on MSF-HSF's behalf, because it was its parent corporation.[68] However, the court rejected this argument on the grounds that, "[g]enerally speaking, a parent corporation and its subsidiary are regarded as legally distinct entities and a contract under the corporate name of one is not treated as that of both."[69]

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58. *Id.* at 300.
59. *Id.* at 301.
60. *MSF*, 435 F. Supp. 2d at 302.
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.* at 302–03.
66. *MSF*, 435 F. Supp. 2d at 303 (stating the UCC's requirements that (1) an assignment of proceeds be made and (2) the subject credit be delivered to the assignee).
67. *Id.*
68. *Id.*
69. *Id.* (citing Carte Blanche (Singapore) Pte., Ltd. v. Diners Club Int'l Inc., 2 F.3d 24, 26 (2d Cir. 1993)).

VII. The Court's Ruling

The court concluded that Plaintiff was foreclosed from enforcing LOC 649 on MSF-HSF's behalf and denied summary judgment for Plaintiff.[70] Further, the court denied Defendant's cross-motion for summary judgment, on the ground that it did not comply with Local Rule 56.1.[71]

A court should grant summary judgment *sua sponte* only when the party against whom summary judgment would be entered, has had the opportunity to oppose it.[72] The court nevertheless granted summary judgment *sua sponte* in favor of the Defendant, because it found the procedural setting ripe, since Plaintiff was given fair opportunity to respond and did respond.[73] The court's decision was based on the fact that "the parties do not dispute the fact that MSF-HSF is the assignee of LOC 649; they instead dispute its consequence under law."[74] Further, "[w]here parties on a summary judgment motion do not dispute a dispositive material fact, and merely disagree as to the consequence of that undisputed fact under the law, a question of law is presented for the court's interpretation and the court could not be on firmer ground in granting summary judgment as a matter of law."[75] The court found it reasonable and necessary to enter a judgment for Defendant as a matter of law. However, the court noted, "without addressing any defense defendant may have in a subsequent suit," that MSF-HSF might be entitled to sue Defendant for enforcement of the credit.[76]

VIII. Conclusion

The case at bar interpreted all applicable statutes, doctrines, and contracts between the parties to come to a conclusion that was legally sound. It considered relevant summary judgment standards, choice of law rules, and the "letter of credit" doctrine. Although it is unfortunate that Plaintiff, as the parent corporation of MSF-HSF, was not found to be a party in interest to seek payment under the credit and was foreclosed from enforcing LOC 649, the court's decision simply applied the pertinent law to the facts of the case in coming to its conclusion.

Plaintiff and Defendant agreed on the crucial material fact in this case—that LOC 649 was in fact assigned to MSF-HSF. The court's denial of Plaintiff's motion for summary judgment was grounded on the fact that, once it was concluded that Plaintiff could not take under the credit where MSF-HSF was a beneficiary, there was no genuine issue of material fact remaining, and therefore, Defendant was entitled to judgment as a matter of law. This is a just ruling by the court.

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70. *MSF*, 435 F. Supp. 2d at 306.

71. *Id.* at 304. *See supra* note 23.

72. *Id.* at 305.

73. *Id.* at 304.

74. *Id.*

75. *Id.* at 305.

76. *MSF*, 435 F. Supp. 2d at 305.

Formation of a contract entails a mutual agreement by the parties, especially presumably sophisticated parties like those in this case. If Philips or MSF-HSF intended Plaintiff to be a beneficiary under the Assignment Agreement, they should have provided for it in their contract. "Letters of credit" typically involve large sums of money, and if courts did not scrutinize their application, there might be an incentive for fraud or meritless litigation by parties who have no right to take under the credit.

Arianna Gonzalez-Abreu

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