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Introduction to the Journal

The Protection Project Background: The Protection Project is a human rights research institute based at The Johns Hopkins University School of Advanced International Studies (SAIS) in Washington, D.C. The Protection Project focuses on promoting human rights values throughout the world by engaging in academic research and conducting training, exchange, and fellowship programs focusing on issues of trafficking in persons and child labor, human rights education, women’s empowerment, state compliance with internationally recognized human rights and capacity building for civil society in developing and transition countries.

Mission Statement: The Protection Project Journal of Human Rights and Civil Society is a new journal that aims to provide a forum for scholarly analysis of critical contemporary human rights issues within the prism and from the perspective of civil society and practitioners in the non-governmental sector.

As civil society and non-governmental organizations gain momentum and experience in human rights advocacy and begin to contribute to driving reform, development and democratization processes, it becomes imperative to examine the interrelationship between developments in the human rights arena and the consequent effects such developments have on the possibilities for the growth or obstructions of the growth of freedom of civil society and non-governmental organizations.

It is also necessary to study how emergent civil society and the non-governmental sector contribute to the movement toward greater respect for and compliance with human rights standards worldwide. As participants and practitioners in this process, civil society representatives and professionals in the non-governmental sector possess tremendous insight into the practical side of the realization of human rights ideals, including both successes and pitfalls.

It is therefore the objective of the journal to probe developments and crucial concerns such as the implementation of and state compliance with international human rights standards, to address poignant themes addressing the interrelationship between human rights theory and human rights practice as that transition is realized in local contexts, as well as the roles of civil society and non-governmental organizations as actors in the social and political development of nations.

Target Audience: The journal is aimed at an audience of human rights and civil society practitioners, representatives of governmental, intergovernmental, and non-governmental organizations, as well as students and scholars of human rights and/or civil society.

Contributions: The journal publishes multi-disciplinary submissions that provide analysis and scrutiny of contemporary human rights concerns in the international realm with a strong emphasis on the practical implications of human rights theory within the authors’ local, national and regional contexts. Submissions analyzing the social, legal and political frameworks as they
interact with and affect the practical applications of international human rights standards and their linkages to civil society and non-governmental sector development are especially valued. The roles, responsibilities, and freedom of civil society and the non-governmental sector in the implementation of international human rights standards are also significant areas of interest for the scope of the journal. Preference will be given to submissions covering practical rather than theoretical aspects of human rights issues, as well as civil society and non-governmental development. Submissions are acceptable from a wide range of disciplines, such as public policy, political science, sociology, anthropology, international development, gender studies, law and philosophy.

**Scholarly Articles:** The journal publishes scholarly articles in some issues under this rubric. Contributions are original, unpublished materials.

**Essays:** The journal publishes essay contributions in some issues covering recent civil society development and non-governmental activities.

**Book Reviews:** The journal publishes analytical book reviews. Books eligible for review are recent publications covering human rights issues within the context of the non-governmental sector and civil society. They address any topics under the scope of the journal, such as human rights standards as they apply to freedom of association and of civil society and non-governmental organizations, theories behind the impact of civil society and the non-governmental sector on development of human rights standards, monitoring of human rights compliance, advocacy, and the practical aspects of the implementation of human rights standards within local social, legal, and political contexts.

**Interviews:** The journal publishes interviews with civil society activists addressing pressing human rights concerns of our time.

**Annotated Bibliographies:** The journal includes annotated bibliographies on important issues associated with human rights and civil society topics in.

**Editing Team:** The journal is edited by The Protection Project staff, as well as volunteer contributors and consultants who are practitioners and researchers in the fields of civil society and human rights. The first issue was edited by: Publications Professionals LLC, Ms. Anna Koppel, Ms. Navneet Shirin Sahani, Ms. Cynthia Rinaldi, and Ms. Leslie Hess. The Annotated Bibliography for this first edition was compiled by The Protection Project's Research Associates. Interview with Ms. Sigma Huda was conducted by Professor Mohamed Mattar and Ms. Anna Koppel.
Introduction to the First Issue

Dear Reader:

I am glad to introduce you to the First Issue of The Protection Project Journal of Human Rights and Civil Society. The journal has been long in the making, but I am pleased that the First Edition is complete. I believe that the nexus of civil society and human rights is an important one and that it merits an in-depth, multidisciplinary scholarly exploration. This is what I hope we can begin to move toward with this journal.

This first edition addresses some important human rights topics of our time, including trafficking in persons, to which several contributions to this issue are devoted. The Protection Project is proud to publish, in its first issue of the journal, an interview with Ms. Sigma Huda, the United Nations Special Rapporteur on Trafficking in Persons, Especially Women and Children. Other issues covered by contributions to the journal include state compliance with international human rights commitments and female genital mutilation. The Annotated Bibliography included in the first issue covers the topic of volunteerism, a critical contributor to a vibrant civil society.

We hope you find this first issue thought-provoking and professionally stimulating.

Sincerely,

Mohamed Mattar
Executive Director
The Protection Project

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Slave Women: The Italian Legal Response to the International Trafficking in Women

MARINA ELEFANTE

Each year, thousands of women arrive in Italy in hope of finding a stable job, a new place to live, and a new life. In a typical situation, newspaper advertisements, a false talent scout, or even a family friend have lured these women with promises of better living conditions abroad. Unfortunately, these women do not know that what they have been dreaming of as a once-in-a-lifetime opportunity will soon turn out to be their worst nightmare. Stripped of their passports on arrival in the country, threatened with death, beaten, raped, and burdened with exorbitant debts, they will end up on the streets, forced into prostitution, or in sweatshops, obliged to work in inhuman conditions and treated as slaves.

The striking increase in the phenomenon of trafficking of women to Italy in recent years led the Italian government in 2003 to enact a law, Measures against Trafficking in Persons. This law constitutes the first attempt to comprehensively regulate the phenomenon of human trafficking, previously neglected by the Italian legislation. The law aims at fighting the phenomenon of trafficking in persons through a three-pronged strategy: first, it severely criminalizes human trafficking and its related activities, such as slavery, servitude, and trade in human beings; second, it provides measures for the protection of the victims of trafficking; and third, it enables the Italian government to enact policies and programs of prevention of trafficking in persons.

In this article, I attempt to explore the phenomenon of trafficking of women to Italy, with special attention to the effectiveness of the Italian government’s response to it. My central argument is that although the criminalization section of the new law might be an effective tool in the fight against trafficking in women because it successfully responds to the previous lack of a legal instrument for the prosecution of traffickers, pending laws on immigration and prostitution actually conflict with the protection and prevention strategy of the new law, thus hampering an effective response to the problem and full compliance with the relevant international law on human trafficking. In this article, I will maintain that the strict line of the current conservative government against illegal immigrants risks preventing effective protection of the victims of trafficking, who are often criminalized as clandestine migrants and summarily deported. Similarly, I will demonstrate how recent amendments to the Italian prostitution law—prohibiting the exercise of prostitution in the streets and allowing it in private places—actually hides trafficked prostitutes in private houses, where they are at the

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5. For a chronological list of all the Italian laws, see http://www.parlamento.it/parlam/leggi/elenumer.html.
mercy of their traffickers and out of sight of law enforcement personnel and services of assistance, thus making their protection far more difficult. By the same token, I will show how these same laws risk hindering a successful strategy of prevention of trafficking, because the enforcement of the immigration law favors the revictimization of trafficked women through their forced expulsion from the country, and the new prostitution law does not address the issue of the reducing the demand for prostitution, which could be an effective tool for the prevention of trafficking.

This article has six sections. Section 1 provides an insight into the phenomenon of trafficking of women to Italy and identifies the issues that need to be addressed to effectively deal with the problem, such as the main causes of the problem, the extent to which Italy is a country of origin or of destination, and the most common methods of recruitment of the victims. Section 2 is a brief introduction to the 2003 Italian antitrafficking law. Sections 3, 4, and 5 analyze in more detail the new antitrafficking law, compare it with the legal situation in Italy before the enactment of the new law, and assess the status of its compliance with the relevant international law on human trafficking. In particular, section 3 examines the criminalization strategy pursued by the new law and demonstrates how the introduction of new crimes and the provision of strict penalties for the perpetrators successfully respond to the need to criminalize trafficking and its related activities. Section 4 analyzes the measures for the protection of the victims of trafficking enacted by the 2003 law. More specifically, this section shows how the protection section of the antitrafficking law seems to comply with the international standards of protection of trafficked people, but it actually does not constitute an effective response to the problem because of its conflict with the immigration and prostitution law. Section 5 analyzes the prevention provision contained in the antitrafficking law and demonstrates how the pending immigration and prostitution laws prevent the Italian government from fully complying with the relevant international law on human trafficking and effectively addressing the issue of prevention of trafficking in persons. Finally, section 6 provides some recommendations to the Italian government for designing a more effective legal response to the problem of trafficking to Italy.

1. International Trafficking of Women to Italy: The Size and Scope of the Problem

In this section, I try to provide an insight into the phenomenon of trafficking of women in Italy. The purpose of this assessment is to highlight the main issues that need to be addressed to design an effective legal response to the problem. Essentially, these issues relate to the main causes of the phenomenon of trafficking of women, the extent to which Italy is a country of origin or destination of trafficked women, the magnitude of the problem and the principal routes of traffickers, and the most common methods of recruitment of the victims. The following subsections analyze each of these issues in more detail.

1.1 Definitions: The Difference between “Trafficking” and “Smuggling”

The terms trafficking and smuggling are often used interchangeably, despite their distinct meanings. Nevertheless, distinguishing between the two concepts is vital because they require different legal treatment and different approaches by law enforcement personnel. Trafficking is internationally defined as

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the recruitment, transportation, transfer, harboring, or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power, or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.\textsuperscript{7}

Smuggling, however, means “the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident.”\textsuperscript{8}

Essentially, smuggling refers to the illegal transport of a person or persons across international borders, which results in a benefit for the smuggler. The definition, however, does not inherently involve exploitation, even though smuggled persons may end up in dangerous situations.\textsuperscript{9} Thus, the abuse of a person is not the fundamental intent of smuggling. Trafficking, instead, specifically targets the trafficked person as an object of exploitation and inherently involves a violation of human rights. The core purpose of trafficking is to exploit the person through deception and coercion and to gain a profit.\textsuperscript{10} As a result, whereas a trafficked person is always a victim, the smuggled person pays her smuggler to illegally enter the territory of a foreign country and, therefore, participates in the commission of the crime of illegal migration.

Clearly, laws and enforcement agencies need to distinguish between these two concepts by protecting the victims of trafficking and by criminalizing both the smugglers and smuggled persons.

1.2 The Main Causes of Trafficking

Identifying the main causes of trafficking in women in Italy is a crucial step in the fight against this phenomenon. In fact, going to the roots of the problem and trying to eradicate them might be the most successful move of an effective strategy of prevention of trafficking. Generally, the causes of trafficking can be divided into two categories: \textit{push factors}, which cause the victim to easily fall into the trap of traffickers because of socioeconomic or other hardships in the country of origin and the desire to seek better opportunities abroad, and \textit{pull factors}, which can make a given country of destination particularly attractive for the traffickers.\textsuperscript{11}

First, poverty in the countries of origin is one of the main push factors of human trafficking. Poor women are particularly vulnerable to the false and deceptive offers of the traffickers because, when they find themselves in a condition in which they lack even basic needs such as food and shelter, they are easily lured with false promises of work and better conditions in the country of destination.\textsuperscript{12} It has been argued that poverty per se is not a sufficient cause for trafficking and that poverty matched


\textsuperscript{9} This situation may arise, for example, when the real intention of the smuggler is to traffic the person and eventually exploit her.


with economic inequality between the countries of origin and the countries of destination actually fuels this phenomenon. Indeed, women end up falling into the trap of traffickers because they hope to improve their living conditions in a richer and more developed country. To this extent, the depiction of Italy, particularly through the Eastern European media, as the country of fashion, gourmet food, and profitable show business contributes to rendering it remarkably attractive both to traffickers and to victims.

Lack of education in the countries of origin is another push factor that contributes to the proliferation of trafficking. Particularly in African societies, lack of education affects women disproportionately because different evaluations of sons’ and daughters’ roles in patrilineal families lead to a tradition of son preference. In these cultures, while education is considered a value for sons, who will eventually find a job and maintain their families, it is deemed a waste of time and money for daughters, whose role is to become wives and mothers. As a result, women in such societies are poorly educated, are not aware of their rights, and become easy targets of traffickers.

Lack of economic empowerment is the third push factor fostering trafficking in women. In fact, gendered development processes and patriarchal values marginalize women from employment and social benefits. Moreover, gender-based property and inheritance laws, especially in African countries, prevent women from owning private property and, consequently, from acceding to land and inheriting. This situation leaves women, in the case of the death of their parents or male breadwinner, with no options but seeking better opportunities abroad and accepting traffickers’ offers.

Globalization and transitional economies have also created fertile soil for the business of trafficking in women. In fact, the fall of communism and the transition to a market economy in many Eastern European countries has caused the feminization of poverty because it has provided job opportunities for highly educated people, which in those countries means essentially men, while women are among the first to suffer retrenchment and unemployment. In parallel, the rise of criminal elements, which take advantage of this situation, has further exposed women to the risk of being trafficked.

Besides all these push factors, an important pull factor makes Italy particularly appealing to traffickers. In Italy, the demand for exploitative activities that are linked with women’s trafficking is constantly high, both for prostitution—currently in Italy an estimated 40,000 prostitutes are actively

17. Ibid.
in business—and for informal employment. Women are most appealing to informal employers because they are considered submissive, cheap, and suited to simple, repetitive tasks. As a result, trafficked women end up working in hazardous conditions with inhuman working hours, low wages, and absence of social security benefits.

1.3 Routes and Numbers

To identify and prosecute traffickers, one must understand the main routes of trafficking as well as the magnitude of the phenomenon. Trafficking in women to Italy has rapidly increased in recent years: traffickers see Italy both as a country of destination and as a country of transit to other European countries. Unfortunately, given the hidden nature of the trafficking phenomenon, the exact number of women trafficked to Italy is unknown, but the Italian authorities estimate that 70,000 women were trafficked to Italy in 2003 for the purpose of sexual exploitation alone. Women trafficked into Italy come primarily from three main zones of origin: Nigeria, Albania, and Eastern Europe—particularly Moldova, Romania, and Ukraine.

The routes followed to reach Italy are often tortuous and vary depending on the victim’s country of origin. For instance, until the mid-1990s, the Nigerian victims, by far the most numerous, came to Italy through the Rome and Milan airports. Stricter screening at airports, however, has recently led to the development of more complicated routes, with longer and tortuous journeys through several African countries. The trip usually involves a flight to Paris, London, or Frankfurt airports, followed by a train journey to Italy. Another common route involves a flight to Moscow, a land trip to the Balkans, and the eventual arrival in Italy by sea.

The sea route is mostly used by Albanian traffickers: they usually leave from the Albanian port of Vlorë in motorboats or fishing boats and reach the Italian shores through the Otranto Channel in less than 2 hours. The third country of origin of women trafficked into Italy is Moldova. Usually, Moldovan trafficked women cross the border into Romania, where they are taken by networks of Romanian pimps and sold at markets just outside Timisoara, from which they will reach Italy through the Slovenian border.

1.4 Methods of Recruitment and Conditions of the Victims

An insight into the main methods of recruitment of victims of trafficking is vital to understand the heinous human rights violations that these women suffer and to draft effective protection strategies in host countries. Traffickers use various ways of recruiting women in their home countries, but the most common methods of recruitment are basically three: false promise of a job in the country of destination, with misrepresentation of the type of job, its duration and conditions; direct violence or kidnapping; and sale by parents.31

In a typical situation, women are attracted through advertisements in local newspapers offering jobs abroad, by agents promising modeling careers, or even through a family friend who is able to reassure the victim and her family that she will be safe in the new country. In most cases, women think that they will work as waitresses or domestic workers, attend language and skill courses, have a house, and earn money.32 Alternatively, women are directly recruited through violence and kidnapping or even sold by their parents. In patrilineal, rural societies, daughters are often seen as a burden for their families, which have to ensure their premarital virginity, provide marriage expenses, and marry them off early and appropriately. In this scenario, the promise of an immediate payment can lead families to sell their daughters with little concern about their future well-being.33

Whatever the method of recruitment, however, trafficking victims always suffer horrible human rights violations after they are in the hands of traffickers. Once recruited or abducted, they are trafficked into forced prostitution or forced labor and controlled through debt bondage. Basically, when they arrive in a foreign country, trafficked women find themselves saddled with an exorbitant debt, which includes a payment made by the trafficker to the victim’s family at the time of the recruitment and travel expenses. Escape is virtually impossible without repaying the debt because the traffickers will harshly punish their victims, even by physical assault. Moreover, stripped of their passports, often unable to speak the local language, sold as chattel, and terrified of both local law enforcement authorities and their traffickers, many victims struggle to pay off their enormously inflated debts; others attempt to escape but, without regular documents, they are likely to be mistaken for illegal migrants and deported, with a high risk of revictimization when they return home.34

2. The Italian Response to the Problem of Trafficking

In July 2003, the Italian parliament approved Law 228/2003, Measures against Trafficking in Persons, drafted by the Ministry for Equal Opportunities.35 Parliament adopted the law in response to observations by several United Nations (UN) bodies that lamented the absence of specific antitrafficking legislation in Italy,36 as well as in response to a recent binding Framework Decision

31. IOM, Trafficking in Women to Italy for Sexual Exploitation, 10.
35. Antitrafficking law, see note 3.
of the Council of the European Union, calling on Member States to adopt legislative measures to severely criminalize trafficking in human beings and protect the victims of this crime.  

Law 228/2003, Italy’s first antitrafficking law, aims at eradicating the phenomenon of human trafficking through a three-pronged strategy, namely criminalization of trafficking in human beings and related activities, protection of the victims, and prevention of the phenomenon. In the following sections, each of these strategies is analyzed and the extent to which they represent a valid tool to comply with the relevant international law in this field as well as an effective response to the phenomenon of trafficking in Italy is assessed.

3. Criminalization

The most striking innovation of the 2003 antitrafficking law is its severe criminalization of all of the most common activities of human traffickers. Essentially, the criminalization strategy pursued by the new law entails a series of significant amendments to the Italian Penal Code (Codice penale, or C.P.), the Italian Code of Penal Procedure, and Legislative Decree 231/2001. These amendments provide the following: (a) a more detailed definition of the crime of slavery; (b) the introduction of the crime of servitude, which was not previously contemplated by the Italian Penal Code; (c) the extension of the crime of trafficking of slaves to include the trafficking of persons placed in a condition of servitude, with a detailed definition of the concept of human trafficking, which was not clear in the old version of the penal code; (d) the extension of the crime of purchase and sale of slaves to include the purchase and sale of persons into a condition of servitude; (e) significantly increased penalties and aggravating circumstances for each of the preceding crimes; (f) the introduction of the specific crime of creation of or participation in an organized criminal group for the purpose of human trafficking and related activities; (g) administrative sanctions for legal persons engaged in trafficking and slave trade, which were not contemplated in the previous version of Legislative Decree 231/2001 on the administrative sanctions applicable to legal persons for crimes against physical persons; (h) the extension to the victims of trafficking, slavery, servitude, and slave trade of the witness protection programs and of all the other procedural and substantial benefits provided by the Code of Penal Procedure to “justice cooperators.”

The amendments represent a crucial step in the fight against trafficking of women in Italy because they are the result of the successful effort of the Italian government to comply with the criminalization requirements set forth in the main international legal instruments on human trafficking, the UN Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children and the Framework Decision of the Council of the European Union on Human Trafficking.

Moreover, the Italian legislature has designed the new norms well, by providing detailed definitions of the crimes and by creating a specific crime for each possible activity of the trafficker. As explained later, according to the Italian penal law, this particular formulation of the norms will widen the possibilities of prosecuting traffickers and provide significantly increased penalties for them.

39. UN Protocol, see note 6.
40. Council Framework Decision, see note 36.
Finally, the criminalization strategy of the new law will deter future perpetrators and stimulate the victims’ cooperation during the prosecution process because it provides both strict sanctions for those responsible and protective measures for witnesses. The following subsections analyze in more depth the innovations introduced by the new antitrafficking law and explain in more detail how these legal innovations will improve the Italian response to the problem of trafficking of women.

3.1 The Crimes of Slavery and Servitude

The first two innovations brought by the new antitrafficking law consist of an amendment to article 600 of the Italian Penal Code. Before enactment of the new antitrafficking law, former article 600 C.P. punished the reduction of a person to slavery or a condition similar to slavery without providing a definition of these two crimes. The 2003 law aims to fill this gap by defining for the first time the crime of slavery and by substituting the new crime of servitude for the vague expression “condition similar to slavery” in the old article.

Essentially, the crime of slavery is defined as the exercise of the powers attached to property rights over a human being, thus basically duplicating the definition of slavery and enslavement contained, respectively, in the Slavery Convention of 1927 and in the International Criminal Court Statute. Moreover, the 2003 law introduces for the first time the new crime of reduction to servitude, which consists in putting or keeping a person in a condition of continuous subjugation. The article clarifies that this status occurs when a person is forced to provide labor, to provide sexual or otherwise exploitative services, or to beg, by means of violence, threat, deception, or abuse of power or of a position of physical or mental vulnerability; by means of a condition of need; or, finally, by means of promising or giving payments or benefits to a person having control over the victim. Basically, the new law not only criminalizes slavery, but also enables the prosecution of other conduct, such as debt bondage, that does not necessarily limit the freedom of a person 24 hours a day but is equally exploitative. This innovation is significant in the Italian penal law because it sanctions behaviors that went unpunished under the general formulation of the old article.

3.2 Trafficking in Persons

The third innovation introduced by the antitrafficking law is an amendment to article 601 C.P. Although the old version of this article exclusively targeted trafficking in slaves, the new article, as modified by the 2003 antitrafficking law, is now titled “Trafficking in Persons,” and it provides sanctions for not only trafficking in slaves, but also trafficking in persons in a condition of servitude and, most important, trafficking in free persons for the purpose of reducing them to slavery or servitude. More specifically, the article includes in this particular form of trafficking anyone who, for the purpose of reducing a person to slavery or servitude, forces that person by means of violence, threat, deception; by means of abuse of power or of a situation of physical or mental inferiority or of

41. C.P. (2002), article 600.
42. C.P. (2003), article 600.
43. Slavery Convention, 60 League of Nations Treaty Series (1927), article 1(1).
45. C.P. (2003), article 600.
46. Ibid.
47. C.P. (2002), article 601.
a situation of necessity; or by means of promising or giving payments or other benefits, to enter, stay in, move in, or go out of the territory of Italy.\(^{49}\)

This distinction is important to effectively criminalize human trafficking because, before the enactment of the antitrafficking law, the crime of trafficking was subject to sanctions only to the extent that it referred to persons who were already slaves. All the violent, threatening, or deceptive activities committed to abduct free women and transport them to Italy for illicit purposes were not even considered by the old version of the criminal law. Therefore, what is described in the first section of this article as the typical methods of traffickers operating in Italy, who recruit free women and forcibly transport them to the country for exploitative purposes, went unpunished.

3.3 Purchase and Sale of Slaves

The fourth innovation introduced by the antitrafficking law is the extension of the crime of purchase and sale of slaves, set forth in article 602 C.P.,\(^{50}\) to persons in a condition of servitude. Whereas the old law applied only if the victim was already a slave, the new law makes the purchase or sale of a person who is in any of the conditions of continuous subjugation described in article 600 equally punishable.\(^{51}\)

This amendment is extremely relevant for the purpose of a comprehensive criminalization of the phenomenon of human trafficking and related activities because it consistently broadens the scope of application of the provision in order to include the most common conditions of trafficked women in Italy. As section 1’s assessment of trafficking of women in Italy shows, the majority of trafficked women in Italy are not technically kept in a condition of slavery, which entails the exercise of property rights over a human being, but rather are kept in a forced condition of exploitation.

3.4 Increased Penalties and Aggravating Circumstances

The firm intention of the Italian legislature to severely punish the perpetrators of human trafficking and related crimes is evident in the significantly increased penalties for each of those crimes in the 2003 law. In fact, the antitrafficking law has amended the penal code in order to punish the crimes of slavery, servitude, trafficking in persons, and purchase and sale of persons with 8 to 20 years of detention, thus making the punishment for these crimes commensurate with that of other grave crimes against persons.\(^{52}\) The new penalties more appropriately reflect the seriousness of this kind of criminal offense and are definitely more stringent when compared with the average penalty of 4 to 15 years of detention provided by the old version of the penal code.

Furthermore, the new legal trend of severely punishing human trafficking is evident in the introduction of circumstances that aggravate trafficking crimes, thereby triggering penalties that are even more severe. The amended articles 600, 601, and 602 C.P. now entail three aggravating circumstances that could increase the penalty from a minimum of one-third to a maximum of one-half, thus producing a maximum sentence of more than 30 years of detention. These circumstances are the following: the victim is a person under 18 years of age, the crimes are committed for the purpose of exploitation for prostitution, or the crimes are committed for the purpose of removal of organs.\(^{53}\)

\(^{49}\) Ibid., article 601(1).
\(^{50}\) C.P. (2002), article 602.
\(^{51}\) C.P. (2003), article 602(1).
\(^{52}\) Serious crimes such as forcible sexual assault, other forms of assault, and even some forms of homicide are punished in the Italian Penal Code with an average penalty of 10 to 15 years of detention.
\(^{53}\) C.P. (2003), articles 600(3) and 602(2).
3.5 Organized Criminal Groups

The 2003 antitrafficking law further contributes to an effective criminalization of human trafficking by sanctioning for the first time the creation of or the participation in an organized group of traffickers. Article 416 of the Italian Penal Code, titled “Organized Criminal Group,” provides that when three or more people act in concert with the purpose of committing a crime, those who create, organize, or direct this criminal group are punishable by a prison sentence of 3 to 7 years. Moreover, mere participation in an organized criminal group, even without any leadership tasks, is punishable with 1 to 5 years of detention. All these penalties can be increased if 10 or more members compose the group. What the 2003 antitrafficking law has added to article 416 is a new paragraph, which provides that when an organized criminal group is created for the purpose of committing one of the crimes under articles 600, 601, or 602 C.P., the leaders of the association are punishable with 5 to 15 years of detention, and the members with 4 to 9 years of detention.

3.6 Administrative Sanctions for Legal Persons

Law Number 228/2003 has modified not only the Penal Code, but also a legislative act of the Italian government, Legislative Decree 231/2001, which assesses administrative sanctions on legal persons, corporations, and associations responsible for crimes against persons. Even though this modification does not introduce any new crime, it belongs under the criminalization section of this article because it provides a further tool to punish the perpetrators of the crimes of trafficking, reduction to slavery or servitude, and trade in human beings. The modification provides that a legal person committing any of the crimes under articles 600, 601, and 602 C.P. is punishable by an administrative monetary sanction. Moreover, if the legal person or one of its organizational units is habitually used for the sole or prevalent aim of allowing or aiding the perpetration of those crimes, the sanction is final interdiction from the exercise of its activities. This provision is specifically tailored to target nightclubs, travel agencies, hotels, airline companies, and any other legal person engaged in human trafficking, sex tourism, prostitution, pornography, and related activities.

3.7 Witness Protection Program and the “Justice Cooperators” Benefits

Usually, women victims of trafficking are reluctant to proceed against their exploiters because they fear retaliation and revictimization. The 2003 antitrafficking law aims to solve this problem by extending the so-called Witness Protection Program to victims of trafficking who agree to testify in courts and to cooperate with police and prosecutors. According to this program, victims who render reliable testimony or information may benefit from a special program of assistance and protection.

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54. Ibid., article 416(1).
55. Ibid., article 416(2).
56. Ibid., article 416(4).
57. Ibid., article 416(6).
58. Legislative Decree 231, see note 37.
59. Ibid., article 25 (1)(a).
60. Ibid., article 25 (3).
61. Antitrafficking law, article 11(1).
if this cooperation can expose them to a serious, current, and concrete danger.\textsuperscript{62} These benefits range from the possibility of testifying anonymously in court to the provision of a new identity and accommodation in a new place, with constant police surveillance.\textsuperscript{63}

By the same token, with the intent of stimulating the cooperation of those directly involved in the crimes at stake, the antitrafficking law extends to the traffickers who agree to help the prosecutors identify other perpetrators the benefits of “justice cooperators.”\textsuperscript{64} These benefits aim both to protect the cooperator’s personal safety and to reward him or her for helpful participation in the investigations. Such cooperation might be rewarded by protective measures as well as lighter penalties or penitentiary benefits.\textsuperscript{65}

3.8 Criminalization Strategy as an Effective Response to the Problem of Trafficking of Women in Italy

Statistics provided by the Italian government show that the 2003 anti-trafficking law has provided an effective tool for the prosecution of traffickers. Statistics from 2003 show an increase in the number of investigations from 209 in 2002 to 318 in 2003. In 2004, the government investigated 1,861 cases and prosecuted 120 cases involving trafficking. The number of convictions also increased from 32 to 77 in 2004. In 2005, 50 convictions were reported and the courts denied 95% of convictions appealed.\textsuperscript{66} The following section will also evaluate the compliance of the Italian antitrafficking law with the relevant international law on human trafficking and assess whether the new provisions are able, in their current formulation, to provide an effective response to the specific features of trafficking of women in Italy. In the following subsections, these two questions are addressed by highlighting the ways in which the innovations introduced by the new law will help fight trafficking of women in Italy.

3.8.1 Compliance of the Italian Antitrafficking Law with the Relevant International Law on Human Trafficking

With respect to the criminalization of human trafficking and its related activities, the international law that is of particular relevance for Italy is contained in four international legal instruments: the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1949 Prostitution Convention);\textsuperscript{67} the 1979 Convention for the Elimination of All Forms of

\begin{footnotesize}
\begin{enumerate}
\item[63.] Ibid., article 9(2).
\item[64.] The term justice cooperator was introduced by Decree-Law 8/1991 and is specifically tailored to target former members of mafia associations who decide to leave their criminal group and start cooperating with the law. To be eligible for the status of justice cooperator, the so-called pentiti have to provide new, complete, and reliable information that could significantly help with the investigation and identification of criminal organizations, with particular relevance to their connections, objectives, and methods. See article 9 Decree-Law 8/1991.
\item[65.] These benefits may range from suspended sentence to special permission to leave the prison for three days, or house arrest. See article 9 Decree-Law 8/1991.
\item[66.] U.S. Department of State, \textit{Trafficking in Persons Report}, Italy (2006)
\end{enumerate}
\end{footnotesize}
Discrimination against Women (CEDAW);\(^\text{68}\) the 2000 UN Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children;\(^\text{69}\) and, finally, the 2002 Framework Decision of the Council of the European Union on Combating Trafficking in Human Beings.\(^\text{70}\) The Italian law essentially complies with these instruments.

First, the 1949 Prostitution Convention, which Italy acceded to in 1980, is basically a prostitution convention; on the criminalization side it essentially requires the punishment by state parties of all forms of procurement and exploitation for reasons of prostitution.\(^\text{71}\) The Italian antitrafficking law, in line with this convention, considers exploitation for prostitution one of the aggravating circumstances for all the crimes it punishes.\(^\text{72}\) Moreover, it explicitly incorporates Italian Law 75/1958, Abolition of the Prostitution Regulation and Fight against the Exploitation of the Prostitution of Others, which punishes all the crimes enlisted in the 1949 Prostitution Convention, such as the management or financing of a brothel, the procurement or enticement of prostitutes, and any form of exploitation of the prostitution of others.\(^\text{73}\)

Second, CEDAW requires that “State Parties take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of the prostitution of women.”\(^\text{74}\) As compared with the CEDAW formulation, the Italian antitrafficking law refers, in gender-neutral fashion, to traffic “in persons,” but it undoubtedly satisfies the requirement of the adoption of a legislative measure to suppress trafficking in women.

Third, the most significant international instrument on human trafficking, the UN Protocol, aims at combating trafficking in persons by criminalizing it.\(^\text{75}\) The protocol requires parties to punish the recruitment, transportation, transfer, harboring, or receipt of persons, committed by the use of violent, fraudulent, threatening, deceptive, or abusive means, for the purpose of exploitation.\(^\text{76}\) The Italian antitrafficking law seems to satisfy the criminalization requirement set forth in the protocol by punishing not only trafficking in persons per se, but also each of the specific purposes contained in the protocol definition—exploitation for prostitution, forced labor or sexual services, slavery, servitude, and removal of organs. The only difference between the protocol’s criminalization requirements and the Italian trafficking law is that the protocol specifies that the recruitment, transportation, transfer, harboring, or receipt of a child will be considered trafficking even when committed without any violent or abusive means.\(^\text{77}\) The Italian law does not have this exact specification, even though it considers the fact that the victim is a child as an aggravating circumstance capable of raising the penalty for trafficking by one-third to one-half.\(^\text{78}\)


\(^{69}\) UN Protocol, see note 6.

\(^{70}\) Council Framework Decision, see note 36.

\(^{71}\) 1949 Prostitution Convention, articles 1–2.

\(^{72}\) Antitrafficking law, supra note 3, articles 1–3.


\(^{76}\) UN Protocol, articles. 3 and 5, 2-3.

\(^{77}\) UN Protocol, article 3(c).

\(^{78}\) Antitrafficking Law, articles 1–3.
Furthermore, the Italian law criminalizes trafficking more strictly than the protocol. Because the UN Protocol supplements the UN Convention against Transnational Organized Crime, it must be interpreted along with that convention. Since the convention basically applies to crimes that are transnational in nature and involve an organized criminal group, the protocol’s scope of application is limited to *international* trafficking involving a *criminal group of three or more people*. By contrast, the Italian law does not contain this limitation and it therefore applies also to a single perpetrator who traffics women within the borders of the country. As a result, the scope of application of the Italian law seems consistently wider than that of the UN Protocol, a sign of the effective and comprehensive criminalization strategy pursued by the Italian government.

In the final analysis, it is fair to conclude that the criminalization section of the Italian antitrafficking law complies with the UN Protocol. For this reason, the ratification of the protocol, which is still pending before the Italian parliament, would be welcomed as a further sign of the Italian government’s commitment to combating human trafficking.

Finally, the most recent international instrument on human trafficking that affects Italy is a recent Framework Decision of the Council of the European Union. The criminalization requirements of this decision are the same as those contained in the UN Protocol, with which Italy is in compliance. Furthermore, the Framework Decision includes a reference to the penalties that should be inflicted on the perpetrators, requiring that the penal sanctions for trafficking and related crimes be effective, proportionate, and sufficient to deter traffickers. Specifically, the penalty should not be less than 8 years of detention when the crimes are committed in abusive, violent, or dangerous circumstances. The Italian antitrafficking law is not only in line with this provision but goes beyond it, having raised the penalties for trafficking and related activities to a minimum of 8 years, independent of aggravating circumstances.

### 3.8.2 The Principle of Nullum Crimen, Nulla Poena Sine Lege in the Italian Penal Law

The weakest point of the former section of the Italian Penal Code dedicated to human trafficking and related activities was the fact that it criminalized some conduct, such as slavery or slave traffic and trade, without giving any definition of those crimes. As noted previously, the 2003 antitrafficking law has successfully filled this gap by providing detailed definitions of the crimes and by specifically introducing new criminal conduct that was not clearly covered by the old version of the penal code. In particular, not only has the new law clarified the meaning of the concepts of slavery and trafficking, but it has also criminalized new conduct, such as servitude, trafficking, and purchase and sale of people who are not already slaves but are simply in a condition of servitude. Therefore, we can fairly conclude that this extensive criminalizing intervention is particularly well suited to respond to the legal uncertainty and vagueness of the previous version of the penal code.

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80. Council Framework Decision, see note 36.

81. Like the UN Protocol, the Council Framework Decision requires that member states criminalize the recruitment, transportation, transfer, harboring, or receipt of persons, committed by the use of violent, fraudulent, threatening, deceptive, or abusive means, for the purpose of labor or sexual exploitation. Council Framework Decision, article 1.

82. Ibid., article 3.

83. Antitrafficking Law, articles 1–3.


85. Ibid.
Moreover, the detailed definition of the crimes is even more valuable when compared to the principle of *tassatività* of the Italian penal law. This concept represents the first and most important feature of the Italian penal law and is best translated by the Latin expression *nullum crimen, nulla poena sine lege*. Both Italian jurisprudence and penal law literature interpret this concept as meaning not only that no one can be held guilty of a criminal offense on account of an act that did not constitute a crime at the time it was committed, but also that an already existing penal provision cannot be interpreted expansively in order to include in it conduct that it does not clearly cover and sanction. With this principle in mind, traffickers could always maintain, for example, that under the old version of the penal code, the forcible transportation of free women to Italy did not constitute trafficking, because the victims were not slaves. Therefore, their conduct could be prosecuted only as kidnapping, which was punishable with much lighter penalties. Similarly, all the activities necessary to maintain a woman in a condition of continual subjugation and to force her to provide labor or sexual services, which now constitute the specific crime of servitude, went basically unpunished, because the crime of slavery could not be interpreted extensively in order to include behaviors that were not explicitly mentioned in the code provision.

By enacting the 2003 trafficking legislation, the legislature did what the court could not do under the principle of *tassatività*: it enlarged the meaning of trafficking. The detailed definitions of the crimes now reduce the maneuvering margins of traffickers’ defenders, thus favoring the prosecution of perpetrators.

### 3.8.3 “Conjunction of Crimes” and “Continual Crime” in Italian Penal Law

A second weak point in the old version of the articles criminalizing trafficking and related activities was the provision of penalties so light that they failed to play an effective deterrent role. As explained in section 3.4, the new antitrafficking law aims to resolve this difficulty in two ways: first, it has consistently enhanced the basic penalties for each of the crimes, and, second, it has introduced for the first time three aggravating circumstances, which raise the penalty by one-third to one-half of the sentence for the underlying crime.

Significantly enough, the occurrence of these circumstances enables the judge to apply consistently stricter penalties. According to the Italian penal law, when a crime is committed in conjunction with some aggravating circumstances, each of these circumstances raises the penalty applicable to the basic crime. In practice, this means that in the specific case of trafficking of women, when a minor is trafficked for the purpose of exploitation for prostitution, the conjunction of these two aggravating circumstances enables the judge to apply a maximum of 40 years of detention, resulting from a maximum of 20 years for the basic crime plus a maximum of 10 years for each of the aggravating

86. Article 1, C.P., states, “No one can be punished for an act that does not constitute a crime under the law.” Article 2 states, “No one can be punished for an act that did not constitute a crime at the time it was committed.”
88. Article 605, C.P., punishes the crime of kidnapping with 6 months to 8 years of detention.
89. The average penalty for trafficking-related activities was from 6 to 15 years of imprisonment. C.P. (2002), articles 600–602.
90. As mentioned, these circumstances are (a) the victim is a person under 18 years of age, (b) the crimes are committed for the purpose of exploitation of prostitution, or (c) the crimes are committed for the purpose of removal of organs. Antitrafficking law, articles 1–3.
91. C.P., articles 61 and 63
circumstances. The result is an extremely severe penalty as compared to the general landscape of the sanctions applicable under the Italian penal law.92

Second, the 2003 antitrafficking law has the major advantage of dividing the typical activities of traffickers into different crimes, thus enabling traffickers to be charged on multiple counts. More specifically, under the new law, a trafficker could be convicted for (a) illegally inducing a woman to enter the territory of Italy; (b) transporting, harboring, or receiving her; and (c) keeping her in a status of continual subjugation by forcing her to provide labor or sexual or other exploitative services.

Furthermore, the division of the various acts of traffickers into different crimes has significant consequences in calculating the applicable penalty. Under the Italian penal law the different activities of a trafficker may trigger either the hypothesis of the “conjunction of crimes” or that of the “continual crime,” either of which significantly affects the applicable penalty. The “conjunction of crimes”93 occurs when an individual commits different violations of the penal law. Thanks to the new formulation of the antitrafficking law, a typical trafficker would likely violate not just one article of that law, but both article 601 (if he or she forcibly introduces trafficking victims into Italy) and article 600 (if he or she tries to reduce them to slavery or servitude) or article 602 (if he or she tries to sell the victims). When a trafficker engages in all these activities, the judge will apply a single penalty, which is the arithmetic sum of all the penalties applicable to the single crimes.94 The practical consequence of this seemingly meaningless rule is that, for example, in the case of a general pardon, the discount on the penalty can be applied only once, on the definitive penalty.95

Alternatively, the conduct of a trafficker may trigger the hypothesis of “continual crime,”96 which occurs when an individual commits several different violations of the penal law in order to implement a single criminal plan. In that case, the applicable punishment is three times the penalty provided for the most serious of all the crimes committed.97 This mechanism enables the application of very high penalties, with a strong deterrent potential.

In light of these mechanisms of penalty calculation, the provision of aggravating circumstances and the provision of different crimes for each specific activity of traffickers seems to successfully respond to the need for strict and deterrent penalties.

92. The highest penalty provided by the Italian Penal Code is life imprisonment, which is usually curtailed to 26 years of detention in case of good conduct. To make a quick comparison with the penalties provided for other crimes, consider that basic homicide is punished with a minimum of 21 years of detention (C.P., article 575), rape with 3 to 10 years of detention (C.P., article 519), and kidnapping with 6 months to 8 years of detention (C.P., article 605).

93. C.P., article 73.

94. Ibid. Thus, the trafficker will not be sentenced to, for example, 10 years of imprisonment for trafficking, 10 for reduction to servitude, and 10 for sale of slaves, but he or she will be rather sentenced to 30 years of imprisonment for trafficking, reduction to servitude, and sale of slaves.

95. A general pardon in Italy takes the form of a discount on the penalty. For example, parliament may enact a law conceding 2 years of discount on imprisonment penalties. In our case, if the trafficker were sentenced to 10 years of imprisonment for trafficking, 10 for reduction to slavery, and 10 for sale of slaves, he would benefit from 6 years of discount, 2 for each penalty. In the case of “conjunction of crimes,” the trafficker would be sentenced to one penalty of 30 years of imprisonment, thus benefiting from only 2 years of discount on the single applied penalty.

96. C.P., article 81.

97. Ibid. Thus, a trafficker sentenced, for example, to 8 years of imprisonment for trafficking, 10 years for reduction to slavery, and 8 years for sale of slaves (in total, 26 years of imprisonment) would be sentenced, in the case of a continual crime, to three times the penalty provided for the most serious violation committed: in this case three times the penalty for reduction to slavery (in total, 30 years of imprisonment).
3.8.4 Public Actors and Legal Persons

A major problem affecting the phenomenon of trafficking of women in Italy is the involvement of public actors and of legal persons in the commission of the crimes. The 2003 antitrafficking law addresses the case of the involvement of public officials by recognizing “abuse of power” as one of the illegal means used to force people to enter the territory of Italy or to reduce to or maintain a person in a status of servitude. Not only does the Penal Code criminalize all the forms of corruption of public officials, such as bribery, blackmail, extortion, and kickbacks, but it also provides that when a crime is committed by means of abuse of power or of a situation of supremacy, or by violating the duties of a public function, the penalty is enhanced by one-third.

Other actors usually involved in trafficking of women in Italy are legal persons, such as airline companies, hotels, bars, nightclubs, advertising agencies, and sex operators. Before the enactment of the new antitrafficking law, all these legal persons went unpunished and an urgent need existed to fill this gap. Although the new law could not hold legal persons criminally liable—the Italian penal law applies only to physical persons—it contains a different solution: the application of an administrative sanction ranging from 400 to 800 shares of the corporation. This way of holding legal persons liable is anticipated to achieve the double result of punishing legal persons and deterring them from further involvement in trafficking activities.

3.8.5 Trafficking in Women and Organized Crime

Trafficking in women in Italy is mainly in the hands of organized criminal groups, essentially mafia style. Even though the Italian law has always criminalized the creation of and membership in mafia associations, before the enactment of the new antitrafficking law, no clear link existed between human trafficking and organized crime. The new law has addressed this issue in a very effective way: it considers the creation of, leadership of, or mere participation in an organized criminal group whose purpose is to commit human trafficking and related crimes as an aggravating circumstance enhancing the penalties provided for organized criminal gangs. But the Italian approach does not require the involvement of an organized criminal group for the establishment of the crime of trafficking; it also criminalizes individual trafficking. In fact, many times traffickers are single individuals, and the Italian legislature did not want to leave them unpunished, as happens under the UN Protocol. In conclusion, the formulation of the antitrafficking law is well suited to address both single perpetrators and, more strictly, organized criminal groups.

99. Antitrafficking law, articles 1–2.
100. C.P., articles 61 and 63.
101. Ministry of Equal Opportunity Web site, see note 98.
102. Fiore, Diritto Penale, 23.
103. Antitrafficking Law, article 5(1).
104. Ministry of Equal Opportunity Web site, see note 98.
105. Article 416, C.P., criminalizes the creation of and the mere participation in an organized criminal group. The penalties are enhanced if the group presents the structure, purpose, and methods of action of a mafia association.
106. Antitrafficking Law, article 4, modifying C.P., article 416.
4. Protection

A well-drafted antitrafficking law is one that not only criminalizes trafficking and its related activities but also provides for the protection of trafficking victims. Accordingly, the second strategy pursued by the 2003 law to combat the phenomenon of human trafficking consists in providing measures for protecting the victims of slavery, servitude, and trafficking. In particular, the new law tries to achieve an effective system of protection for the victims through three measures: the establishment of a fund for antitrafficking measures, the institution of a special program of assistance for the victims of trafficking, and the granting of a special residency status for victims of trafficking. All these provisions represent a substantial innovation in the Italian legal system; unfortunately, however, a conflict with pending laws on immigration and prostitution prevents these measures from representing an effective response to the problem.

4.1 Fund for Antitrafficking Measures

The 2003 law has instituted a special fund for antitrafficking measures, which is designed to finance programs of assistance and social integration of the victims of trafficking. This fund had actually been created in 1998 by the Italian immigration law, with the aim of financing programs of assistance for illegal immigrants who ended up in the hand of pimps and were forced into prostitution. The new antitrafficking law has expanded the purposes of the fund to cover programs for victims of trafficking. The fund has two sources of financing: as provided by the immigration law, it is partly financed by the state and partly by local governments; as provided by the antitrafficking law, it is funded by the proceeds of the confiscation of assets of the traffickers.

4.2 Involvement of Civil Society in Programs of Assistance for Victims of Trafficking

The 2003 antitrafficking law also builds on the 1998 immigration law to provide special programs of assistance to the victims of trafficking. The immigration law provided two kinds of programs that are now extended to the victims of trafficking: the Programs of Social Protection and the Systemic Actions.

The Programs of Social Protection are designed to ensure a continuous path of assistance and protection to victims of trafficking. These programs have two phases. The first phase entails the initial contact with the victims through “street units,” toll-free numbers, police operations, and
customers’ reports, followed by their reception in secret shelters, legal counseling, the granting of special residency status, and psychological support. The second phase aims to achieve the social integration of the victims through vocational training programs to enable them to enter the labor market, Italian language courses, and scholarships. In parallel to this path of social recovery, the victims can start a legal path by filing a formal charge against their exploiters. The Programs of Social Protection last for 12 renewable months and can be provided by the local government, nongovernmental organizations (NGOs), and private associations involved in first care activities for immigrants, such as the provision of food, shelter, and health care facilities. In 2004, Italian NGOs delivered literacy courses to 440 victims of trafficking and vocational training programs to 431 victims. Thanks to the intervention of civil society organizations, 389 victims found temporary jobs and 944 found permanent jobs in 2004.

The Italian government has promoted two main Systemic Actions as additional tools for the protection of victims of trafficking. The first action consists of a comprehensive sensitization campaign directed to the victims of trafficking as well as to the general public. This campaign, realized through television and radio advertisements, wall boards, and stickers in the languages of the main countries of origin of the victims, aims at educating victims about the phenomenon of trafficking and informing them of the possibility of escaping their exploiters through Programs of Social Protection. This campaign has strongly advertised a toll-free number, the “Antitrafficking Green Number,” which is active 24 hours a day in 15 sites around the country and represents a fundamental tool to enable the victims to ask for help.

Finally, the Italian Ministry of Home Affairs, assisted by the International Organization for Migration, has promoted the Systemic Action to Ensure the Trafficking Victims’ Voluntary Return and Reintegration in the Countries of Origin. This program offers the practical option of a safe return in the country of origin through projects of social reintegration.

4.3 Residency Status for the Victims of Trafficking

The third tool of the protection strategy against trafficking in women, the granting of a special residency status to the victims, was first created under the immigration law. Indeed, the 2003 antitrafficking law merely refers to the special visa provision of the immigration law, which provides for granting of a special visa to victims of exploitation for reasons of prostitution and other crimes related to prostitution. This special visa can be granted when a situation of violence or serious exploitation against a foreigner is ascertained either during police operations, investigations, or criminal proceedings for exploitation for reasons of prostitution or during assistance interventions by social services. Once a situation of exploitation is established, either the social services or the general prosecutor (GP) can apply for the special visa, which is granted by the questore.
A substantial requirement for obtaining a special visa is the existence of “concrete danger” to the victim’s personal safety, which might arise either because the victim has filed a charge against her exploiters or because she has attempted to “escape the criminal organization.”\textsuperscript{126} When filing the application for the visa, social services or the GP must report to the questore about the seriousness of the danger to the victim as well as about her contribution to the fight against the criminal group and the identification of those responsible.\textsuperscript{127}

The special visa, which lasts for 6 months and is renewable for 1 year, enables the victim to participate in the Programs of Social Protection, attend school, or go to work.\textsuperscript{128}

4.4 The Protection Strategy as an Effective Response to the Phenomenon of Trafficking of Women to Italy

The international standards for protection of trafficking victims are set forth in the UN Protocol as well as in the European Council Framework Decision; the Italian law appears to comply with those standards. This compliance on paper is, however, undermined by at least four factors: (a) the granting of the special visa only to the victims of exploitation for prostitution; (b) a conflict with pending prostitution and immigration laws; (c) a stalemate in the enactment of the Programs of Social Protection caused by their funding mechanism; and (d) slow and ill-conceived proceedings for the granting of the special visa. The following subsections show how the Italian law seemingly complies with the international standards for the protection of the victims of trafficking but actually does not provide an effective response to the problem.

4.4.1 Compliance of Italian Law with International Standards for Protection of Trafficking Victims

Formally, the Italian antitrafficking law complies with international standards for the protection of victims of trafficking. The UN Protocol requires that state parties (a) protect the privacy and identity of the victims by making criminal proceedings confidential;\textsuperscript{129} (b) provide information and assistance to the victims through appropriate housing; medical, psychological and legal counseling; and employment, training, and educational opportunities;\textsuperscript{130} (c) enable the victims to obtain civil compensation for the damages suffered;\textsuperscript{131} (d) allow victims of trafficking to remain in their territory;\textsuperscript{132} and (e) favor the repatriation of the victims.\textsuperscript{133}

The Italian government aims to comply with the first two requirements by providing Witness Protection Programs for victims of trafficking and instituting Programs of Social Protection and Systemic Actions. With regard to the issue of civil compensation for victims of trafficking, according to Italian criminal procedural law, victims as well as all persons damaged by the commission of the

\textsuperscript{126} 1998 immigration law, article 18(1).
\textsuperscript{127} Ibid., article 18(2).
\textsuperscript{128} Ibid., article 18(5).
\textsuperscript{129} UN Protocol, article 6(1).
\textsuperscript{130} Ibid., articles 6(2) and 6(3).
\textsuperscript{131} Ibid., article 6(6).
\textsuperscript{132} Ibid., article 7.
\textsuperscript{133} Ibid., article 8.
crime can ask for civil damages in compensation for the damages they suffered. Finally, the Italian government aims to address the issues of residency status for victims of trafficking and their voluntary repatriation through the granting of a special visa provided by the immigration law and the institution of the Systemic Action to Ensure the Trafficking Victims’ Voluntary Return and Reintegration in the Countries of Origin.

The only protection measure required by the European Council Framework Decision is that the investigations or penal actions against traffickers not depend on a formal charge by the victim. According to the Italian Code of Penal Procedure (C.P.P.), human trafficking and related offenses are listed among those crimes that are subject to independent investigative initiative of the prosecutor, without requiring a formal charge by the victim.

4.4.2 Weak Points in the Protection Strategy

The protection section of the Italian antitrafficking law appears on its face to fulfill the international requirements for the protection of the victims of trafficking. This section addresses the provisions of that strategy, which entail both textual and practical difficulties that hamper an effective response to the problem of protecting trafficking victims. The main concerns regard article 18 of the immigration law on the granting of a special visa to the victims and article 12 of the antitrafficking law on the institution of the fund for antitrafficking measures.

4.4.2.1 Article 18 of the Immigration Law: Textual Critiques

As explained previously, the 2003 antitrafficking law does not contain a specific provision granting residency status to the victims of trafficking but merely incorporates by reference a similar provision in the 1998 immigration law. Considering the situation in Italy before the enactment of the 2003 law, incorporating this provision of the immigration law might be considered a step forward, given that the victims of trafficking had no possibility of remaining legally in Italy and were exclusively treated as criminals because of their illegal status in the country. The special visa provisions of the immigration law are, however, insufficient in scope to provide effective protection to the victims of trafficking, and, for this reason, the antitrafficking law should have dedicated a specific section to the residency status of the victims.

Article 18 of the immigration law fails to protect the victims of trafficking for at least four textual reasons. First, article 18 is limited to victims of exploitation for reasons of prostitution, referring explicitly to prostitution-related crimes, such as the procurement or enticement of prostitutes, and any form of exploitation of the prostitution of others. Although helpful to victims trafficked for prostitution, the explicit reference to prostitution-related crimes has the negative consequence of leaving unprotected the victims of trafficking for other purposes, such as forced labor, domestic labor, and pornography.

134. Code of Penal Procedure (C.P.P.), article 74.
135. European Council Framework Decision, article 7(1).
136. C.P.P., article 50.
137. Antitrafficking law, article 12(1). This article, regulating the functions of the fund for antitrafficking measures, states that the fund aims to finance all the activities of protection set forth in article 18 of the 1998 immigration law.
139. 1998 immigration law, article 18.
140. 1958 Prostitution Law, article 3.
Second, article 18 provides that the application for the special visa can be filed either by the GP, when the victim has filed a formal charge against her exploiters or has testified against them in a penal trial, or by social services, when it uncovers a case of exploitation. Alternatively, the questore directly issues the special visa during police investigations in prostitution-related crimes, but in that case, as well as in the case of an application by social services, the GP must evaluate the degree of danger for the victim. The practical consequence of this procedure is that the victim of exploitation cannot apply for the special visa by herself but must wait for an external initiative. A more comprehensive solution would have extended to the victims the possibility of applying for residency status on their own initiative.

Third, a critical issue for sustainable and effective social integration of the victims of trafficking in the countries of destination is the Derivative Victim Doctrine, according to which the benefits granted to the victim are extended also to members of her family. Unfortunately, article 18 of the immigration law does not contain any mention of the possibility of extending the special visa to the spouse, children, or parents of the victim. The ability to extend benefits to family members is vital for successful protection of many victims as well as for their integration into the country.

Fourth, article 18 explicitly states that the special visa aims at helping the victim escape the exploiting association and participate in a protection program. Moreover, when evaluating the conditions for granting the special visa, the questore gives particular weight to the contribution of the victim in the fight against the criminal group and in the identification of its members. From the formulation of these provisions, the eligible beneficiaries of the special visa clearly are only those who are victims of an organized criminal group, not those who are victims of individual traffickers. Left uncovered are all cases of victims trafficked by single perpetrators as well as all cases in which proving the existence of a criminal group is difficult or impossible. Moreover, structured in this way, the special visa seems more like a reward for cooperating in the investigations than a protective tool for these victims of human rights violations.

In light of these observations, I conclude that the solution of incorporation by reference to the special visa provided by the immigration law was too hasty; moreover, it underestimates the complexity of the phenomenon of trafficking of women and therefore fails to provide an effective response to the need for protection of the victims of trafficking.

4.4.2.2 Article 18 in the Italian Legal Context: Practical Incongruence and Unsatisfying Results

In addition to deficiencies arising from the text of article 18 of the 1998 immigration law, both (a) the recent government policy orientation in the fight against illegal immigration and exploitation of prostitution and (b) the slowness of the Italian bureaucracy further risk undermining the effectiveness of the protection strategy pursued by the antitrafficking law.

First, the immigration law, drafted in 1998 by a different administration and intended to protect immigrants, has recently been amended by the current Italian government with the purpose of

141. 1998 immigration law, article 18(1).
142. Ibid., article 18(2).
143. Mattar, A Comparative Analysis of the Anti-Trafficking Legislation in Foreign Countries.
144. 1998 immigration law, article 18(1).
145. Ibid., article 18(2).
146. This intent is demonstrated by the enactment of the Fund for Programs of Assistance of the immigrants and by the provision granting residency status to the victims of exploitation of prostitution.

Second, in line with its repressive policy, the Italian government is already enforcing a draft law on prostitution, which aims to “clean up the streets of prostitutes.”\footnote{Bruce Johnston, “Italy Aims to Clear the Streets of Prostitutes,” 23 December 2003, http://www.humantrafficking.com/humantrafficking/client/view.aspx?ResourceId=305, and “Italy Poised to Sweep Away Street Prostitution,” \textit{Agence France Presse}, 21 December 2003, http://www.humantrafficking.com/humantrafficking/client/view.aspx?ResourceId=288.} This law considers prostitution a moral evil rather than a possible form of exploitation of women and simply prohibits the exercise of prostitution in public places.\footnote{Camera dei Deputati, XIV Legislatura, Project of [draft] Law 3826 of 26 March 2003, “Dispositions on Prostitution,” article 1 (hereinafter Dispositions on Prostitution).} Unfortunately, the law has the counterproductive result of hiding the phenomenon of trafficking by favoring the exercise of prostitution in private houses. As a consequence, this law makes reaching the victims much more difficult, thus hampering the activities of the social services and “street units,” which were the main promoters of the application of article 18.

Finally, some practical difficulties that contribute to the ineffectiveness of the protection strategy pursued by the antitrafficking law are worth considering. First, Italian justice and bureaucracy are proverbially slow; as a result, the granting of the special visa requires months of consultation between the offices of the GP and the \textit{questore}, plus additional time for the collection of evidence.\footnote{Paggi, “Commento Sintetico alla Legge Bossi-Fini.”} Furthermore, the special visa is exclusively granted for the purpose of enabling the victim to participate in a Program of Social Protection.\footnote{1998 immigration law, article 18(1).} Unfortunately, the funding mechanism of these programs risks undermining their effectiveness. As explained, the Programs of Social Protection are financed through the fund for antitrafficking measures, which in turn is financed partly by the proceeds of the confiscation of assets of the traffickers and partly by governmental contributions.\footnote{Ministerial Decree, 23 November 1999, see note 118.} Undoubtedly, the idea of the confiscation of assets is a clever one in a system in which justice is speedy and the bureaucracy not too complex. But in Italy, the process of confiscation is extremely long because of a slow and overcrowded judicial system.\footnote{1998 immigration law, article 18(1).} Moreover, seizing the assets of traffickers
is extremely difficult because they are often registered in other persons’ names. Consequently, the fund is basically financed only by the governmental contribution provided by the 1998 immigration law for financing programs of assistance to immigrants. As a result, although the demand on the fund grows because it now has to finance programs of assistance of both victims of trafficking and immigrants, the money to finance the fund remains basically the same. To make matters worse, the government’s 2003 budget has reduced all financial allocations for social services, including antitrafficking expenditures.

5. Prevention

The third strategy that the antitrafficking law aims to pursue is preventing the phenomenon of trafficking. Even though the new law represents a considerable step forward in the eradication of trafficking, by enabling the enactment of special joint programs of action with governments of the countries of origin, the Italian legislation is still weak on two points explicitly required by the UN Protocol—prevention of revictimization and deterrence of the demand for prostitution.

5.1 The Prevention Strategy in the 2003 Antitrafficking Law

The 2003 antitrafficking law authorizes the minister for foreign affairs to enter into cooperation policies with the governments of the main countries of origin of the victims to prevent the commission of trafficking and its related crimes. To ensure effective joint programs, the law gives preference in the choice of the partner countries to those countries that demonstrate their intention to cooperate and their attention to the issue of the protection of human rights. Sensitization campaigns in the countries of origin, international meetings, and training programs will precede the institution of the joint programs.

This provision is of particular significance because it allows the design of specific programs of prevention, a possibility that was not contemplated in Italian law before the enactment of the 2003 antitrafficking act. Moreover, it has already produced results: a joint program has been designed and implemented with the government of Nigeria, the Program of Action against Trafficking in Minors and Young Women from Nigeria into Italy for Sexual Exploitation Purposes. The aim of the program is to prevent trafficking of minors and women through a joint fight against the organized criminal groups managing the human trafficking business.

5.2 Compliance of the Prevention Strategy with the UN Protocol

Even though the prevention provision in the 2003 antitrafficking law represents without doubt a step forward in the Italian legal fight against trafficking of women—as compared with the complete absence of antitrafficking legislation before 2003—some points in the current immigration and prostitution laws still nevertheless hinder the prevention section of the antitrafficking law from complete compliance with the international standards of prevention set forth in the UN Protocol.

156. Ibid.
157. Antitrafficking law, article 14.
158. Ibid.
159. Ibid.
In addition to the establishment of policies to prevent and combat trafficking in persons, such as research and media campaigns or measures to alleviate some of the main causes of trafficking in the countries of origin,\textsuperscript{161} the UN Protocol explicitly requires that state parties establish measures to protect victims of trafficking, especially women and children, from revictimization\textsuperscript{162} and adopt or strengthen legislative or other measures “to discourage the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking.”\textsuperscript{163}

Unfortunately, the current status of the Italian immigration and prostitution laws is in evident conflict with both the revictimization and demand requirements. First, in line with the current conservative government’s policy of introducing firm measures to curb illegal immigration, the 2002 amendments to the 1998 immigration law have increased the cases of forced expulsion from the country and have introduced prison penalties for noncompliance with the expulsion order.\textsuperscript{164} As a result, law enforcement personnel, such as police and immigration officials, have begun to summarily deport all foreigners who do not fulfill the requirements for legal entry and stay in the country, without further investigating their possible conditions of servitude and exploitation, thus treating trafficked women as undocumented migrants.\textsuperscript{165} Clearly, this recent attitude of the Italian government is in sharp contrast with the UN Protocol’s requirement of prevention of revictimization. In fact, summary deportations deny trafficked women access to justice and may place them at risk of retaliation and revictimization back home, where they are extremely likely to fall again into traffickers’ traps.

Moreover, strict immigration laws fuel human trafficking not only through the revictimization of trafficked women, but also by favoring recourse to illegal entry channels. Because restrictive immigration laws often conflict with the high demand for cheap unskilled labor in the countries of destination, the enforcement of such laws paradoxically contributes to the creation of a lucrative market for traffickers. When compliance with immigration regulation is extremely difficult, poor job-seeking women, particularly from areas with scarce access to information on migration and job opportunities, end up seeking illegal entry channels, thus putting themselves at high risk of passing from the condition of mere smugglees to that of trafficked women.

As noted in section 4.4.2.2, the Italian prime minister has recently approved a draft law to sweep prostitutes off the streets. The punishment for the exercise of prostitution in public places is a fine of up to €3,000 and 3 months of detention in the case of repeat violations of this prohibition.\textsuperscript{166} To keep its promises of harsh crackdown on crimes against morality, the Italian government is already enforcing this measure through street raids carried out by the Buoncostume police units.\textsuperscript{167} Besides hiding the phenomenon of prostitution by basically forcing prostitutes to operate in private homes, where they are more difficult to reach and more easily exploited by traffickers and pimps, the new prostitution draft law is totally ineffective because it fails to address the demand for prostitutes. Although the draft law punishes the customers who buy sex on the streets, no measure is provided to go after the customers of prostitutes operating in private homes. This provision is therefore highly unlikely to deter customers from buying sexual services and so discourage the demand for prostitution, which is

\textsuperscript{161} UN Protocol, article 9(2).
\textsuperscript{162} Ibid., article 9(1)(b).
\textsuperscript{163} Ibid., article 9(5).
\textsuperscript{164} Bossi-Fini Law, article 11.
\textsuperscript{165} Paggi, “Commento Sintetico alla Legge Bossi Fini.”
\textsuperscript{166} Disposition on Prostitution, article 1.
\textsuperscript{167} Johnston, “Italy Aims to Clear the Streets of Prostitutes,” and “Italy Poised to Sweep Away Street Prostitution.”
one of the main factors fostering women’s trafficking. In fact, thanks to this law, the customers can arrange their meetings with prostitutes in comfortable houses with a simple phone call, with no need to go to the suburbs and dangerous streets to get a prostitute.

In the final analysis, this draft law might have the effect of fostering prostitution, rather than discouraging it, and Italy will not meet the requirement of the UN Protocol that state parties reduce the demand for all forms of exploitation leading to trafficking. The Italian government must therefore enact new measures that effectively address the issue of demand, such as strict penalties for customers and advertising agencies or managers of Web sites that advertise prostitution.

6. Final Recommendations and Conclusions

In light of the previous analysis, several recommendations can be made.

6.1 Criminalization

As discussed in section 3, the criminalization strategy of the antitrafficking law seems comprehensive and well structured. The only recommendation in this regard is that the Italian government should ratify without reservations the 2000 UN Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children. Ratification would be a critical act to demonstrate the firm intention of the Italian government to fully comply with international law. Moreover, because the UN Protocol is enforceable before the International Court of Justice, its ratification would be a crucial tool to hold the Italian government internationally accountable.

6.2 Protection

The Italian legislation appears, at first glance, to comply with international standards for the protection of the victims of trafficking set forth in the UN Protocol, but the only way to successfully end trafficking is to eliminate the current conflict between the immigration and prostitution laws. With respect to this situation, I first recommend that the Italian government amend the current immigration law to extend the granting of the special visa to the victims of all kinds of trafficking, give victims the opportunity to apply for the special visa, speed up the procedure for issuing the visa, and welcome and protect the victims of trafficking instead of treating them as illegal immigrants and summarily deporting them. Second, I strongly recommend an amendment of the prostitution law that enacts protective measures for exploited and trafficked women, instead of relegating them to private houses, at their exploiters’ mercy and making them unreachable by service providers.

Finally, although the statistical data show that trafficking affects women disproportionately, the antitrafficking law contains only gender-neutral provisions. This law should also contain some gender-sensitive measures to meet the specific needs of women. These measures should not be mere protective tools that risk reinforcing gender stereotypes, but they should provide a rights-based approach addressing gender-specific differences and inequities in the magnitude, impact, causes, and consequences of trafficking, such as those explained in section 1 of this paper, that create women’s disproportionate vulnerability to trafficking.

6.3 Prevention

On the prevention side, the Italian legislation has made a consistent step forward by allowing the enactment of programs of cooperation with the governments of the countries of origin of the victims.
The case of the recent agreement with the Nigerian government is exemplary in this respect. Despite this effort, however, pending laws on immigration and prostitution constitute an obstacle to a full compliance with the UN Protocol and hamper an effective strategy of prevention of trafficking.

To design a more effective prevention strategy, I recommend that the Italian government (a) address in a more comprehensive way the issue of the demand for all the activities leading to trafficking, especially prostitution and forced labor, by severely punishing pimps and customers and by strictly enforcing pending laws on working hours and workers’ rights; (b) enact programs of cooperation with countries of origin that do not consist exclusively in fighting organized crime, as in the case of Nigeria, but also promote economic empowerment and education as well as the establishment of the rule of law in the countries of origin, to guarantee women equal rights with men and reduce their vulnerability to trafficking; and (c) constantly train law enforcement personnel, such as police and immigration officers, about different approaches and methods for dealing with illegal migrants and trafficking victims.

6.4 Conclusions

Trafficking in women is a tragic and complex human rights abuse that exploits women and prevents them from emancipating themselves and their families. Legal interventions can play a crucial role in fighting trafficking in women, but the effectiveness of antitrafficking laws depends on their ability to respond to the terrible social and economic conditions faced by victims both in the countries of origin and in the countries of destination.

The Italian government has made a consistent step forward by enacting specific antitrafficking legislation that appropriately criminalizes human trafficking and related activities. Unfortunately, the Italian legal response to trafficking in women falls short on issues such as the protection of victims and the prevention of trafficking because of the government’s failure to understand that an effective antitrafficking legal strategy must necessarily take into account immigration and prostitution policies. Conflicts between antitrafficking laws and immigration and prostitution laws, as happens in Italy, may have drastic consequences for the victims of trafficking, including deportation and revictimization.

For too much time, trafficking has been seen solely as a criminal justice issue and has been treated as a “victimless” crime. The only way to successfully end trafficking is for Italy not only to hold abusers accountable, but also to remedy the human rights violations that victims suffer. The Italian government should address the issues of protection and prevention through a thoughtful rewriting of immigration and prostitution laws that emphasizes that trafficked persons are victims and not perpetrators and that they should not be criminalized as illegal migrants and summarily deported from the country.

The challenge Italy faces is the enactment of effective legal tools to welcome trafficking victims in its territory, protect them, and prevent their victimization. In doing so, Italy will successfully respond to the problem of trafficking in women and demonstrate its commitment, as a party to the most relevant human rights treaties,168 to protecting and respecting the human rights, equality, and dignity of all human beings.

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168. Italy is a party to, among others, 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; the Convention on the Rights of the Child; the European Charter on Human Rights and Fundamental Freedoms; and the Slavery Convention.
Female Genital Mutilation: Cultural Right or Violation of Women’s Human Rights?

An Analysis of Female Genital Mutilation within the Universalist versus Cultural Relativist Debate with Foreign Policy Implications

JANINE A. HOITT

1. Introduction

Universal human rights have been an increasingly important component of international politics since 1945. Vincent provides a simple definition of human rights as “the rights that everyone has, and everyone equally, by virtue of their humanity.” An international human rights regime has grown extensively since the United Nations Declaration of Human Rights in 1948. This regime is made of formal declarations, treaties, and covenants and supported by international governmental organizations (IGOs) and nongovernmental organizations (NGOs).

Although, indeed, “the idea that human beings have rights is a staple of contemporary world politics,” controversies continue to surround the universal human rights regime. Dalacoura correctly highlights the universality of human rights as a source of tension in contemporary international politics. Which rights are human rights? Are universal human rights a Western construct? Do human rights principles override the principle of sovereignty and the norm of nonintervention? These questions fuel the popular universalist versus cultural relativist debate.

Certain human rights, often those that are new additions to the universal human rights regime, are more heavily disputed within the universalist versus cultural relativist debate than others. Women’s human rights, a relatively recent addition to the human rights discourse, are often supported and challenged in the language of the universalist versus cultural relativist debate. Gender-specific violations of women’s human rights, those violations that only women suffer and that they suffer because they are women, are often the most heavily debated of all.

Female genital mutilation (FGM) is an example of such a gender-specific violation of women’s human rights that is drawing a great deal of attention in international relations today. To gain a better understanding of the proper role for the international community in either the toleration or eradication of this practice, we must first analyze FGM through the universalist versus cultural relativist debate. This paper argues that the universalist account of FGM is much more persuasive than the cultural relativist one and that the practice of FGM is indeed a violation of universal human rights. As a violation of universal human rights, such a practice warrants the involvement of the international community in its eradication.

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3. Ibid., 7.
2. Theoretical Debate: Universalism versus Cultural Relativism

The debate between universalism and cultural relativism lies at the heart of most international controversies surrounding human rights today. This section introduces both sides of the debate, preparing us for a thorough analysis of FGM in section 3.

2.1 Universalism

John J. Tilley defines universalism simply as the idea that “some moral judgments are universally valid.” Applying this idea to human rights leads us to the conclusion that all human beings, regardless of their culture, religion, or citizenship, hold certain rights. Such rights are termed universal human rights. The United Nations Declaration of Human Rights (UNDHR) of 1948 builds on explicit references to these universal human rights.

Universalists often refer to a natural law tradition as the basis for universal human rights, claiming that “human beings have an essential nature which dictates that certain kinds of human goods are always and everywhere desired as necessary for human flourishing.” This essential nature allows common moral standards to govern all human relations. Universalists would argue that the rights that express universal human standards should be the basis for legal rights and that such moral standards should be upheld through the universal human rights regime.

Universalism is closely linked with cosmopolitanism. Charvet defines cosmopolitanism as an ethical theory that “holds that there is an ideal moral order that applies universally and in which individual human beings are immediately members. As such they have rights and duties in relation to all other human beings.” He cites the Kantian idea of individual dignity as the cosmopolitan basis for treating all persons as equals. Cosmopolitanists see the world as “a great society of humankind” and argue that modern state boundaries should not negate our commitments to each other as human beings.

Vincent finds that “the central idea of cosmopolitanist morality is to heighten the sensitivity of people in one place to wrongs done in another in the interest of the achievement of global justice.”

A spectrum of universalist arguments exists. Some, such as Brian Barry, argue for the promotion of all values that are part of the individual human rights regime. Others, such as Bikhu Parekh, are narrower in their universalism, arguing for a minimum set of human rights. Those at the latter end of the spectrum seem to introduce more ambiguity and controversy into the universalist versus cultural relativist debate, for they beg the question of who decides which rights are considered minimal rights. Most universalists would agree with Martha Nussbaum that there are “many different

7. For more information on the distinction between rights as moral standards and legal rights, refer to Brown, Sovereignty, Rights, and Justice, 118.
10. Ibid., 91.
11. Ibid., 84.
ways in which human beings can live a human life, but there are limits to the acceptable range of differences.”

13 Some activities simply should not be tolerated and justified by an “anything-goes” attitude. Donnelly advises Westerners to be cautious when dealing with clashing cultural values because of the imperialist legacy. However, he warns that caution and sensitivity should not be confused with inaction. Some practices of others are truly objectionable, and the Western position of relative power should not cause Western societies to respect and tolerate such traditions.

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2.2 Cultural Relativism

Vincent defines cultural relativism as the idea that “moral claims derive from, and are enmeshed in, a cultural context which is itself the source of their validity.”

15 Consequently, no universal morality exists and any attempt at universality is “a more or less well-disguised version of the imperial routine trying to make the values of a particular culture general.”

16 The philosophical foundation for cultural relativism is the dismissal of the idea of universal truth in ethics. An independent standard of right and wrong does not exist, and therefore we cannot judge the customs of different societies.

17 Cultural relativism has close ties with communitarianism, multiculturalism, and “third-generation” rights (rights of “peoples”). The rise of cultural relativism as a doctrine is often associated with the emergence of the third world from colonial domination. Two of the doctrine’s most attractive features are the protest it makes against imperialism and its seeming tolerance and acceptance of other cultures.

According to cultural relativists, universal human rights do not exist. Each culture has its own value system by which its members judge their actions. No one culture or morality can lay claim to an objective truth. The argument follows that universal human rights are really just a Western construct with limited applicability.

18 Rather than adhering to the universal human rights regime, cultural relativists believe that “there are a variety of distinctive and defensible conceptions of human rights that merit our respect and toleration even if we disagree with them.”

19 Cultural relativists often draw on statist arguments when making their case against universalism. They argue that an international focus on universal human rights is inconsistent with the principle of sovereignty. Such an argument often leads cultural relativists to claim that the universal human rights regime is a form of moral imperialism.

Just as the universalist camp exists in degrees, so too the cultural relativists lie on a spectrum. At one end are cultural relativists such as Alison Dundes Renteln who argue that human rights are an ethnocentric concept of the West and that the 1948 UNDHR is not at all relevant to non-Western societies. At the other end of spectrum are cultural relativists such as Richard Rorty who believe that human rights are an expression of Western societies and their beliefs, but who nonetheless argue for “human rights culture” on pragmatic grounds.

13 Brown, Sovereignty, Rights, and Justice, 208.
15 Vincent, Human Rights and International Relations, 37.
16 Ibid., 38.
19 Donnelly, International Human Rights, 32.
20 Brown, Sovereignty, Rights, and Justice, 125, 206.
3. Female Genital Mutilation

3.1 What Is Female Genital Mutilation?

Throughout the world, more than 130 million girls and women have suffered some form of genital mutilation. The World Health Organization defines female genital mutilation as “partial or total removal of the external female genitalia or other injury to the female genital organs whether for cultural or other non-therapeutic reasons.” FGM is currently practiced in 28 Sub-Saharan and northeastern African countries. In 14 of those countries the majority of women undergo FGM. The procedure also takes place in immigrant communities around the world, including in Europe, North America, Australia, and New Zealand.

Different degrees of genital mutilation exist, and the preferred operation within any given region depends on the social norms established within that community. A type I FGM refers to procedures ranging from the removal of the clitoral hood to total clitoridectomy. Type II operations include the removal of the labia minora as well as the clitoris. A type III FGM, known as infibulation, involves the removal of the labia minora, the clitoris, and the inner surface of the labia majora. The exposed edges of the labia majora are then stitched using silk or thorns so that scar tissue forms over the vagina. A small opening is kept so that urine and menstrual blood can flow out. The legs of the girl or woman are often bound together following an infibulation procedure to prevent the reopening of the vagina. Type IV extends to practices that introduce substances into the vagina for the purpose of tightening or narrowing it.

The “surgeons” who operate on this delicate area of the female body are often local midwives who use “crude instruments,” such as stones, razors, or glass, and no anesthetic. Every type of genital mutilation holds serious health ramifications for women. Immediate complications include infection, shock, hemorrhage, urine retention, and ulceration of the genital region. Long-term consequences include infertility, problems during pregnancy, pain during sexual intercourse, and recurrent bladder and urinary tract infections. All types of FGM negatively affect the woman’s sexual life. In varying degrees, the procedures destroy the nerves that are of vital importance to female sexual enjoyment. No surgical technique can ever repair this result. FGM essentially removes a woman’s sexual organ while leaving her reproductive organs intact. Perhaps the most serious health consequence of FGM is the increased risk of acquiring HIV.

Female genital mutilation is a socially driven procedure. Societies that practice FGM cite multiple reasons for its continuation. In such patriarchal societies, FGM is thought to preserve female chastity by making sex impossible. This outcome ensures virgin brides and faithful wives to men. The narrowed vaginal opening of an infibulated woman is also thought to increase men’s sexual pleasure. Other reasons expressed by such societies include adolescent initiation rites, religious observance, and female

21. Controversy continues to surround the terminology of the procedure. Westerners first referred to the practice as female circumcision. Fran Hosken, founder of the Women’s International Network, was the first to use the term female genital mutilation. Many scholars, activists, and medics continue to use the term FGM so as to highlight the ill effects of the procedure.
preparation for the pain of childbirth. The reasons lying behind the continuation of FGM are analyzed and discussed more thoroughly in the next section.

3.2 Universalist vs. Cultural Relativist Account of FGM

Having introduced both the theoretical debate between universalism and cultural relativism (section 2) and the background on FGM (section 3.1), we are now intellectually equipped to use the framework of the universalist versus cultural relativist debate to analyze FGM. First we discuss one of the main reasons cultural relativism is such an appealing justification for the continuation of FGM, the fact that the procedure occurs in the private sphere. Then we refute the most popular claims cultural relativists make in arguing that FGM should be allowed to continue. That section demonstrates that the cultural relativists’ arguments fail and that FGM should indeed be considered a violation of universal human rights. Finally, we conclude section 3 with evidence that the international community already supports human rights that are necessarily violated by the practice of FGM, providing further support for the universalist argument.

3.2.1 Public versus Private

Many feminist scholars agree that human rights are gendered. They were defined by men to protect men, and to this day they are interpreted and enforced mostly by men. Brown explains that the gendered nature of the human rights discourse is much deeper than merely differential application:

... the problem with the discourse of rights is not simply that for most of human history the bearers of rights have been men; rather it is that rights seem a particularly appropriate response to one kind of oppression—that directed against active citizens attempting to engage in public life—but not particularly appropriate to the equally damaging forms of oppression characteristically found within the private sphere.26

Defining rights in terms of protections necessary for public life essentially excludes the majority of the world’s women from protection. The subordination of women is often informal; it takes place in the private sphere and at the hands of nonstate actors. Hilary Charlesworth finds that “the most pervasive harm against women tends to occur right within the inner sanctum of the private realm, within the family.”27 This finding is certainly true with FGM, where the practice is passed on from mother to daughter and demanded by one’s future husband.

Charlesworth describes the public/private dichotomy of human rights as both gendered and normative.28 The human rights regime attaches greater significance to the public world, a world from which women are often excluded. Additional claims to cultural and religious rights often reinforce the public/private dichotomy that operates to the disadvantage of women. Charlesworth explains, “While the right to gender equality on the one hand, and religious and cultural rights on the other, can be reconciled by limiting the latter, in political practice cultural and religious freedom are accorded a much higher priority nationally and internationally.”29

28. Ibid., 69.
29. Ibid., 74.
FGM is in many ways the perfect example of a practice that the traditional human rights regime is hesitant to address. It is the most private of private practices. It occurs outside state regulation and often at the will of the family. The practice deals with issues of sexuality and is therefore considered inappropriate for state interference. Furthermore, many societies that practice FGM claim that they have a cultural and religious right to do so. The fact that FGM is on the private side of the public/private dichotomy makes the cultural relativists’ job of excusing the practice quite easy. Until the international human rights regime evolves to overcome the public/private dichotomy (which because of its gendered nature is a flaw of the universal human rights system), universal human rights activists will have to work a bit harder to show that FGM is indeed a violation of women’s human rights.

3.2.2 The Failure of the Cultural Relativist Account of FGM

In her discussion of gender and human rights, Arati Rao notes that “no social group has suffered greater violation of its human rights in the name of culture than women.”\(^{30}\) Often these violations are related to the control of women’s bodies, as with the case of FGM. Before we analyze—and ultimately refute—the most common claims cultural relativists make for why FGM should be protected by cultural rights and not subject to universal human rights discourse, it is pertinent that we first demonstrate that FGM is simply a physical means of controlling women’s sexuality in patriarchal societies. This point must be understood so that while critically analyzing the claims put forth by cultural relativists, we are aware of the real reason FGM is practiced.

FGM is performed as a means for male members of patriarchal societies to control the sexuality of females. The Center for Reproductive Law and Policy describes FGM as “an attempt to repress the independent sexuality of women by altering their anatomy.”\(^{31}\) The immediate and pragmatic purpose of the practice is to ensure that women are virgins before marriage and faithful wives during marriage. With severe forms of FGM, such as infibulation, this control of sexuality is ensured by the creation of a “chastity belt made of flesh.”\(^{32}\) With less severe forms, such as clitoridectomy, the removal of the clitoris makes it impossible for a woman to experience sexual pleasure and is thought to remove her sexual desires as well. Many societies that practice FGM are quite open about the fact that its purpose is to control female sexuality. One exciser is quoted as saying, “If she has not been cut... a woman might think instead about her own sexual pleasure.”\(^{33}\) Although ensuring virginity and fidelity is the immediate reason for FGM, the practice serves deeper and more extensive social purposes. By controlling female sexuality, men keep women in an oppressed state and maintain a gender-hierarchical society that is to their advantage. Raqiya Haji Dualeh Abdalla writes that FGM is a particular form of sexual oppression “based on the manipulation of women’s sexuality in order to assure male domination and exploitation.”\(^{34}\) Similarly, Boyle notes, “To the extent that [FGM] made men masters over female sexual function, it historically reinforced the idea that wives are a husband’s private property.”\(^{35}\)

34. Raqiya Haji Dualeh Abdalla, as quoted in Dorkenoo, Cutting the Rose, 29.
35. Boyle, Female Genital Cutting, 27–28.
Although many societies that practice FGM openly admit that its purpose is to control the sexuality of the female members, they tend to use the language of cultural relativism to justify the continuation of the practice to the international community. We now analyze some of the more popular arguments cultural relativists make in defense of FGM: that it is based in and required by religion, that it is traditional and therefore necessary for the continuation of their culture, and that female members of these societies want to undergo the procedure. Throughout this analysis it is important to remember that arguments based in “culture” can be used to serve a variety of interests. Keeping Rao’s three key questions in mind will be helpful: “First, what is the status of the speaker? Second, in whose name is the argument from culture advanced? Third, what is the degree of participation in culture formation of the social groups primarily affected by the cultural practices in question?”

3.2.2.1 Religion

Asma Mohamed Abdel Halim notes, “Religion has always seemed to be relativist’s strongest argument and women’s and universalist’s weakest point.” She attributes this observation to the fact that “The sacrosanctity of religion keeps those who are not of the same faith from arguing any issue in that religion.” Additionally, those who are of the same faith fear being labeled as disloyal or being shunned by their community. Many leaders of the patriarchal societies where FGM is practiced are aware of the power of religious arguments and use them readily in their defense of FGM, particularly the leaders of Islamic communities who claim that the Islamic faith requires FGM. These Islamic leaders often reference a hadith that addresses FGM. According to this hadith, Mohammed called genital cutting an honorable deed for women. (This hadith is highly contested because its provenance is questionable.) Besides this doubtful hadith, no other reference to FGM occurs in Islamic religious texts.

Most Islamic scholars agree that FGM has no basis in the Islamic faith. It has been practiced in some Islamic communities for centuries, but this cultural tradition must not be confused with a religious requirement. The Muslim author Azizah Y. Al-Hibri believes that “many oppressive practices attributed to Islam are either cultural ones or ones that resulted from a patriarchal interpretation of religious text.” As with any religion, the interpreters of Islamic texts possess great power and responsibility. Some are misusing this power, purposely manipulating the religious texts to support the continued oppression of women. Mahnaz Afkhami writes that “the crass infringement of women’s rights we see in the Muslim world has more to do with power, patriarchy, and misuse of religion as political weapon than with religion properly understood as individual faith.” Many of these elite Islamists use the language of cultural relativism and suggest that the West constructed the concept of universal human rights so as to impose their way of life on the rest of the world.

Al-Hibri prescribes a “tripartite strategy” for reclaiming the true Islamic faith for all Muslims, including women. First, a distinction must be made between customary and religious practices. Such

38. Ibid.
39. Boyle, Female Genital Cutting, 32.
a distinction will help decrease the Muslim resistance to changes that take place in the purely cultural realm. Second, the existing jurisprudence must be critically reexamined so that any manipulations and distortions made by patriarchal interpreters can be removed. Third, modern interpretations of Islamic law must take place, and female participation in this process should be encouraged. This tripartite strategy would help Muslim communities become more self-aware and less susceptible to the political and religious manipulation of patriarchal leaders. The communities would be better prepared to recognize the fallacious claims made by cultural relativists in their attempt to distort cultural texts so as to shield FGM from universal human rights standards.

3.2.2.2 Dynamic Nature of Cultures

An underlying assumption of some cultural relativist claims is that cultures and traditions will remain the same if left alone. This assumption is especially true with regard to gender roles and women’s rights. Nahid Toubia notices, “It is only when women want to bring about change for their own benefit that culture and custom become sacred and unchangeable.” Cultural relativists claim that some cultures are gender hierarchical by nature and that outside cultures should not judge such cultures as less moral. Any talk of women’s rights is dismissed as cultural imperialism of the West. These cultural relativists deny the possibility that progress toward gender equality can take place within a culture without destroying the culture itself. This assumption that culture is static often underlies cultural relativist arguments that FGM should be allowed to continue. Cultural relativists claim that if traditional practices such as FGM are eradicated, the very culture of the society will begin to disintegrate. This argument can be reduced to a very simple idea: if change takes place within a culture, it necessarily destroys that culture.

The cultural relativist argument that culture is incompatible with change is not only weak but also historically incorrect. History has demonstrated that culture is anything but static. Mahnaz Afkhami comments on cultural change throughout history:

There was a time when in the name of Christianity women were burned at the stake as witches because their behavior did not conform to the prevailing norms. Those who committed the murder justified their action by reference to Christian principles. Slavery was once the norm everywhere. Women were kept out of social and political decision making across the world. But times have changed. Christians have changed. Jews have changed. Muslims have changed.

Islamic cultural relativists who argue against change deny Islam’s impressive history of adapting to the times. Mahmood Monshipouri writes that “Islam is capable of adapting to change without losing its integrity and authentic nature; in fact it has done so for the past 14 centuries.” Al-Hibri agrees that Muslim religious and cultural sentiments are inherently flexible.

Islamic cultures are not distinct in their need to change the patriarchal nature of some of their traditions. Most of the world’s cultures have a history of gender inequality. Religions and cultures

42. Al-Hibri, “Is Western Patriarchal Feminism Good?,” 43–44.
worldwide have successfully adapted their traditions to modern demands for women’s rights. Okin notes that progressive, reformed versions of Judaism, Christianity, and Islam have softened their powerful drive to control women and their sexuality. The obstacles to the realization of women’s human rights are the more orthodox or fundamental versions of these religions. Although “discrimination against and control of the freedom of females are practiced, to a greater or lesser extent, by virtually all cultures, past and present,” the present threat to women’s rights tends to be found in “religious [cultures] and those [cultures] that look to the past—to ancient texts or revered traditions—for guidelines or rules about how to live in the contemporary world.”

The cultural relativist claim that patriarchal cultures cannot withstand changes such as the eradication of FGM is undermined by the reality that culture is a “living, breathing system for the distribution and enactment of agency, power, and privilege among its members and beyond.” As a living, breathing system, it is certainly capable of change. Cultural relativists and those who find their arguments for FGM convincing should pay heed to Yael Tamir’s advice: “We ought to recognize that cultures are permanently changing and developing, and that there is no reason to ‘freeze’ a culture in order to preserve it.” Rao describes culture as “a series of constantly contested and negotiated social practices.” As these social practices, such as FGM, are contested and negotiated, cultures change accordingly. As cultures change and evolve to the needs of the time, they make room for new realities, such as the universality of women’s human rights.

3.2.2.3 Women’s Choice?

Cultural relativists often defend FGM by referring to the fact that older women of a community often encourage and perpetuate the practice. They argue that if the women of practicing societies are actively involved in and support the continuance of the practice, any eradication efforts introduced by the rest of the world are necessarily foreign and imperialistic. In analyzing such a claim, one must first question why women might choose to perpetuate FGM. Using the answers to this first question, one must then question whether women really have a choice in the matter.

The most significant reason women give for having their daughters undergo FGM is that they want their daughters to be eligible for marriage. In societies where FGM is practiced, most men refuse to marry an uncircumcised woman. Such women are considered dirty, sexually perverse, promiscuous, and unfaithful. In these patriarchal societies, women’s only means of achieving economic security is through marriage. FGM is necessary for marriage, and marriage is necessary for economic security. When a woman chooses to have her daughters circumcised, in reality she has very little choice at all. Because the women of these societies are economically and socially powerless, they do not have the luxury of opting out of the social injustices imposed by society.

48. Ibid., 21.
52. Bunch and Reilly, Demanding Accountability, 53.
3.3 Conclusion

Cultural relativists’ claim that the universal human rights discourse is inappropriately applied to such traditional practices as FGM may sound appealing at first. Cultural relativists strategically use such catch phrases as “religious rights,” “cultural preservation,” “the freedom of third-world women to choose for themselves,” and “cultural imperialism”—all of which are currently in vogue in the West—causing even human rights activists to hesitate. However, as this analysis shows, such claims prove empty with regard to FGM. Neither Islam nor any other religion calls for the practice of FGM. Rather than being static, cultures are dynamic and capable of changing with the times. Third-world women of these patriarchal societies are socially, politically, and economically powerless members of their communities and therefore are not in a position to make choices regarding their own bodies. When the cultural relativists’ arguments crumble, what is left is the fact that FGM is a violation of universal human rights.

The fact that the international community (including the states that practice FGM) has already vowed to protect human rights that are necessarily violated by the practice of FGM supports the universalist claim that FGM is a violation of universal human rights. Starting with the basics, the UNDHR explicitly affirms the equality of women and men. Penn and Nardos note that “at minimum, equality must mean the right to live free of gender-based violence and exploitation.” Article 5 of the UNDHR states, “No one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment.” FGM, in its painful removal of a woman’s sexual self for the purpose of continuing patriarchy, certainly falls under this article. Because the practice is often performed on girls at a young age, FGM violates the Convention on the Rights of the Child. Furthermore, FGM violates a woman’s right to bodily integrity, liberty, and security of person, private and family life, health and appropriate health care services, and freedom from all forms of discrimination. Societies that use cultural relativist arguments to ward off outside efforts to eradicate FGM within their boundaries find themselves in an ironic position: their government has already agreed to uphold certain human rights that are violated by FGM even before FGM became a recognizable phrase in the human rights discourse.

4. The Role of the International Community in the Eradication of FGM

Having established that FGM is a violation of universal human rights, we must now discuss what the international community has done and what it can possibly do in the future to aid in the eradication of this procedure. Section 4.1 analyzes the activities of IGOs and NGOs. Section 4.2 focuses on bilateral foreign policy. Section 4.3 looks at two case studies, one from Egypt and another from the United States, to observe how the activities discussed in the first two sections play out in real situations.

4.1 IGOs and NGOs

In a discussion on international strategies for using the human rights system to advance women’s rights, the Institute for Women, Law, and Development finds that international standards can be

54. For more information, refer to UNDHR (articles 3, 5, and 12), the UN International Covenant of Civil and Political Rights (articles 7, 9.1, and 17), the UN Convention against Torture and Other Cruel, Inhumane, or Degrading Treatment or Punishment (article 2), and the African Charter on Human and Peoples Rights (articles 5 and 6).
used in two main ways: first, by “going international,” which means taking one’s claims of rights violations to an international forum to place pressure on the state concerned; second, by “bringing the international back home,” which means using international standards to strengthen one’s case in the national arena. IGOS and NGOs are the key actors in both of the institute’s strategies. Their activities are the backbone of the international community’s efforts to eradicate FGM.

Some of the most significant progress in the international effort to eradicate FGM has been a result of conferences where IGOS and NGOs meet to reflect, network, negotiate, and strategize with one another. A consensus emerged among the delegates of the Nairobi Conference of 1985 that gender-based violence should be addressed as a human rights issue in international legal and political arenas. The document produced as a result of the conference mentioned FGM and called for legal measures to prevent such violence. The 1995 Beijing Conference on Women resulted in a comprehensive platform for protecting women’s rights. The platform specifically addressed violence against women and the inadequate protection of women’s rights.

The 1993 Vienna Conference on Human Rights was the most influential with regard to FGM because it addressed the public/private dichotomy, gender-based violence, and state responsibility. Aware of the plethora of cultural relativist arguments proposed by defenders of FGM, the participants at the Vienna Conference reaffirmed the universality of human rights regardless of differences in cultural systems. The Vienna Declaration calls on governments, IGOS, and the entire international community to recognize and prevent violations of women’s human rights even if those violations occur in the private sphere.

The United Nations, by far the most influential IGO in international relations, is responsible for two of the most significant contributions to the international anti-FGM campaign: the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the UN Declaration on the Elimination of Violence against Women. In 1992, the Committee on the Elimination of Discrimination against Women decided to include gender-based violence in CEDAW. CEDAW defined gender-based violence as “violence which is directed against a woman because she is a woman or which affects women disproportionately. It includes acts which inflict physical, mental, or sexual harm or suffering, threats of such acts, coercion, and other deprivation of liberty.” CEDAW also called for state responsibility and requested that state parties initiate effective measures to end all forms of gender-based violence, whether such violence occurred in the public or private sphere. Boyle believes that “within the international treaty system, CEDAW stands distinctly as the symbol that women’s rights are human rights.” CEDAW’s call for state responsibility, its transcendence of the public/private dichotomy, and its focus on violence against women made it a particularly effective instrument for the international effort to eradicate FGM.

In 1993, the General Assembly adopted the UN Declaration on the Elimination of Violence against Women. This document was “the first international human rights instrument designed exclusively to deal with violence against women.” The declaration specifically mentions FGM as an example of

58. Boyle, *Female Genital Cutting,* 52.
violence against women that occurs within the family. Although the declaration is not legally binding, it provided the first set of international standards to address violence against women. Like CEDAW, the declaration called on the state to condemn gender-based violence and to use all appropriate means to prevent gender-based violence within its borders. Following intense pressure from a number of NGOs, an optional protocol (permitting individual complaints) was finally adopted in 1999. This optional protocol greatly increased the usefulness of the declaration for the anti-FGM campaign.

Although IGOs and NGOs often work in conjunction with one another, sharing efforts, responsibilities, and campaigns, their roles and tactics in the international effort to eradicate FGM are quite different. The typical approach of IGOs is to develop international consensus on FGM, to get nations to act of their own volition, and to increase African-led efforts. Boyle correctly notes that the strategies of IGOs are constrained by their dependence on the sovereignty system. Because IGOs are composed of states, they only have the powers that states give them. Hence, IGOs are unlikely to take any action that might threaten the principle of sovereignty.

NGOs, on the other hand, are not as constrained by the system of sovereignty. The typical NGO approach to the issue of FGM is a combination of coercive reform, condemnation of FGM in outright terms, and public embarrassment of inactive governments. Boyle finds that because NGOs are less concerned with issues of sovereignty, they tend to be more outcome oriented than IGOs or states. They have the freedom to make more drastic proposals for change and to “raise the baseline for the range of action nation-states should take.” NGOs are in many ways better able to press for human rights because they are free of the political control of states and do not have to account for other foreign policy objectives.

The Foundation for Women’s Health Research and Development (FORWARD), a London-based NGO, provides excellent examples of the various types of activities NGOs engage in. In 1992, it organized the First Study Conference on Genital Mutilation of Girls in Europe. This conference produced the London Declaration, which formulated guidelines for the abolition of FGM in Western countries. FORWARD worked with Equity Now, a U.S.-based NGO, to brief Congress and the U.S. Agency for International Development on FGM. Those efforts ultimately led to the 1996 anti-FGM legislation that is the subject of our second case study. In addition to these groundbreaking projects, FORWARD runs a consultancy service on FGM for decision makers, supports grassroots projects in Africa, and runs an African Men against Female Genital Mutilation project.

4.2 Bilateral Foreign Policy

In his discussion of UN efforts at international standard setting, Brown finds that because the UN (like other IGOs) lacks effective enforcement machinery, the enforcement of human rights by the international community relies more on the foreign policy imperatives of major powers. Forsythe agrees that even though the number of IGOs and NGOs is increasing, states and their foreign policies remain key in the enforcement of human rights. Sally Engle Merry concludes that “inevitably, it

60. Ibid., 9–10.
62. Boyle, Female Genital Cutting, 71.
63. Ibid.
64. Ibid., 78.
66. Brown, Sovereignty, Rights, and Justice, 120.
will be the rights promoted by the most powerful nations that will be most effectively pushed on noncompliant nations.\textsuperscript{68}

As noted, leading human rights scholars clearly indicate that foreign policy is a potent instrument in the promotion and enforcement of human rights. The eradication of FGM has been promoted in foreign policy in essentially two ways. The first and most common way that anti-FGM goals are expressed through foreign policy is when countries that do not practice FGM outlaw the practice within their own boundaries. By legislating against the practice, those governments send a clear message to African countries that FGM is considered a serious human rights offense. In 1982, Sweden became the first Western country to adopt anti-FGM legislation. France was the first country to prosecute cases of FGM within its borders and has continued to prosecute such cases with exceptional diligence. The United Kingdom passed a law prohibiting FGM in 1985, and in 1993 it became the first state to discipline a doctor for practicing FGM. The United States finally passed anti-FGM legislation in 1996.

The second way that anti-FGM measures enter foreign policy is when aid is made conditional on efforts to eradicate the practice. This tactic was first used by the United States as part of its 1996 anti-FGM legislative package. The details of using aid as an instrument in anti-FGM foreign policy are discussed more thoroughly in the U.S. case study. Here, we only point out a serious weakness in how this tactic has been used thus far and make recommendations for reform. The U.S. law linking foreign aid with FGM eradication efforts by African states predictably results in the passing of empty laws with negligible enforcement measures. African states simply pass (or impose) laws to satisfy Western conditions, often with no intention of actually initiating any reform in their societies. Conditioning aid on action is an excellent idea for making the eradication of FGM part of a state’s foreign policy, but such conditions might be more effective if they linked aid with the enforcement of anti-FGM laws or with evidence of real change in the prevalence of FGM in African states.

4.3 Case Studies

We analyze two case studies: Egypt and the United States.

4.3.1 Egypt

Muslim and Christian groups throughout Egypt practice FGM, and 97 percent of females in Egypt have undergone the procedure. Egypt’s experience with FGM is a particularly useful case study for two reasons. The first is the high prevalence of the practice, indicating a high level of support, or at least of support from the highest levels in the country. The second reason is that Egypt possesses a relatively high level of power in the international system compared with its fellow African states. Because of this position, Egypt seems less likely to follow orders from the universal human rights regime if such orders are not deemed in the state’s interest. Both of these factors have influenced how Egypt conducts its international politics regarding universal human rights and, more specifically, how Egypt has adapted its policies on FGM in response to demands from the international community.

In her study of national policies on FGM, Boyle found that, all else being equal, policies were more contested where they had local relevance and such contestation was greater in countries with

more leverage in the international system.\textsuperscript{69} Both of these findings hold true in the Egyptian case. With 97 percent of the female population having undergone FGM, the practice clearly has local relevance. Egypt has a long tradition of supporting FGM. Historically, the Egyptian elite preferred to populate their large harems with infibulated slaves. Although opponents to FGM have existed in Egypt throughout history, the practice is certainly the norm. In many regions of the country, failing to circumcise one’s daughters is considered child neglect.

Egypt’s anti-FGM policies evolved through an intense struggle with both the international community and its own citizens. In 1981, Egypt ratified CEDAW, obligating it to file periodic reports on the status of gender equity in the country. Egypt’s first two reports to the committee failed to mention FGM. Initially, the Egyptian government did a stellar job of avoiding international pressure to reform its FGM policies. When in 1990 the committee finally questioned Egypt’s representatives about the actions the Egyptian state was taking with regard to FGM, they falsely replied that the practice was uncommon and was certainly dying out. Those fallacious remarks became a source of embarrassment for Egypt when in 1994 CNN broadcast live the circumcision of a 10-year-old girl in Cairo while the city was hosting an international population conference. This broadcast received much international attention and led to worldwide outrage toward the Egyptian government.

Having spent the past decade keeping Egyptian citizens content by not taking a proactive stance on FGM, the Egyptian government knew that it would now have to cater to the international community. Boyle writes, “When Egypt found itself caught between international approbation and local cultural assumptions, in the end it succumbed to international pressure—at least formally.”\textsuperscript{70} The government initially expressed interest in passing legislation to make FGM illegal. This pursuit ended unsuccessfully when a task force formed by the health minister denounced the idea of criminalizing FGM. Around the same time, a prominent sheikh publicly supported the practice. Many Egyptians began to claim that the attempt to eradicate FGM was part of a Western conspiracy to undermine Egyptian culture. The Egyptian government was caught in a conflict between appealing to Western investors and showing support for traditional Islam.

Because the Egyptian parliament proved unwilling to pass legislation against FGM, Egyptian President Hosni Mubarak decided to have his health minister, Dr. Ali Abdel Fattah, extend a 1959 health decree to ban FGM in public hospitals. By taking this action, the Egyptian government was able to sidestep domestic opposition and satisfy growing international demands. However, the battle continued. Sheikh Gad el-Haqq publicly criticized the ban, leading the Egyptian health minister to compromise. The new ban required that hospitals set aside one day a week to perform circumcision. The health minister explained to the international press that families would be convinced by doctors that FGM was unwise and would therefore opt not to have their daughters undergo the procedure. Five months after this compromise ban was established, the NGO Equity Now announced that Egyptian hospitals were allowing circumcisions to be performed daily rather than once a week. Furthermore, Equity Now found that rather than discouraging families from having the procedure performed on their daughters, doctors were competing for opportunities to operate on the young girls because of the fees involved. In 1996, the new minister of health, Dr. Ismael Sallam, took a definitive stance and issued a decree prohibiting FGM for nonmedical purposes. Although this decree was challenged in several lower courts by both medical associations and Islamic fundamentalist groups, the highest administrative court ultimately upheld the decree in December 1997.

\textsuperscript{69} Boyle, Female Genital Cutting, 21.
\textsuperscript{70} Ibid., 7.
While these legal battles were being fought in the courtrooms and the highest government offices, anti-FGM grassroots movements were beginning to take hold. These local NGOs used the window of opportunity provided by the increased international attention on Egypt’s policies to initiate local campaigns to eradicate the practice. One domestic NGO called Care for Girls Committee held interactive meetings with local communities to educate girls on the negative effects of FGM. The NGO commissioned plays; led discussions with the audience; and delivered picture books, posters, slide shows, and audiotapes. These initiatives were especially useful in rural, illiterate communities that were not able to benefit from formal health education in schools. Local and international NGOs encouraged Egyptian school systems and Egyptian television programs to discuss FGM and the dangers associated with the practice. Although Egypt’s formal ban of FGM and increased NGO activity on the subject are encouraging signs that Egypt is adapting its traditions to universally recognized human rights standards, only time will tell how well enforced—and therefore how effective—these measures really are.

The Egyptian case study demonstrates many aspects of the role the international community plays in the eradication of FGM. Boyle finds that “governments in the modern world take action with many principles and pressure groups in mind, acting in response to pressure that extends well beyond the territorial boundaries of their countries.”71 The result of this principle, when applied to countries such as Egypt that have a high prevalence of FGM, is that even in such countries, states uniformly oppose the practice because of pressure from the international community to do so. The principles institutionalized in the international system and the universal human rights regime were at least as important, if not more so, in shaping Egyptian policy as local political, religious, and cultural demands. However, although Egypt certainly folded to international pressure to reform its policies on FGM, it did so in a way that was unique and fitting to its domestic environment.

The Egyptian president knew the Egyptian parliament would never pass a law banning FGM, so he instead chose to implement a policy administratively through a ban extended by the health minister. The Egyptian policies on FGM have tended to be a continuing balancing act between domestic and international demands. The Egyptian case study also illuminates the role of one particularly important international NGO—the media—in the eradication of FGM. The 1994 CNN broadcast of the FGM procedure in Cairo was a powerful catalyst in the international community’s pressure on Egyptian FGM policies. The role of the media is discussed further in the U.S. case study that follows.

4.3.2 United States

The U.S. federal legislature passed an anti-FGM law in November 1996. This law banned FGM in the United States, linked foreign aid to a country’s FGM eradication efforts, and made education about the dangers of FGM and its legal status in the United States mandatory for all new immigrants. Two important international events led up to and were the driving force behind this U.S. legislation. The first was the 1994 CNN broadcast of the 10-year-old girl undergoing FGM in a Cairo hospital. This media event brought the gruesome realities and horrors of FGM into the homes of Americans, including American legislators. In 1996, the New York Times reported that “Senator [Harry] Reid, the point man in the Senate, said he first lost sleep over this issue in 1994 after CNN broadcast a video of a 10-year-old Egyptian girl being cut.”72 Senator Patricia Schroeder, the other cosponsor of the bill, recognized the effect these graphic images had on the American public. For years, she had

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71. Ibid., 1.
tried to explain to her fellow representatives that FGM was not at all like male circumcision. She was quoted in the *New York Times* as remarking that “Once they really find out it goes on and is not some victim fantasy we’re having, they’re horrified.” The shock and horror that accompanied American viewing of the CNN broadcast played an immeasurable role in the passing of the 1996 anti-FGM legislation.

The second international event was the first successful gender-based asylum claim in the United States, that of Fauziya Kasinga, which began in 1994 and was finally decided in 1996. Kasinga, a native and citizen of Togo, fled her homeland at the age of 17 to escape the threat of FGM. She fled Togo, passed through Ghana and Germany, and finally reached Newark International Airport on 17 December 1994. Kasinga immediately requested asylum and was detained by the Immigration and Naturalization Service. An immigration judge first denied her request for asylum on 25 August 1995 and ordered that Kasinga be deported from the United States. After reviewing the appellate record anew, the Board of Immigration Appeals (BIA) sustained Kasinga’s appeal, granted her asylum, and ordered her admitted to the United States.

The issue before the BIA was whether FGM could be the basis for a grant of asylum under section 208 of the Immigration and Nationality Act. To obtain asylum within the United States, an alien must first prove that she fits within the statutory definition of a *refugee* in the act. For Kasinga to be considered a refugee, her lawyers had to show that she satisfied the following conditions: she must have a “fear of persecution”; the fear must be “well founded”; the persecution must be “on account of race, religion, nationality, membership in a particular social group, or political opinion”; and she must be unable or unwilling to return to her country because of her fear of persecution. The BIA found that Kasinga did satisfy these conditions: that FGM, as practiced by the Tchamba-Kunsuntu Tribe of Togo, constituted persecution; that Kasinga was a member of a social group consisting of women of the tribe who had not undergone FGM and who opposed the practice; that Kasinga had a well-founded fear of persecution; that her fear was on account of her social group; and that Kasinga’s fear was countrywide.

Without trivializing the importance of this decision, for the purposes of our discussion we note that Kasinga’s effect on the issue of FGM was limited by the BIA’s narrow focus on the physical consequences of FGM and the severity of the form of FGM that Kasinga would be forced to undergo. The BIA was hesitant to set a precedent for granting asylum on the basis of FGM, fearing that the floodgates would then open for women all over Africa to seek asylum in the United States. The concern was not unreasonable. Of the 18 million refugees worldwide, 80 percent of them are women and children. With more than 2 million girls and women at risk of undergoing FGM every year, the potential for a flood of refugees is a real one. In her comments on the Kasinga case, Boyle writes, “Based on the arguments of the Immigration and Naturalization Service, the United States seemed at least as interested in limiting the number of future refugees as actually stopping [FGM].”

Following the Kasinga case, the United States realized it needed to address FGM outside of asylum requests if it hoped to limit the flow of African refugees into the United States. As part of

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73. Ibid.
74. 8 U.S. Code 1158.
77. Boyle, *Female Genital Cutting*, 90.
the 1996 legislation, the United States linked its foreign aid and support for loans from international organizations to states’ FGM eradication efforts. The African states in which FGM is practiced, many in desperate need of the foreign aid that is controlled by the United States, had no choice but to formally enact laws banning FGM. Many of the states that enacted those laws had either no intention of enforcing them or no authority within their state to do so. Their choice to formally denounce FGM and nominally initiate eradication efforts was certainly strategic.

A skeptic might say that many in the U.S. government had little concern over whether these changes claimed by African states were real or not. An important condition for seeking asylum in the United States is that harm would be unavoidable if a person were returned to her home country. This claim became very difficult for asylum-seekers to make with regard to FGM after African states had formally passed anti-FGM laws and initiated eradication policies. Boyle notes that, ultimately, “in tying U.S. foreign aid to other countries’ eradication efforts, some in the federal legislature may have been trying to prevent a tide of African women from seeking asylum on American shores.”

Less skeptical observers might argue that the United States was truly concerned with decreasing the number of women whose human rights were violated each year through the practice of FGM. In this light, the United States was using the most powerful instrument short of armed intervention—foreign aid—to produce real change in the lives of African women.

The 1996 anti-FGM legislation was certainly an act of U.S. foreign policy, as evidenced in two distinct aspects of the legislation. First, by outlawing FGM within its own borders, the United States was sending a clear message to African countries that such violations of women’s human rights would not be tolerated and that the United States found the issue sufficiently serious to pass formal legislation. Second, the United States committed itself to using a powerful foreign policy instrument, foreign aid, to influence African countries’ own policies regarding FGM.

5. Conclusion

Analyzing FGM through the framework of the universalist versus cultural relativist debate revealed that FGM is indeed a violation of universal human rights. Cultural relativist claims that FGM is required by religion, necessary for the survival of a culture, and desired by women crumbled under closer scrutiny. Furthermore, by referencing already agreed-on human rights, such as the right to health and the right to be free from torture, we saw that FGM violated universally accepted human rights even before considering more controversial, gender-specific human rights conventions, such as CEDAW.

Properly treating FGM as the universal human rights violation that it is means transcending the public/private dichotomy and demand that states take action against the practice. Charlesworth astutely observes that nonintervention by the state with regard to women’s human rights does not mean that the state is neutral. Rather, a lack of direct state intervention in the name of protection of privacy serves to disguise inequality and domination in the private sphere. O’Hare regards such nonintervention as “at best neglect, and at worst complicity on the part of the state.”

78. Ibid., 111.
79. One might even say “coerce,” because many of the African countries had little choice but to honor the U.S. conditions.
The international community, having explicitly named FGM as a violation of human rights in such prominent documents as CEDAW and the UN Declaration on the Elimination of Violence against Women, now has a responsibility to actively pursue the eradication of the practice. Some of the most powerful states in the international system have already addressed the issue legally by outlawing the practice within their own boundaries, granting asylum on the basis of FGM, or linking foreign aid to efforts to eradicate the practice.

Much remains to be done. Although approaching the topic legally is a logical and useful first step, the international community must also address underlying factors. African women must be educated and integrated into the mainstream work force so that they are no longer socially and economically powerless and therefore susceptible to such oppression. Religious and political leaders must become well versed on the topic and co-opted into the eradication campaign. These leaders will play a significant role in educating and counseling African men on the topic and in guiding them in attitudinal changes toward gender relations. Throughout this process, the international community must stand firm in its belief that FGM violates international human rights. Cultural relativist arguments tend to strike an emotive chord in all, playing on feelings of guilt that our actions might be ethnocentric, imperialist, and intolerant. The international community must always remind itself that cultural relativist arguments in support of FGM are used as a tool by those who have a vested interest in the maintenance of patriarchal societies. FGM is a clear violation of universal human rights in the face of which the international community’s duty is to take action.

MARAT KENGERLINSKY

1. Introduction

As has been rightly addressed in contemporary scholarship, the region of the former Soviet Union has become a major area of constitution-making in the past years. On the one hand, the extensive political and economic changes in that part of the world have been accompanied by the adoption of entirely new or radically modified national constitutions. On the other hand, the processes of international integration and cooperation have created the foundations for incorporation of international norms and standards into domestic legal systems. As a rule, the reformers framing new post-Communist constitutions have been predominantly concerned with the problem of recognizing the individual as an “international person” with the associated international safeguards of basic individual rights as defined in treaty mechanisms and customary law.

On 25 January 2001, Azerbaijan joined the Council of Europe and became its 43rd member. Observing the conditions for accession to ratify the organization’s most important legal instruments, on 15 April 2002, Azerbaijan ratified the European Convention on Human Rights (hereinafter, the European Convention) and thus accepted certain commitments and obligations to promote and protect human rights and fundamental freedoms throughout its territory. Since then, every citizen of Azerbaijan can rely on the system of human rights protection in Europe and lodge a complaint to the European Court of Human Rights in Strasbourg (hereinafter, the European Court), should his or her human rights covered by the European Convention be infringed upon. These developments strongly enhance the role and power of international law in the domestic legal system of Azerbaijan and require that Azerbaijani legislation be brought into compliance with such international norms and standards.

The aim of this article is to examine how far Azerbaijan has come in bringing its domestic legislation into conformity with its international commitments under the European Convention. To what extent is Azerbaijani law compatible with the principles enshrined in the European Convention? What does the Azerbaijani constitution guarantee in the realm of human rights? This article therefore focuses on a comparative analysis of the main constitutional provisions of Azerbaijani legislation and the major principles of international human rights law as provided by the European Convention.

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2. Obligation of the Azerbaijani State to Respect Human Rights

In this section, we examine Azerbaijan’s obligations under the European Convention.

2.1 The Purpose of Article 1 of the European Convention

Article 1 of the European Convention reads as follows:

_The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention._

Thus, article 1 imposes on state parties the general obligation to guarantee certain human rights and freedoms. It requires that all state parties ensure that the rights defined in the European Convention are enshrined in their own legal systems, which means that states ought, first and foremost, to bring their legislation in line with the European Convention. Moreover, that legislation must be applied in a way compatible with the European Convention’s standards. As the European Court held, “The object and purpose of the European Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective.”

It follows then, that all contracting states should, with certain exceptions allowed by the European Court’s doctrine of “margin of appreciation,” give more or less identical meaning to the substantive rights enshrined in the European Convention. Indeed, the European Court ruled that “any interpretation of the rights and freedoms guaranteed has to be consistent with the general spirit of the European Convention, an instrument designed to maintain and promote the ideas and values of a democratic society.” This assumption is reinforced by the decision of the European Commission of Human Rights (hereinafter, the Commission) in _Austria v. Italy_, which stated that “the purpose of the High Contracting Parties was not to concede to each other reciprocal rights and obligations … but to realize the aims and ideals of the Council of Europe … and establish a common public order.”

Here, it should be noted that the wording of article 1 of the European Convention differs significantly from other international human rights instruments. It says that “the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms …”, whereas, for example, article 2 of the International Covenant on Civil and Political Rights (ICCPR) obliges state parties to undertake “to respect and to ensure to all individuals … the rights ….” The difference between “shall secure” and “undertake to respect and ensure” is evident. It becomes clearer in light of paragraph 2 of article 2 of the ICCPR, which imposes upon state parties an obligation to “undertake the necessary steps … to adopt … legislative or other measures as may be necessary to give effect to the rights recognised in the present Covenant.” In contrast, the European Convention does not require states, especially those with a dualist legal system, such as the United Kingdom and Hungary, to postpone

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5. Ibid.
6. Abolished by Protocol 11 to the European Convention, which came into force on 1 November 1998. The case law of the Commission is still valid.
9. Ibid., 183
10. Ibid.
11. In a dualist legal system, national courts are obligated to follow only treaties and international court decisions that are specifically legislated into domestic law, as opposed to monist legal systems, in which such treaties and decisions automatically prevail over domestic legislation or constitutional provisions.
the implementation of the convention’s provisions until relevant human rights provisions are adopted in national legislation.\textsuperscript{12} It is sufficient and necessary that states directly refer to and implement the convention’s provisions even before their full incorporation into domestic legal systems.\textsuperscript{13} Whether or not the states incorporate the actual text of the convention into their domestic law, they are obliged “to ensure that their domestic legislation is compatible with the Convention, and if need be, to make any necessary adjustments to this end.”\textsuperscript{14} As one commentator writes, “A State that is well integrated into the community of nations and assumes a great number of international obligations, does not consider it necessary to transform them one by one into domestic law and is ready to admit the primacy of international treaties over domestic Acts.”\textsuperscript{15} There is no dispute, however, that domestic law must give full effect to the rights guaranteed by the convention. The protection of the individual is more effective if the substantive rights can be reinforced by the national courts.

The prohibition of reservations of a general nature to the provisions of the European Convention also highlights the importance of article 1’s purpose. Thus, in its 1995 judgment in \textit{Loizidou v. Turkey}, the European Court noted that

\begin{quote}
the power to make reservations ... is a limited one, being confined to particular provisions of the European Convention.... In addition, reservations of a general character are prohibited. However, the inequality among Contracting States, which the permissibility of qualified acceptances might create, runs counter to the aim, as expressed in the Preamble to the European Convention, to achieve greater unity in the maintenance and further realization of human rights.\textsuperscript{16}
\end{quote}

Thus, using various pretexts, mostly security and public interest, some states are often allowed, by means of reservations, to circumvent certain commitments and obligations for the protection of human rights, while others are not. Some examples of reservations are Malta with respect to article 2, Portugal with respect to article 4, Turkey with respect to article 2 of Protocol 1, and Azerbaijan with respect to articles 5, 6, and 10.\textsuperscript{17}

\subsection*{2.2 Beneficiaries of Article 1}

Before Protocol 11 to the European Convention came into force,\textsuperscript{18} states could ratify the convention without recognizing the right of individuals, nongovernmental organizations (NGOs), and groups of individuals to lodge an application with the European Court. States had individual discretion whether to allow persons within their jurisdiction to submit individual complaints. After Protocol 11 came into force, certain very significant amendments were made in the text of the European Convention. Thus, currently, when a state becomes a party to the European Convention, any person, NGO, or group of persons automatically gets the relevant procedural rights to complain against that state. States are required to secure to everyone within their jurisdiction the right to lodge a complaint

\textsuperscript{12} The clearest example used to be the United Kingdom, before adoption of the 1998 Human Rights Act.
\textsuperscript{17} See the Council of Europe’s Web site: http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?CM=8&CL=ENG.
\textsuperscript{18} Brownlie, \textit{Basic Documents on Human Rights}, 398.
with the European Court. This assumption is reinforced by article 34, which stipulates, among other things, that “the High Contracting Parties undertake not to hinder in any way the effective exercise of this right.”

Notably, the European Convention does not make the enjoyment of the right to complain to an international body contingent on nationality. As the European Court of Human Rights noted in *Soering v. United Kingdom*, “the State’s obligation under Article 1 of the European Convention is to ensure the rights and freedoms defined in Section 1 to every person within its jurisdiction, regardless of his or her nationality or status.” Specifically, *everyone* who claims to be ill treated by the authorities of a state party may submit an application to the European Court under the following conditions: (a) a 6-month rule—the application must be submitted not later than 6 months after the final decision of the domestic judicial authority, (b) all domestic remedies have been exhausted, (c) the same matter has not been examined by or submitted to another international tribunal, and (d) the application is not anonymous.

As regards NGOs, the term *nongovernmental organization* is vague and open to interpretation. An important question arises: according to which or whose criteria is it to be decided whether an institution qualifies as a nongovernmental organization? Perhaps for that reason, the European Court has slightly clarified the issue. In the *Ayuntamiento* case it stated that the term *nongovernmental organizations* should not be understood as covering such institutions as municipalities, other local government organizations, or semistate bodies. Clearly, the European Court applies its own understanding and undoubtedly follows certain rules of interpretation. At the same time, it is well known that the European Court uses the doctrine of “margin of appreciation” in cases in which the practices of state parties are rather diverse. According to this doctrine, the European Court concedes that states are free to interpret particular domestic circumstances, which they may know better than the court. But this doctrine primarily concerns certain substantive rights guaranteed under the European Convention. In the case of NGOs, the issue seems to be slightly different. The question concerned in this context is not, in fact, freedom of association or freedom of assembly, but rather a matter of who is entitled to file a complaint to the European Court. The question remains, however, what is meant by NGO? Are the national governments capable of making necessary use of the “margin of appreciation”?

The issue of defining NGOs has long been a problem in Azerbaijan, and understanding which institutions might lodge complaints before the European Court is crucial in the Azerbaijani legal context. For example, will private universities or trade unions be entitled to lodge a complaint with the European Court, even though Azerbaijani laws do not deem them to qualify as NGOs? Although state universities clearly do not fit within the concept of an NGO, whether private universities do is a question open to mutually contradicting interpretations. However, the European Court accepts applications from newspapers, which also are not regarded as NGOs by Azerbaijani laws. Therefore, one can conclude that no legal obstacle exists for the European Court to accept applications from private universities or trade unions. In short, the European Court must decide whether a particular organization is an NGO for the purpose of article 34. As a result, the government of Azerbaijan will not be able to apply its own legal definition of NGOs.

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19. Ibid., 406.
22. See, for instance, the Law on Nongovernmental Organizations at http://www.consulting.minimax.az/Content.
23. See, for instance, the Law on Mass Media at http://www.gtz-legalproject.az/templates/pictures/a3bc820a5ab43f1f3991f2cd00272271.doc
2.3 “Privatization” of Human Rights

Scholars have long debated whether a public/private distinction in law affects a state’s obligation under the European Convention. Naturally, complaints must be directed against a state; that is, state bodies should cause the alleged violation. The state has the obligation, after all, to secure the rights provided by the European Convention. However, it is perfectly possible to complain against private individuals or institutions if the state’s obligation was positive in nature (in other words, if what was complained of was the state’s inaction when it should have acted). As the European Court noted, “the state cannot absolve itself from responsibility by delegating its obligations to private bodies or individuals.” As more areas fall within the private sector, private individuals, companies, or corporations increasingly violate more human rights. If a private individual or organization commits a human rights violation, failure of the state to act might be deemed as not fulfilling its obligation, given that its law adequately protects the rights guaranteed and provides for an effective remedy in the event of such violation.

However, the precise extent to which a state may be liable for the conduct of a private individual or organization ultimately depends on the terms of the individual articles of the convention and must be examined separately in relation to each of the rights guaranteed. For instance, the issue has arisen as to how far the state is liable in relation to trade union freedoms or the acts of private employers. The issue is even more important in such matters as family relations. Who is responsible for guaranteeing the rights of children, for example—the state or the parents? To this end, it is important to conceptualize the responsibility of public corporations, such as state television and radio broadcasting companies, state universities, and state foundations. However difficult the issue of determining the responsibility of those corporations might be, the rights they violate must be remedied by a state. A state has to provide effective legal remedies against human rights violations that may occur in the private sector. Otherwise, there will be a breach of article 13, which states, “Everyone whose rights and freedoms are set forth in this Convention are violated shall have an effective remedy before a national authority, notwithstanding that the violation has been committed by persons acting in an official capacity.”

2.4 The Issue of Jurisdiction

The state’s obligation to secure the individual’s rights has certain spatial limitations. Those limitations are implicit in the concept of jurisdiction. As the European Court held,

> the engagement undertaken by a Contracting Party is confined to “securing” ... the listed rights and freedoms to persons within its own jurisdiction. Further, the European Convention does not govern the actions of States not Parties to it, nor does it purport to be a means of requiring the Contracting States to impose European Convention standards on other States ....

24. The term positive obligation here is used as it is normally understood in law. The conceptual difficulties with defining those obligations—and whether certain obligations are really positive—are left open because they are beyond the scope of this study.


29. Brownlie, Basic Documents on Human Rights, 403.

However, although a state’s jurisdiction is always limited in space, the concept of jurisdiction used in article 1 and the territory of a state do not necessarily overlap. Indeed, the Strasbourg authorities have made it clear that jurisdiction is a broader concept than territory. For example, in M. v. United Kingdom and Ireland and related cases, the Commission stated that “the High Contracting Parties are bound to secure the said rights and freedoms to all persons under their authority and responsibility, not only when the authority is exercised within their own territory, but also when it is exercised abroad ….” The mere presence of certain state’s agents in the territory of another state does not make the former responsible for human rights violations. Obviously, a state’s agents always remain under its jurisdiction. What is important is the exercise of their authority in the territory of another state. That aspect of the issue was highlighted by the Commission in the above-mentioned case:

The authorised agents of a State, including diplomatic or consular agents and armed forces, not only remain under its jurisdiction when abroad, but bring any other person or property “within the jurisdiction” of that State, to the extent that they exercise authority over such persons or property. In so far as by their acts or omissions they affect such persons or property, the responsibility of the State is engaged.

It follows from this reasoning that the Republic of Azerbaijan will be responsible for the acts or omissions of its agents not only within its internationally recognized territory but also abroad.

Because the Republic of Azerbaijan is a unitary state, it has no internal competing jurisdictions. The central government bears the sole responsibility over its subjects of jurisdiction, and this jurisdiction is unaffected by the presence of an autonomous republic (Nakhchivan), which is separated from the main territory of Azerbaijan. Azerbaijani jurisdiction prevails, first, because the judicial system is centralized and the two main judicial organs are the Supreme Court of Azerbaijan and the Constitutional Court, and second, because human rights do not fall within the legislative authority of the parliament of Nakhchivan, but rather are exclusively regulated by the Milli Mejlis (Azerbaijani parliament).

One matter, however, complicates the issue of jurisdiction of Azerbaijan and has serious implications for human rights: the Nagorno–Karabakh problem. Azerbaijan and Armenia were admitted to the Council of Europe before the resolution of the conflict between them over the territory of Nagorno–Karabakh. At present, a ceasefire exists between the parties, but Armenian troops control up to 20 percent of the territory of Azerbaijan, including the disputed Nagorno–Karabakh and six adjacent Azerbaijani administrative regions. The Azerbaijani government has no authority or representation in those territories. A question arises now as to who is responsible for human rights violations in Nagorno–Karabakh and the rest of the captured territories. Clearly, the self-proclaimed “Republic of Nagorno–Karabakh” will not bear the responsibility for the very simple reason that it is not an internationally recognized sovereign state. Nor can Azerbaijan be responsible, because it does not control that part of its territory. Armenia somewhat inconsistently claims that the conflict is of internal nature, so it has nothing to do with anything happening in Nagorno–Karabakh. However, a lot of direct—as well as indirect—evidence exists that Armenia has militarily intervened and continues

31. That was reflected in article 2 of the ICCPR, which uses the language “within its territory and subject to its jurisdiction.”
32. M. v. United Kingdom and Ireland, Appl. 9837/82, Decision of 4 March 1985, para. 25, European Court of Human Rights.
33. Ibid. M. v. United Kingdom, Decision of 4 March 1985, Appl. 9837/82, para. 25.
34. Thus, article 10 of the 1998 Law on Citizenship obliges the state organs to take all necessary steps to protect the rights of Azerbaijani citizens residing abroad. Logically, failure to take such steps may serve as a basis for lodging a complaint with the court.
to interfere with domestic politics of Nagorno–Karabakh. Moreover, Armenia has its own military bases in Nagorno–Karabakh and certain nearby districts.

The answer to the question posed can be found in the analogous human rights situation that occurred as a result of military intervention in cases concerning northern Cyprus. In the interstate case of *Cyprus v. Turkey*, the Commission held that Turkey could be responsible, notwithstanding that it had not annexed Cyprus nor did it establish military or civil government there. The Commission, however, grounded its interpretation on the basis that Turkish armed forces exercised authority over persons and property in Cyprus. The approach of the European Court to this issue was somewhat different. In the case of *Loizidou v. Turkey*, the European Court decided that “The responsibility of a Contracting Party may also arise when, as a consequence of military action—whether lawful or unlawful—it exercises effective control of an area outside its national territory.” The shift from “exercising authority over persons or property” to “an effective control of an area” has been important. The significance of the judgment for the Nagorno–Karabakh case is that the responsibility of an occupying state can arise not only when the state directly exercises authority, but also when it exercises authority indirectly. Thus, the European Court held that the obligation to secure to everyone the rights defined in section 1 of the European Convention can be derived “from the fact of [effective] control [of an area outside the State’s own territory] whether it be exercised by a State directly, through its armed forces, or through a subordinate local administration.” The latter is exactly the case with the Armenian military presence in and administration of Nagorno–Karabakh. Therefore, the Armenian government should bear the sole responsibility for the infringement of the rights and freedoms guaranteed by the European Convention and protocols thereto on the occupied Azerbaijani territories.

3. Relationship between the European Convention and the Azerbaijani Constitution

We will now examine the Azerbaijani constitution, looking particularly at conflicts that arise with respect to the European Convention.

3.1 The Azerbaijani Constitution of 1995

Apparently, one of the common features of all new constitutions in the former Soviet Union states is their openness to international law, particularly to international human rights law. International attention to human rights has led to the recognition of international human rights instruments in a number of constitutions, which are binding within national legal systems. Moreover, these instruments...

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36. According to article 42 of the annex to the section IV of the 1907 Hague European Convention Respecting Laws and Customs of War on Land, “the territory is considered occupied when it is actually placed under the authority of the hostile army.”
39. Ibid.
40. On depositing the instrument of ratification on 15 April 2002, Azerbaijan declared that it is unable to guarantee the application of the provisions of the convention in the territories occupied by the Republic of Armenia until those territories are liberated from that occupation. See the Council of Europe’s Web site, http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?CM=8&CL=ENG
are superior to national laws. The human rights factor became an imperative chain in the process of “penetration” of international law principles into national constitutions and legal systems in a number of post-Soviet states.

In 1991, following the collapse of the Soviet Union, Azerbaijan regained its independence, which had been lost to the conquering Red Army at the beginning of the 20th century. As with many other newly independent state successors to the Soviet Union, Azerbaijan suffered a period of political and economic instability and disorder. However, as of 1994, the situation stabilized and the country started making necessary reforms in political, economic, and legal spheres. On 12 November 1995, a new constitution was adopted by referendum. It became the first constitution of the independent Azerbaijani state.

The new Azerbaijani constitution incorporates 47 articles concerning human rights. In particular, article 71(6) of the constitution provides that “human and citizen’s rights and freedoms shall be directly enforceable in the territory of the Republic of Azerbaijan.” This provision is reinforced by article 147(2), which stipulates: “The Constitution of the Republic of Azerbaijan shall have an immediate legal force.” Additionally, paragraph 1 of the same article provides that the constitution shall be the supreme law of the country, and article 12(1) asserts that ensuring human rights and freedoms shall be the supreme goal of the state. Thus, as far as the wording is concerned, the relevant constitutional provisions do conform to the “shall secure” requirement of article 1 of the European Convention.

The Azerbaijani constitution implies several quite remarkable changes in the approach to the protection of human rights. First, it accords quasi-constitutional status to international human rights obligations, giving international treaty obligations superiority over ordinary domestic legislation. Article 148(2) states, “International agreements wherein the Azerbaijan Republic is one of the parties constitute an integral part of the legislative system of the Azerbaijan Republic.” Article 151 further adds, “Whenever there is disagreement between normative legal acts in the legislative system of the Azerbaijan Republic and international agreements, provisions of international agreements shall dominate.”

Second, the constitution’s section on human rights brings in an expanded list of civil, political, economic, and social rights that essentially reflect universal human rights standards. For the first time in the history of Azerbaijan, people have an opportunity to realize their real and legitimate constitutional rights. Article 24 of the constitution, opening the human rights section, proclaims that everyone, from the moment of birth, possesses inviolable and inalienable rights and liberties. The constitution outlines such basic rights and freedoms as the right to life, the right to property, freedom of assembly and association, freedom of speech, freedom of conscience, freedom of information, the presumption of innocence, and freedom of enterprise and business. Rudolfson and Eide write, “The Azeri Constitution contains such a broad catalogue of rights that any further effort on the constitutional level would seem to be redundant at this point.”

42. The Azerbaijan Democratic Republic existed from 1918 to 1920.
44. Ibid., 116.
45. Ibid., 116–17.
Third, the constitution includes some third-generation rights (for example, the right to a healthy environment). Article 39 provides that “everyone has the right to live in healthy environment, to gain information about true ecological situation, and to get compensation for damage done to his/her health and property.” This right is overlooked by most international human rights instruments, except for the African Charter on Human and Peoples’ Rights. The constitution provides also for the ownership right (article 29), the right to rest (article 37), and the right to culture (article 40), which many international human rights instruments—for instance, the ICCPR and International Covenant on Economic, Social, and Cultural Rights—omit.

### 3.2 The Constitution in Light of International Human Rights Standards

After Azerbaijan became a party to the European Convention on Human Rights, the issue of the relationship between the international human rights standards and the Azerbaijani legal system inevitably arose. Addressing the constitution not as a freestanding legal document, but within the framework of international law, became vital. With respect to that issue, it would be useful to generally touch on certain related constitutional provisions.

From reading the text of the Azerbaijani constitution, one notes that some textual contradictions exist in the document. For instance, article 7(2) reads as follows:

> The state power in the Republic of Azerbaijan shall be restricted in domestic matters only by law and in foreign affairs by provisions stemming from those international treaties to which the Republic of Azerbaijan is a party to.

Such wording reflects the dualistic approach to relationships between international and national laws. The shortcomings of this wording are evident. First, Azerbaijan is restricted in foreign affairs not only by treaties to which it is a party, but also by international customary rules, general principles of international law, and even decisions of certain international institutions, such as the United Nations Security Council. The fact that the constitution does not mention those sources does not change anything. Second, the language of article 7(2) regards international treaties merely as instruments of foreign policy. The misconception increases when one moves on to article 148(2), which provides that “international treaties to which the Republic of Azerbaijan is a party shall be an integral part of the legislative system of the Republic of Azerbaijan.” However, according to the constitutional doctrine, provisions of the constitution should be interpreted to reconcile all inconsistencies among them. So, one can say that the word law used in article 7(2) implies both national and international laws.

Apart from that, the language of article 148(2) gives reason to say that international treaties need not be incorporated into domestic legislation. Now, does that mean that Azerbaijani courts may apply international treaties directly? Clearly, they may. The jurisprudential doctrine of this country

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49. So far, no authoritative interpretation has been given to the provisions concerned.

50. Interestingly, on 16 October 1992, the Plenary Chamber of the Supreme Court adopted a resolution 1, which provided that “the courts of the Republic of Azerbaijan ought, together with valid legislation, also to apply the ‘Basic Principles on the Independence of the Judiciary,’ approved by the UN General Assembly’s Resolution. 40/146 (13 December 1985)”. What is interesting is not that the UN General Assembly’s resolution, unlike international treaties, does not have binding force, but rather that the Supreme Court of Azerbaijan obliged the lower courts to apply it together with national legislation. By so doing, the court left open the question of conflicts of laws. However, as years passed, it had become clear that the resolution of the Supreme Court was of a rather rhetorical nature, and to date the courts had not applied “The Principles of Judicial Independence.”
certainly accepts the principle of primacy of international law. The question is, however, which kind of primacy? The constitution implicitly distinguishes two kinds of primacy: general and ad hoc. The latter is reflected in the text of article 151, which reads as follows:

In case of contradiction between normative legal acts (except for the Constitution and acts adopted by means of referendum) and international treaties, which the Republic of Azerbaijan is party to, the latter shall be applied.\(^{51}\)

Azerbaijani lawyers and politicians often refer to article 151 as a key provision for understanding the core of the relationships between international treaties and national laws. The Supreme Court, for example, in its decision of 10 March 2000, noted in reference to article 151 that courts should directly apply international treaties until domestic laws are brought into conformity with them. Such ad hoc primacy has nothing to do with human rights, however. Rather, article 12(2) ought to be invoked (general primacy). That article provides that “human and citizen’s rights and freedoms enumerated in this Constitution shall be applied in accordance with the international treaties to which the Republic of Azerbaijan is a party.”\(^{52}\) The difference between articles 12(2) and 151 is very important. The latter does not provide for a criterion of legitimacy of national laws. It only gives international treaties, on an ad hoc basis, a priority over national laws in case of contradiction. In light of article 151, national laws that contradict international treaties are not automatically overruled by the latter; however, article 44.1.3 of the Law on Legal Acts provides that in case of contradiction between a previously adopted normative act and an international treaty, the former loses its force, which does not happen automatically. First, the Constitutional Court, the sole competent authority to nullify and void laws, has to decide the issue. Second, the text of article 44.1.3 refers only to those domestic normative acts adopted before an international treaty comes into force. If courts and executive authorities apply the article’s literal meaning, they may interpret it to mean that acts adopted later may be applied, even if they contradict international treaties.

In contrast, article 12(2) of the constitution establishes a criterion for validity of relevant national laws. International human rights treaties become part of the Azerbaijani legal system not because of article 148(2), but rather because of article 12(2),\(^{53}\) which means that provisions of international human rights treaties acquire constitutional force. Article 151, however, makes international treaties subordinate to the constitution and acts adopted by referendum. This point is very important for the relations not only between international treaties and national laws, but also—and even more important—between laws incorporating international treaties and other national laws. Theoretically, laws incorporating international treaties enjoy the status of ordinary legislation. Consequently, the principle of lex superior derogat legi inferiori\(^{54}\) does not apply to their relations with other laws, because no statute ranks higher than others. As is well known, rules of the same rank are subject

52. Ibid., 68.
53. A general overview of the ranking of authorities in the Azerbaijani legislative system, according to article 148(1) and (2), is as follows:

   1. The Constitution
   2. Acts adopted by means of referendum
   3. International treaties
   4. Laws
   5. Decrees of the President
   6. Resolutions of the Cabinet of Ministers
   7. Acts of ministries and other organs of the central executive power

54. The superior law suppresses the lower law.
to the principle of *lex posterior derogat legi priori*. According to that principle, a statute adopted later takes precedence over the previously enacted one. But, if one applies the *lex posterior* principle to laws incorporating international treaties, then in case of contradiction, laws adopted later should be applied. Obviously, such an approach will lead to an unlawful derogation from international obligations of a state.

The problem here is that in Azerbaijan no tradition exists of direct application of even constitutional, let alone international, rules. The consciousness of judges is shaped by the formula according to which they are liable only for statutes, and the word *statute* is taken literally. The constitution is not a statute, but rather a kind of legislative program to be fulfilled by the parliament. To overcome such a facile approach to the constitution and international treaties, judges should be active and creative. They can reconcile contradictions by interpreting national laws in light of relevant constitutional and international provisions. Another possibility is to regard laws incorporating international treaties as *lex specialis*. In that case, laws adopted later will not take precedence over them.

Coming back to article 12(2) of the constitution, one must not overestimate its significance. International treaties are well known to contain only minimal standards of human rights, and individuals have the right to benefit from the greater protection afforded by local legislation, if available. Quite a number of human rights provisions of the Azerbaijani constitution go beyond the relevant provisions of the European Convention. Moreover, the constitution and ordinary laws of Azerbaijan provide for many rights that the European Convention does not guarantee. Indeed, the very European Convention, in its article 53, provides that “nothing in this European Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms, which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party.”

One more point can be made about international treaties in general: they become binding on the Azerbaijani authorities applying the law only if they were duly concluded. The jurisdiction to check whether an international treaty was concluded in accordance with law belongs to the Constitutional Court. Obviously, if an international treaty was concluded in breach of procedural rules, it will have no legal effect. In fact, that situation will seldom occur. What more important is the content of a treaty. Under article 130(3(6)), the constitution provides that the Constitutional Court may examine only those treaties that have not yet come into force. Since the dates when a treaty comes into force and when it is ratified do not overlap, a question immediately arises: may the Constitutional Court review a treaty after its ratification by Azerbaijan but before it comes into force? Or may the Constitutional Court review a treaty even before ratification? The wording of article 130 is, thus, open to various interpretations. The Constitutional Court itself must give the answer.

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55. The newer law suppresses the older law.

56. The Constitutional Court makes a few exceptions to this policy of looking solely to statutory guidance. For instance, in its decision of 1 August 2003, the court cited *Ferrazi v. Italy*. See the Constitutional Court’s Web site, http://www.constitutional-court-az.org/index.php?j=4

57. Brownlie, *Basic Documents on Human Rights*, 409–10. In the light of this provision, due attention should be paid to the interpretation of article 3(2) of the new Azerbaijani Civil Code, which states, “If the rules established by international treaties to which the Republic of Azerbaijan is a party differ from the rules of civil legislation, then the former shall be applied.” All other codes and ordinary laws contain analogous wording. It is very important to keep in mind that *difference* does not yet mean *contradiction*. The rules of national legislation may very well differ for the better from international rules. In such a case, giving priority to an international treaty would be highly unreasonable. Regrettably, the relevant wordings of various laws deviate from the language of article 151 of the constitution.

58. Courts of general and specialized jurisdiction are not entitled to review either international treaties or national laws.
The Law on International Treaties provides that a treaty should be ratified together with a translated text. That translation, after its approval by the parliament, becomes an official text that Azerbaijani authorities may apply. Here, a special problem arises with respect to human rights treaties. Although translations into state parties’ languages abound (often in contradiction with one another), they are all unofficial.\footnote{An exception is an official translation of the European Convention on Human Rights, which is nevertheless not 100 percent accurate.} As a result, national European courts use nonauthoritative texts with inadequately translated legal terms, and the judicial practice can become illegitimately diverse.

Furthermore, the term \textit{everyone} used in article 1 means that the European Convention affords its protection to any person who falls under the jurisdiction of a contracting state. Consequently, states ought to guarantee not only the rights of their own citizens, but also those of aliens, stateless persons, persons having several nationalities, and even persons lacking legal capacity. The \textit{personal jurisdiction} of a state covers not only those who are continuously or temporarily in its territory, but also those who occasionally come under its competence (e.g., visa-seekers).

Article 1 connotes that, unless specifically provided elsewhere in the European Convention (e.g., article 16) or its protocols (e.g., article 1 of Protocol 1), all people, regardless of their nationality or status, shall enjoy equal rights. This meaning is reinforced by article 14 of the European Convention, which prohibits discrimination on any ground in securing the rights and freedoms provided for. In that regard, the Azerbaijani constitution in most of its human rights provisions uses the term \textit{everyone}, thus implying that those rights shall be guaranteed to any person who falls under the jurisdiction of the Azerbaijani state. The constitution then goes on to state in article 25 (on the right to equality) that

\begin{enumerate}
  \item \textit{Everyone shall be equal before the law and European Courts.}
  \item \textit{Men and women shall have equal rights and freedoms.}
  \item \textit{The State shall guarantee to everyone their rights and freedoms regardless of race, nationality, religion, language, sex, origin, property, occupation, political convictions, membership in politics parties, trade unions, or other organization. Restrictions of human and citizen’s rights and freedoms based on race, nationality, religion, language, sex, origin, convictions, political and social affiliation shall be prohibited.}\footnote{Constitution of the Republic of Azerbaijan, 117.}
\end{enumerate}

The constitution, however, when referring to “nationality” means “ethnicity” rather than citizenship. Consequently, aliens are not protected from discrimination by article 25. Nonetheless, article 69 specifically concerns the rights of aliens and stateless persons. It provides that aliens and stateless persons shall enjoy equal rights with Azerbaijani citizens, unless the laws and international treaties to which Azerbaijan is a party provide otherwise. Article 69 goes on to stipulate that the rights of aliens and stateless persons may be restricted only in accordance with international legal rules and laws of the Republic of Azerbaijan.

As already mentioned, the majority of the human rights provisions of the constitution refer to “everyone” when identifying the right-holder. Indeed, among 47 articles concerning human rights, only 7 refer directly to Azerbaijani citizens.\footnote{These articles are the following: article 28.4 (the right to return to one’s country at any time), article 52 (the right to citizenship), article 53 (guarantees of the right to citizenship), article 54 (the right to participate in political life of the society and the state), article 55 (the right to participate in governance of the state), article 56 (the right to participate in elections), and article 57 (the right to petition).} One can conclude, then, that all other rights defined in
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the constitution, including those enshrined by the European Convention, extend equally to aliens and stateless persons. However, as is seen from the text of article 69, the constitution itself allows the legislature to restrict the rights of aliens by means of current legislation. For example, although article 48 of the constitution provides for the right of everyone to freedom of religion, including the right to disseminate religious ideas, the Law on Legal Status of Aliens and Stateless Persons in its article 18(2) prohibits noncitizens from propagating religion.\textsuperscript{62} Another example could be the Law on Public Health, which in the preamble limits the scope of its application to the relations between citizens and the state and in article 10 provides that only those stateless persons who permanently reside in the territory of Azerbaijan shall enjoy the right to health care in accordance with international agreements in the field concerned.\textsuperscript{63} And these provisions apply even though article 41 of the constitution speaks of the rights of everyone to health care and medical aid. Article 57 is particularly interesting and thought provoking in that sense. It specifies in paragraph 1 that only citizens of Azerbaijan have the right to appeal personally and also to submit individual and collective written applications to state bodies. The article does not mention a possibility of appealing and submitting petitions to international organs for the protection of fundamental human rights and freedoms if they have been violated and all available domestic remedies are exhausted. Furthermore, paragraph 2 of the same article stipulates that citizens of Azerbaijan have the right to criticize activity and work of the state, its officials, political parties, and institutions.

Obviously, such textual inconsistencies should not be allowed to establish the practice of illegitimate—from the viewpoints of the European Convention and Azerbaijani constitution—discrimination of aliens and stateless persons. Therefore, either the respective provisions of the above-mentioned and other laws should be amended to bring them into full conformity with the constitution and the European Convention, or the Constitutional Court should give them, to the extent possible, consistent interpretation. Otherwise, the government might put itself at risk of being held responsible for violation of the rights of aliens and stateless persons by means of illegitimate discrimination.

4. Conclusion

Azerbaijan’s membership in major international organizations—in particular, the Council of Europe—has brought colossal challenges to the domestic political and legal system of Azerbaijan. The country has become part of the European community, sharing its common human rights principles and humanitarian values, and it took on a number of significant international commitments and obligations. Ratification of the European Convention on Human Rights further increased the role of human rights in the internal matters of Azerbaijan and created an international human rights model, against which any act of national authorities and legislators should be measured.

The foregoing analysis provided us with several examples of inconsistency between Azerbaijani domestic legislation and international human rights standards. However, the general constitutional framework of the Azerbaijani legal system conforms with the spirit of article 1 of the European Convention. For a country that is almost lacking any democratic tradition, this situation is encouraging. Certain textual inconsistencies are capable of being reconciled by means of judicial interpretation—much depends on practice. To that end, the Constitutional Court of Azerbaijan should provide an official interpretation for some implicit articles contained in the constitution of Azerbaijan. It should

\textsuperscript{62} For the text, see http://www.consulting.minimax.az/Content.

\textsuperscript{63} Ibid.
extend the application of the European Convention’s protected rights and the European Court’s jurisprudence to situations in which the constitutional protections of the Republic of Azerbaijan have not yet reached. Certain laws and legal provisions should be revised and brought into conformity with international standards.

The Council of Europe and other international organizations, such the United Nations and the Organization for Security and Cooperation in Europe, work in close cooperation with Azerbaijani judicial and legislative authorities to help upgrade the Azerbaijani domestic legal system to the required level of international standards. Much has been done, but much still remains to be done in order to fulfill this difficult task.

No doubt exists that domestic law must give full effect to the rights guaranteed by the European Convention. The role of the Strasbourg machinery is only subsidiary to guaranteeing of European Convention rights in national laws. A solid legal basis for the protection of human rights must be available at a national level. Such a foundation must be accomplished by reliable law enforcement mechanisms. Therefore, the better the system of protection within the national legal orders, both in securing the rights guaranteed by the European Convention and in remedying violations of those rights, the more effective the implementation of international standards and the fewer cases will need to be brought before the European Court of Human Rights.
Interview with Sigma Huda, United Nations Special Rapporteur on Trafficking in Persons, Especially Women and Children

Dr. Mohamed Mattar, Executive Director of The Protection Project [Dr. Mattar]: Naturally, I would like to start with the United Nations mandate for the special rapporteur on trafficking in persons, especially women and children. Could you tell us about your reporting on the status of trafficking in persons: what are you covering, for how long, when we might expect reports to come out, and any specific regions that you might be covering under this United Nations mandate?

Ms. Sigma Huda, United Nations Special Rapporteur on Trafficking in Persons, Especially Women and Children [Ms. Huda]: As you know, this mandate was taken up in 2004, on 19 April. Trafficking has become a huge problem worldwide, and in most cases one can see that the trafficking flow takes place mostly from developing countries to the developed or first-world countries. One can also see a cycle of trafficking taking place within the countries themselves, both in the sending states and the receiving states, as well as in the transit states.

The enormity of this problem led the United Nations to decide that it should be addressed as a separate human rights violation issue, and as such, the mandate was created. Though the mandate came out of a law-and-order framework prevalent at the time, when trafficking was being looked at as a law-and-order problem, the United Nations felt that it was also a human rights issue in the sense that victims of trafficking must be recognized as victims of trafficking and, therefore, that they should not be treated as undocumented, illegal, irregular, or smuggled migrants. There exists a basic difference between migration and trafficking.

My mandate is to look at the human rights of the victim of trafficking, [at] the dignity of the victim, and at what kind of treatment the victim is getting once the victim has been recovered in either the receiving, transit, or even the sending state.

Dr. Mattar: When you cover trafficking, I am sure that you are following the definition of trafficking under article 3 of the United Nations Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children of 2000 [hereinafter UN Protocol or Palermo Protocol].

I have a few questions in this regard. The first is the issue of sex trafficking versus labor trafficking. I understand that the UN Protocol does not consider sex as labor and approaches these two

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1. Sigma Huda, a lawyer by education and profession, is a longtime advocate for human rights, especially women’s rights, in Bangladesh and around the world. For many years, she has also been involved in mobilizing civil society in Bangladesh. She is the founder and current president of the Bangladesh Women Lawyers Association and founding secretary of the Institute for Law and Development, in addition to the leading roles she has played in many other organizations. She has worked particularly hard toward combating trafficking and sexual exploitation of women. In recognition of her work against trafficking, the prime minister of the People’s Republic of Bangladesh appointed Ms. Huda to the National Council for Women in Development in Bangladesh, the highest national body for the development of women. She has organized and participated in numerous international workshops and seminars and has worked closely with various United Nations institutions. She took up her current UN rapporteurship mandate in 2002.
Ms. Huda: Well, my mandate covers all forms of trafficking, including practices similar to slavery and sexual exploitation and prostitution. It also talks about forced labor and forced marriages, so it is quite a wide mandate. Anything [that] is committed against the will of an individual—when control lies with a third party and you are not really free to do what you want and you are in a situation of exploitation—would fall within the definition of the Palermo Protocol. So I guess if you see a distinction between sex trafficking and prostitution—as well as forced labor and forced marriage, which is also a slavery-like practice—and debt bondage, then I would also be looking at that.

I will also be looking at the issue of prostitution, because one cannot deny that a woman (or a man or a boy) [is] often trafficked for the purpose of sexual exploitation. In most cases, we find that when a person is exploited or trafficked, he or she finds himself or herself in a situation where [he or she is] more vulnerable to prostitution. And the sex business is a very big, billion dollar business. I do think that the importance of discussing prostitution is crucial, as is the need to address the issue of forced labor. We often see that even lawful migrants can fall into a situation of being trafficked.

Dr. Mattar: So does it make any difference whether a country is legalizing prostitution or making prostitution a crime? How do you feel about that issue?

Ms. Huda: I am very strong on the question of prostitution because I feel that there can be no legality of a situation in which a woman is not in control of herself. Even if we talk about “free” or “voluntary” prostitution, there is no such thing as purely voluntary prostitution, because once you are put into a situation where somebody else has control over your body, you don’t have any control over yourself anymore—rather, the man or the person who is the customer would be using the body in any way he wants to use it. He has bought the body, he has paid for the body, and for the time being, he is therefore the owner of this body.

In such a situation, the victim becomes very vulnerable to the possibility of all types of horrors and crimes. There is no such thing as a clean and socially acceptable prostitution. And I have also seen that even in those countries where prostitution has been legalized, people don’t encourage a prostitute living as a neighbor and don’t want to be seen in the neighborhood of a prostitute. Even in those countries where prostitution is legalized, there is no complete social acceptance of prostitution. So those are my thoughts on that. But that does not mean, however, that if I find a victim of prostitution, I would not extend to her the necessary assistance and help to get her legal rights established. It doesn’t mean that I wouldn’t see to it that she doesn’t get an opportunity to come out of prostitution—because prostitution is harmful, not only in regard to her physique, but also [in regard] to her psyche, as well as to her environment and atmosphere. A victim in this situation is also very prone to taking drugs. Most of the prostitutes [whom] I have met have resorted to taking some kind of drugs to keep themselves going so that they don’t think about the harm that is being done to their body. I would seek to give her protection in this situation.
Dr. Mattar: Since you mentioned vulnerability and you mentioned forced marriages, do you see early marriages, arranged marriages, temporary marriages, marriages by catalog, as contributing factors to trafficking in any way? Do they make women more vulnerable?

Ms. Huda: Oh, yes, very much so. Not arranged marriages. I would like to distinguish between forced and arranged, because there is a very thin line. And when working with the British Home Office in South Asia on the question of forced marriage, I have always said that we need to draw that line. In forced marriages, consent becomes immaterial. For instance, in Islam—the religion—there has to be consent. But in a social context, this consent is very immaterial. It’s expected that someone is arranging a marriage for you. In such cases, the woman or young girl has not been given the option to choose a spouse or have a say in the matter, so she is forced into a situation which is not of her making. And then she finds herself trapped.

Dr. Mattar: You mentioned Islam, and my understanding is that Islam allows for early marriages—because there is no age of [majority for] marriage for Islam—and also temporary marriages under [a] certain understanding of marriage. How do you reconcile that with those who argue that early marriages and temporary marriages contribute to trafficking of women?

Ms. Huda: In Islam, as you said, there is no minimum age of marriage. But Islam has its own particularities by saying that you could repudiate a marriage that your parents have gotten you into, [for example,] if you are a minor below the age of puberty as in strict Sharia law, in which the age of consent is the age of puberty. In that case, a child who is married off before the age of puberty can repudiate her marriage upon attaining puberty, provided, of course, that she has not consummated the marriage. That has been extended to bring in the age of 18 in our cases, and today our minimum age of marriage for girls is 18; so you can only marry at the age of 18. This [age of consent] also applies to repudiation of the marriage. When the child has been married before the age of 18, by the guardian or the parent, on attaining 18 she could say …,”I don’t accept this marriage,” and she has that right. This is not the case with other religions, so that is one redeeming feature.

Dr. Mattar: How about temporary marriage in Iran, Iraq?

Ms. Huda: You are talking about mutah marriages.

Dr. Mattar: Yes, mutah marriages.

Ms. Huda: I don’t think that there is so much of this practice these days. Mutah marriage is really in very restricted areas of the Islamic world, and it is not prevalent in most of the countries. I do not [know] how I reconcile this question of mutah marriage—the idea of a man wanting to create a temporary marriage contract, whereby the woman is being allowed to service him, not only sexually but also otherwise, just because he needs some kind of caring. He is being allowed to take a second wife, a temporary marriage, and trial period. Children born of that marriage are legitimate—but that poor woman. She is left on her own. I would say that I don’t think that this is something I would be attracted to, but maybe in those days when Islam was first revealed,
because of the pre-Islamic culture, because of the long journeys by slow vehicles and other kinds of transportation, maybe they felt that there was a need because the man was so helpless, in such a pitiful condition that he needed this. But it puts the woman in a very vulnerable position. I don’t think I can adhere to it. As a person, as a human rights advocate, and as a feminist, I don’t think I would be OK with the idea of such an arrangement.

Dr. Mattar: An important form of trafficking that is subject to debate is trafficking for the purpose of illicit intercountry adoption. Some argue that this is not really a form of trafficking because of the absence of the element of exploitation, since the child—assume that he is being taken from one country to another—will end up in a family. He may end up in a better situation, and there is not really any exploitation here. Do you consider movement of children for the purpose of adoption as a form of trafficking, and does that fall within your mandate?

Ms. Huda: Well, actually, I think there is a danger in intercountry adoptions, unless there is very stringent monitoring and there is a guarantee that you really can find the kind of family the child deserves. I do feel that there is a chance of good homes being found, but in most cases you find that there has not been a proper verification of the family, and within the family there could be exploitation. You also hear of children being put into a situation of not only sexual exploitation but other forms of exploitation as well. When a prospective home study has not been done properly, or the legal requirements have not been fully complied with, or federal monitoring or follow-up [is] not taking place, then of course the child becomes definitely vulnerable—very, very vulnerable. And we are very concerned here in Bangladesh about intercountry adoptions, because in Bangladesh we went through a war of liberation and we had lots of war babies. The women of Bangladesh were raped by the occupying forces, and we had children [who] in the Bangladeshi context were not being accepted, [because] they were viewed as illegitimate, and there is no process of legitimization in our legal system. We then saw that intercountry adoption did put the children in various places in Europe and did put them in vulnerable positions. We heard stories of when the children were used for pornography, child prostitution, and snuff movies. When the tsunami came through, I am glad to say that the Sri Lankans managed to control their orphans and abandoned orphans, and immediately the government stepped in and said there was no room for third countries or third parties to come in and put in claims for adoptions, thereby minimizing the vulnerability of these poor children to situations of being exploited through the guise of adoption.

Dr. Mattar: And that’s why the Hague Convention on Adoption makes intercountry adoption the last resort. So that you try to place the child with his own family to the extent possible and, if you cannot do that, then try adoption inside the country itself. And only if this is not possible, you can take the child outside his or her country.

Another context that may give rise to vulnerability to trafficking is a postconflict situation. And I am talking especially about Iraq. Do you support or detect that there are some instances of trafficking that are taking place now in Iraq that did not take place before the war? Are you covering Iraq in any specific way as part of your mandate?

Ms. Huda: I think that any postwar conflict situation or any warlike situation will be very high on my list of concerns. In reference to Iraq, as in any situation of this nature, there will likely be a
lot of sad stories. Though I have not been able to visit Iraq, I have tried to make my visit to some postwar conflict situations like Bosnia, and I am now going to Lebanon to look at the situation in the Middle East, so I can gain clearer understanding of the situation in the Middle East as concerns trafficking in its various forms. Whenever there is a warlike situation and civil unrest, we always find that the women and the children are more vulnerable.

**Dr. Mattar:** While we are speaking of the Middle East, what are your thoughts on domestic service, where exploitation often occurs and [which] is a problem in countries like Saudi Arabia?

**Ms. Huda:** Oh, yes, very much. In preparation for going to Lebanon, I have heard lots [of] stories on the domestic service issue in the Middle East. This is an issue that I’ve been involved with for a very long period of time, and I did bring out wounded women from Kuwait once who I would say were trafficked, because of the slavery-like conditions that they found themselves in as domestic help.

I hope that I will get an extension for another 3 years so that I [can] really organize myself more into looking into this and other aspects of trafficking, which are so many.

It is also such a worldwide phenomenon, trafficking. It takes place from East London to South America to the Euro zone; from Africa to Spain and Italy and other countries; and from Asia to Europe. I don’t think there is any country that is devoid of trafficking problems. Even the United States of America is not devoid of trafficking problems, with victims coming from outside the country to the United States. And internal trafficking is also going on across the United States, as well as from Central America and South America to the United States. These are all great concerns.

**Dr. Mattar:** I want to move to the issue of civil society. Recently, the Egyptian government refused to let civil society supervise the elections that took place in September 2005. How do you get governments to recognize the role of civil society? But first, let’s address the question of whether and how you are covering civil society and the role of NGOs [nongovernmental organizations] in your work as the rapporteur.

**Ms. Huda:** I rely a lot on NGO and civil society input into understanding the situation of trafficking in their countries because governments don’t always give good reports. No government or country would like to admit that they have a trafficking problem. If they do admit to the existence of a problem, they won’t admit to the actual extent of that problem. So, of course, the information that I rely on is what I gather in addition to government reports from the NGOs, human rights activists, and civil society. A government that doesn’t allow civil society to watch—or even to see—means that the government is not being transparent, which is a concern, maybe not directly covered by my mandate, but is an important issue.

**Dr. Mattar:** I want to refer you to articles 6 and 9 of the UN Protocol, because there is no specific provision in the protocol on civil society in the way, for example, the European Convention on Trafficking that just recently came out has a specific provision on civil society. However, one can make the case that there is an international obligation, which is imposed upon all states, to cooperate with civil society when it comes to the issue of trafficking. If you take a look at article 6, it talks about protection of victims, and it says that states shall adopt these protective measures in cooperation with NGOs and members of civil society. The same thing [occurs] with article 9,
which talks about preventive measures and says that states shall take these preventive measures in cooperation with civil society. So based upon these articles, I think one can safely make the argument that there is an international obligation of cooperation with NGOs. What do you think about that?

Ms. Huda: I think your interpretation is correct. I think those states that have ratified the UN Protocol definitely owe it to themselves to work in close collaboration with civil society and NGOs, especially as it is a recognized fact that most of the work is done by civil society and the NGOs in combating certain kinds of offenses and crimes, including trafficking. This call to the member states to work in collaboration with civil society and the NGOs speaks volumes. Obviously, some of the member states do have to work in close collaboration with NGOs and civil society, and I think in most countries they are doing that. Because of the nature of trafficking, it’s not possible for a government to solve or bear all responsibility. The government has to share the responsibility, and civil society is part of the whole structure of any country in any case. It could also be said that the NGOs and civil society are the ones that assist in good governance, and civil society has a lot of responsibility in encouraging the state to function properly.

Dr. Mattar: When we talk about the role of civil society, I understand that NGOs play a role in prevention and protection. But how about prosecution? I would like you to perhaps also think about a role for civil society in helping with cases of prosecution. The other area also which I think is important is the identification of victims of trafficking. It is a huge problem in many countries. We talk about trafficking, we talk about victims of trafficking, but we cannot find the victims, identify the victims, and reach these victims so that we can provide them with protection. I think this is an important area that the government must cover with the help of civil society.

Ms. Huda: Definitely, I think that it is much easier for an NGO or a civil society group to identify a victim than it is for the government itself. As I would say myself as a member of not only one but two or three NGOs, it’s much easier for me to identify a victim than it is for a member state. An incident of trafficking is normally brought to the attention of the government at a later stage than it is brought to the attention of an NGO. And because civil society organizations are constantly working with each other and working with the common people, the common people feel more comfortable in sharing or expressing issues and problems to civil society rather than the government, because the common people are very much afraid and they would say that, yes, we saw a changed issue in there because the common people are very much in fear of the government. The child traffickers are rarely caught. Somehow they always manage to get one step ahead of the law; they are very elusive. And the only way that maybe a victim or vulnerable person could, would, open up, would be to an NGO or a member of civil society who could then follow up on the case and take care of the victim. Of course, you, as an NGO member, could assist in the prosecution, if the legal system provides for this possibility. But it is also a problem to produce evidence and witnesses, because in most of the countries, there may not be any witness protection system. People are very frightened to get themselves involved in a case of prosecution, as they may think they might become an easy target of prey themselves.

Dr. Mattar: You mentioned witness protection and the absence of witness protection programs, what are your thoughts on effective witness protection?
**Ms. Huda:** I think that there is a need for a complete witness protection scheme on the part of the countries. Currently, in most of the countries where I have seen legislation relating to witness protection, I find that witness protection is provided only during trial, but nothing beyond trial, even though the woman continues to need that protection—because we must remember that traffickers don’t operate singly. Rather, they operate as syndicates, and obviously when the traffickers are brought to justice it is not the entire chain that comes in. There are always some persons who are left out, and these persons again could be intimidating and pose danger to the woman. I think that the witness protection scheme should be complete and fully encompassing through pretrial and in trial and post trial.

**Dr. Mattar:** There has been a legislative movement in the last 4 or 5 years, and many countries now have specific antitrafficking legislation. Are you satisfied with the legislation that has been adopted in the area of trafficking, or do you think it lacks something? What do you think about the legislation that countries have in place?

**Ms. Huda:** There are some countries that have very stringent laws, and the more stringent the laws, the easier it is for the victim of trafficking to come forward. But I would say that in most countries, when the victims are found and recovered, they find that they don’t get much space, dignity, or opportunity to think about themselves. They need more space to think about whether they should go back home. They should not be deported, and they should not be treated like an illegal, undocumented migrant worker. They should be treated more like a person who has been a victim of an offense. Most of the time, the antitrafficking laws do talk about the deportation of the victim back to the country of origin, where she could become vulnerable again to retrafficking. Instead, she should be given an opportunity to get a job, or she should have the opportunity to think about what she could do for herself, where to go from here, what her alternatives are, and her options. And the government, which has recovered her, should be also more sympathetic to her. So maybe the antitrafficking laws need to look into all these aspects, because it is not just a criminal law issue in all situations; it is beyond that. It is not just picking up a trafficker, prosecuting him, and putting him into jail; it is beyond that. At the same time, the victim of trafficking should be given all sorts of benefits and privileges and opportunities to enable her to come out of the storm in which she is in, enable her to go back home in dignity or wherever she wants to go. It should not be just an act of mere prosecution.

**Dr. Mattar:** Moving on to statistics. I am sure you’re aware of the fact that we are having problems charting how many victims we have. How are you dealing with the numbers? You talk to NGOs, and NGOs perhaps tell you that there are too many victims of trafficking. You talk to the governments, and the governments provide you with almost nothing, or perhaps statistics that show that there are not too many cases of trafficking, and then you talk to even ourselves as an academic institution, and we are having a hard time reaching the exact numbers in a country or in a region. How do you cover the statistics issue?

**Ms. Huda:** Well, actually, the very term trafficking denotes something illegal. So how does one have a statistic on such an illegal act? There could be some estimates, and I think that I have at least come up with some kind of an estimate, which is based on various summaries that are based
on information gathered from various sources. So you cannot really rely on statistics—as you said—about the number of trafficking victims, or how much of trafficking is going on. ... You could only say there is trafficking taking place and that it’s a very grave offense and there are a lot of people being moved across the world because of this offense. You could try to summarize the recovered victims, but you cannot say on the whole that, as a matter of fact, yes, 200,000 women are trafficked from Bangladesh yearly to Pakistan or monthly into Pakistan. You cannot really put a figure to it.

It’s a very difficult situation to put an exact figure, but of course you need to have some sort of an estimate, using which you could say that, yes, because of the numbers of victims that I have recovered, while I can’t say that it represents is one-tenth or one-fiftieth, ... I could definitely say that, yes, this is a grave concern. [S]ince this many victims have been recovered, then obviously there are more than what can be seen and there have been more out there who are not yet recovered and who are susceptible.

Then you also have the root causes of trafficking, which can give you an indicator as to how many people could have been trafficked or may be trafficked. There are certain areas which are more vulnerable, and you can always see that. So you can understand, then, if there is too much poverty, there is lack of opportunity, or there is something like feminicide or something like that. These could all be indicators of trafficking taking place. You can see that there is a tendency—because of culture, social norms, lack of opportunities, poverty, [and] lack of education and facilities—that people definitely are going to go abroad, where they feel they can reach greener pastures. So those things will have to be looked [at] and then definitely those things we have to notice that could be an indicator, but we cannot say for certain that this is the statistic: that 200,000 women are being trafficked into Pakistan or that so many people have been trafficked all over the world. You cannot really put a number to it.

**Dr. Mattar:** Another issue which is of concern to us is the issue of demand—going after the purchaser of the services, whether sexual services or other types of services. As you well know, the UN Protocol, under article 9(5), addresses the issue of demand as an issue of prevention. At the same time, the European Convention of May 2005, in article 19, covers the issue of demand also as an issue of prosecution. It now mandates that European countries should criminalize the use of the service if the service is or would be provided by a victim of trafficking. Something along the lines of the Macedonian law as opposed to the law of Sweden, which punishes the customer of prostitution regardless of whether the person providing the sexual service is a victim of trafficking or not. So I just want to get your reaction to the whole issue of the customer. Some argue that it is very difficult to do that, that we should focus on the trafficker. Why do we have to bother ourselves with the customer? Some argue that it is very hard to change the behavior of the customer. What do you think about that?

**Ms. Huda:** You cannot address the issue of trafficking, the issue of customers, unless you address the issue of demand. When you’re talking of trafficking, you are talking of supply, and, of course, as anybody knows, if there is no demand there is no supply. And there is a demand, whether [it’s] for cheap labor, whether it’s for exploited labor, whether it’s for mail-order brides, whether it’s for forced marriage, or whether it’s for prostitution. Unless you address that demand, you really cannot address the issue of trafficking or combating trafficking. You have to look at both
perspectives—the supply and the demand—because these two are related to each other. We have to look at the question of demand. We really have to look [at] why there is a demand. I have just addressed an Asian-Pacific regional conference, organized by the government of China and the Office of the High Commissioner for Human Rights, and I did ask for research that would look into this question—and I think it has to be a joint research, in which both the sending and receiving countries are involved—to find out exactly why a particular type of trafficking takes the shape that it does. Is it because of the demand? And if so, what is the demand in a particular context? And is it likely that we can control the demand? And how do we look at a particular context of trafficking from both perspectives—the supply and the demand?

**Dr. Mattar:** So you support a law like the Swedish law?

**Ms. Huda:** I support the Swedish law, yes. I think it is a good law, which says that the crime of buying prostitution should be punished, and we have been advocating that for quite some time here [in Bangladesh] also. Some might say that prostitution is a matter of personal economics and survival, but from the victims’ point of view, we should look at better opportunities for potential victims of prostitution and gear up our resources and provide them to these women. In this regard, civil society again has a role to play, NGOs have a role to play, international organizations have a role to play, and the governments have a role to play. All have a role to play to see that these vulnerable groups do get alternative opportunities for survival and better circumstances than what is being offered to them in the shape of demand for prostitution. I think it is a good idea that the Swedish government has decided to punish the purchaser, and I believe that this is something that should have been done by other countries where there is too much prostitution and sexual exploitation going on.

**Dr. Mattar:** Under the law of Macedonia, if the purchaser of sexual services has the knowledge that the person who is performing the sex act is a victim of trafficking, he would be subject to imprisonment from 6 months to 5 years. This law is different from the Swedish law. The customer would be punished only if he has the knowledge that the person is a victim of trafficking. What do you think about the Macedonian law?

**Ms. Huda:** I think anybody in this situation is a victim of trafficking in persons. I am going to look at prostitution and a prostitute as a victim of trafficking. I don’t want to make the voluntary and involuntary distinction, because the victim may think that the reason that she goes into it without anybody forcing her into prostitution is the fact of survival. It is certainly the compelling and propelling factor that says, in order to survive, this is what you need to do. So I would much rather go with the Swedish law and not make any distinction between no knowledge of being a victim of trafficking and the existence of that knowledge. In other words, this means that I am not actually for the legalization of prostitution.

**Dr. Mattar:** So you do not support the new European Convention that criminalizes or calls upon states to criminalize the behavior of the customer only if the customer has the knowledge that the person who is providing the services is a victim of trafficking?
**Ms. Huda:** I did go through the European Convention and I thought some parts of it were very good, but there is definitely the question of the caveat of her being the victim of trafficking. I can understand why the European Convention was made the way it was, because of the fact that there are certain countries that have legalized prostitution and do not look at it from the viewpoint that I am looking at it. So from their viewpoint, maybe they were correct in saying, “OK, unless you know she was a victim of trafficking.” And as a lawyer, I would insist that [language] to mean everyone being a victim of trafficking. I think the definition of the victim of trafficking is very wide and expansive. We can shape it. We could interpret it the way we would like to understand it.

**Dr. Mattar:** Speaking from the United States, I wanted to get your opinion on what the United States is doing in its reporting on the severe forms of trafficking in foreign countries. Do you support a reporting mechanism of that nature, as implemented by a country, and do you support imposing sanctions on countries that do not comply with what the United States considers as minimum standards for the elimination of trafficking?

**Ms. Huda:** Well, actually I have gone through some of the TIP [Trafficking in Persons] reports of the United States, placing countries on various tiers, and sometimes the reporting sources were not very accurate. I would say that in imposing sanctions, you should [be] very, very sure of your sources, because the imposition of sanctions is a very serious thing for a country. But, yes, if the country is very negligent toward controlling or combating trafficking, then, yes, sanctions are a method. But I think that also we will have to rely a lot on who the sources are, and what the means and mechanisms of identifying countries’ position on a tier are, or whether they fall on the watch list or not on the watch list. We have to be very careful about what the criteria and yardsticks are for measurement, because the TIP report doesn’t really cover that.

**Dr. Mattar:** I am not clear as to the reporting mechanism under the United Nations protocol on trafficking. In my understanding, there is no specific provision that requires countries to report to the United Nations on what they are doing in the same way you have under the CEDAW [Convention on the Elimination of Discrimination against Women] or the Rights of the Child Convention. Can you help me understand that? Are there plans to require countries to report to the United Nations under the trafficking protocol? What does the protocol say on that?

**Ms. Huda:** Well, this is a recommendation that could come from me, definitely, on a mechanism that could be implemented to encourage reporting from states. Obviously having a special rapporteur who is an independent expert, and who can question governments and the receipt of complaints about them, is quite a big step in making a country answer regarding what they are doing about combating trafficking. So I think that in the current situation, even though there is no reporting mechanism, having an independent expert is one kind of mechanism that is involved.

**Dr. Mattar:** When we talk about civil society, we tend to focus on NGOs. I would like you to very quickly tell us about the ordinary citizen. What I mean here is public participation, the role of the ordinary citizen in helping, through reporting, to prosecute the crime of trafficking. So if the person—the public—sees something that is suspicious, he would forward a report of trafficking. Don’t you think public participation is really important also?
Ms. Huda: Well, yes, very much so, and I did mention that early on when I said that we do rely a lot on the members of civil society—meaning that civil society in an expansive definition, the public at large. I say this especially because each community knows its people, and each community can recognize strangers to their community, and if they are watchful of such strangers, they may be able to identify who is a victim of trafficking or a trafficker. And so we definitely rely a lot on this type of public support, and I think it’s a good thing and I fully agree with you.

Dr. Mattar: How do you interpret the fact that the United Nations became concerned with the issue of trafficking to such an extent in 1999/2000? Why now? People come and ask me that question all the time. Why is trafficking in persons taking so much attention right now, perhaps at the expense of other human rights violations? How do you explain this fact, also, outside of the United Nations, in countries around the world, where people are now talking about trafficking in persons in a way that was not talked about 10 years ago?

Ms. Huda: Well, trafficking has been in existence for a long time, and it’s become of a certain magnitude so that it’s gotten noticed. And I think that whether it’s 1999 or it’s 2005, it doesn’t matter, as long as somebody did wake up to the idea of making countries accountable and responsible in controlling and combating trafficking. And trafficking, I can say, is one of the worst violations—one in which a human being is not being allowed to do what a human being should be able to do to live his or her life with dignity. And the United Nations has at last woken up to the fact that women are being trafficked and men are being trafficked into situations which are beyond their control, in which they are not free people, and in which they have been under deceit and coercion. I don’t want to look at this from the point of view that certain countries are wanting to control the free movement of human beings or … to close their borders, not in a very obvious way, but indirectly, through screening people and allowing certain kinds of people into their country but not others. I don’t want to talk about all that. I would rather take it as that states are willing to combat trafficking. And when I talk about this, I would also simply like to reiterate the fact that the victim of trafficking should not be prejudiced in any way. The victim of trafficking should not be made to pay for the crime perpetrated upon him or her by a third party or the trafficker. I don’t want her to become again a victim by the receiving state’s deporting her or putting her in confinement, detention, or something similar.

Dr. Mattar: Do you think this focus on the problem will continue, at least from the United Nations perspective? Are you going to keep pressing for more efforts on the part of governments to do something about trafficking?

Ms. Huda: Yes, because I would like to propose something to the United Nations. I hope that by the second year of my term I will be able to propose to the United Nations that we would like to make a survey of how many countries have responded to the problem of trafficking, in what way, how many prosecutions have taken place, how many countries have upheld the human rights of the victims of trafficking, and how they have distinguished themselves in allowing the victims of trafficking more freedom and latitude than others, such as undocumented migrants in their country. And I would like them also to highlight the distinguishing factors that exist between trafficking and migration.
**Dr. Mattar:** So do you see the problem as expanding or improving this last 2 or 3 years?

**Ms. Huda:** It is too early for me to say that it’s improving, but definitely there is a consciousness amongst all people of the world that this is an offense and an abhorrent crime and there is a great number of women and men and children who are being trafficked across international borders, within national borders, and that these issues need to be looked at. And there is a lot more responsibility being taken on the part of governments, so this awakening is there. But I don’t think there will be a reduction, but there on the contrary will be more, unless more mechanisms could be involved in combating this more widely—for example, by swapping notes between states and finding out exactly where we stand, what we have done, what we can learn from our mistakes. Then we could go on ahead and evolve more ways and means for fighting trafficking more successfully. I think that we can see this expanding, and I can see the controlling factor coming together in a better way.

**Dr. Mattar:** Finally, I want to ask you what an organization like this one can do to cooperate with you and to do something to contribute toward the good work that you are doing at the United Nations.

**Ms. Huda:** Thank you, Dr. Mattar. I have a questionnaire on the Web site on the question of demand, and I would like you to see that. And I do welcome your cooperation in helping me with gathering information on this issue, because, as I said, one person can’t do anything by oneself. This has to be a concerted and joint effort, and I do welcome any input that you might give me that would assist me in making a very strong and good report, and I would definitely like you to look at the questionnaire that I put on the Web site and get some input from that. Thank you very much.

**Dr. Mattar:** I want to really thank you very much for taking the time to speak with us on this important issue and appreciate your insight into a number of poignant topics.
Volunteerism:
An Annotated Bibliography


Although Abrahams concedes that in the past many feminist organizations have criticized women’s unpaid volunteerism as exploitative in its devaluation of women’s work and its perpetuation of dependency on their husband’s income, she asserts that volunteerism affords women the ability to negotiate power within society. Most notably, Abrahams points to the enhanced opportunities for political involvement and empowerment through the development of skills and resources to gain status within the community. She explores the collective identity built around motherhood and community service work, stressing the influence of maternal identity on the types of activities a woman chooses to become involved with and women’s progression to formal political involvement.


Alexander examines Parsons’s views and interpretations of the volunteerism concept and how it relates to the actual idea of volunteerism. He concludes that Parsons’s interpretations can be very questionable because they are not fully developed; Alexander finds that a lot of substance needs clarification and development. However, he does credit Parsons for his theories, even while making every attempt to disagree with each one of them.


Alexander makes four main points. The first suggests that volunteerism is not antithetical to systems analysis or to normative control. Volunteerism does not depend on whether an “actor’s choice” is preserved or whether the actor is a “member” of a normative system. Alexander indicates that a nominal error coming from classical liberalism and neo-Kantian theory identifies volunteerism with free will. Freedom depends on certain distinctive internal qualities produced through associations and internalization. The second point he advocates is the socially constructed exercise of individual choice and not “laissez-faire” individualism. Parsons’s theory tries to synthesize the approaches of individual freedom imbedded in more collectivist theories in both the materialistic and idealist traditions. The third point does not consider differentiation to be inevitable, but Parsons is often optimistic about the emergence of differentiated structures. Alexander, in turn, thinks that this idea does not necessarily represent a bureaucratic state but is less differentiated from the legal and religious systems. The final point is that Parsons’s work is very ambiguous about both formal and substantive issues; however, Alexander wanted to underline Parsons’s positive contribution.

Anderson asserts volunteerism is an important and long-lasting factor in society. The article focuses on legal volunteer service through the perspectives of the volunteers.


Anheier and Leat focus on philanthropy in the 21st century. Their main question is how can foundations not only meet the challenges of these changed circumstances but also be actively engaged in the creation of new circumstances? Anheier and Leat provide knowledge about the shift from charity toward creativity with respect to philanthropy as society has changed over the past centuries. The problem they address is that many changes have occurred in the social and political areas, but few within the philanthropic area. They also discuss how to renew and maintain philanthropic foundations as they develop social creativity rather than function only as charitable organizations.


Beito, Gordon, and Tabarrok aim to examine historic and contemporary examples of private and voluntary delivery of public services. The book is divided into three parts. Part 1 focuses on urban planning and construction of urban infrastructure and the role that market-oriented arrangements play. Part 2 focuses on how private and voluntary initiatives can provide options for law and social services. Part 3 focuses on contemporary examples of theories and history regarding proprietary communities. Beito, Gordon, and Tabarrok outline how market-based factors rather than state involvement can contribute to the community. The purpose of the book is to focus on private nonprofit organizations that function as a complement to the state and state institutions.


Berger presents a systematic analysis of religious nongovernmental organizations (RNGOs) and their effect on shaping global policy through social activism at the local, national, and international levels. She provides background on the emergence of RNGOs and examines their role in current religious and sociopolitical contexts. She discusses the contributions of RNGOs in the reformation of a just society.


According to Bloom and Kilgore, in the past 20 years, Western liberalized nations have adopted neoliberal methods, leading to a criticism of the welfare state. This transition has led to an
increase in the importance of volunteerism in American society. The article details a case study that examines the importance of matching low-income families with middle-class volunteers and how it alleviates the social isolation of the poor. The article also observes volunteer motivation, volunteer activities, and conceptions about one’s ability to help. Bloom and Kilgore suggest that to alleviate poverty, one must look at the moral and ethical concerns about the interests of those living in poverty, instead of merely looking at the cost-effectiveness of welfare in our economy. Thus, volunteers are not meant to make up for lack of government involvement.


Bonell and Hilton examine consumerism in the voluntary health sector in the United Kingdom and present a field study of gay men’s HIV-prevention organizations. By doing so, Bonell and Hilton examine whether members are united by the experience of using the services; analyze whether the work of the health sector includes any strategies for consumerism; and if that is the case, try to determine the extent to which the strategies are influential and effective as well as whether they generate tensions between the provider and the consumer. Different kinds of consumerism are presented in the paper. The conclusion of the study is that the volunteers in these organizations are motivated by the experience of discrimination rather than by poor experiences of other services, even though the latter can sometimes be the case. Regarding consumer relations, Bonell and Hilton state that the medical and political authorities still influence and have a large amount of power over consumers.


Bristow and Ferrari’s study focused on undergraduate student (74 women, 46 men; average age = 19.9 years, standard deviation = 3.39) perceptions of their campus atmosphere as it related to community service motives and engaging in public service. Lower-division students (n = 82), compared with upper-division students (n = 38), controlling for social desirability, perceived the campus atmosphere as more altruistic and reported stronger service motives based on a commitment to address public interest, social justice, and a display of self-sacrificing behavior. Also, for lower-division students, an altruistic campus atmosphere significantly predicted a commitment to public interests, a sense of civic duty to the community, and a feeling of compassion toward helping others. Results imply that school communities need to promote, communicate, and display a helpful environment as a way of facilitating student engagement in community volunteerism, at least among first-year and sophomore students.


Brock focuses on the relationship between the third sector and the government in Canada. She discusses not only how the relationship between the voluntary sector and the government can be structured to not hinder the voluntary sector, but also how to improve the framework for the sector.

Volunteer labor is a vital resource in the American economy, Brown writes. Volunteer work produces benefits for those who receive volunteer services and for the volunteers themselves. In determining the economic value of volunteer services, Brown argues that economic ideas of value should be directed to the value that volunteering has for individuals, rather than the agencies that use volunteers. In effect, volunteering brings people together who otherwise might not have ever had contact with one another. Thus, Brown argues that such connections must be measured when assessing the value of volunteer activity.


According to conventional wisdom, although volunteer programs save money and increase the services offered by organizations, they also jeopardize the positions of paid staff. Brudney and Gazley conducted a quantitative and qualitative study regarding those assumptions using the case study of the U.S. Small Business Administration (SBA) and its own volunteer program, the Service Corps of Retired Executives (SCORE). The information used in the analysis of the relationship between SBA and SCORE spanned 42 years. Brudney and Gazley concluded that the implementation of SCORE did not cause conflict between volunteers and paid staff, did not threaten the jobs of paid personnel, and did not cause budgetary cutbacks in relation to the addition of volunteer workers. Although a few changes did occur in the job descriptions of the paid staff members, analysis showed that such changes were not met with resistance. Finally, Brudney and Gazley suggest that public agencies should focus their fears on challenges from other bureaucracies rather than on the creation of volunteer programs.


Brudney and Kellough discuss and analyze the results of their study on volunteering in state and government agencies. First, they examine the use of volunteers by state agencies and then articulate the benefits realized from volunteer participation. The results are substantial volunteer participation at the state level. Finally, Brudney and Kellough conclude that effective management of volunteer programs is necessary to achieve the full benefits of volunteerism in an organization.


Chinman and Wandersman review various studies on the costs and benefits linked to participation in voluntary organizations. They argue that by directly assessing the costs and benefits of participation, organizations can better promote their own viability. Finally, they discuss practical implications and make recommendations to enhance future research efforts.

According to Coy and Hedeen, the community mediation movement in the United States arose in the late 1970s as an alternative to a formalized justice system that was perceived as costly, time consuming, and unresponsive to individual and community needs. Community mediation advocates also valued community training, social justice, volunteerism, empowerment, and local control over conflict resolution mechanisms. But over the past quarter century, community mediation has become increasingly institutionalized and has undergone varying degrees of co-optation in its evolving relationship with the court system. Coy and Hedeen have developed a four-stage model of co-optation as it has occurred within the community mediation movement, identifying multiple steps in each stage. This analysis facilitates greater understanding of specific events, particular processes, and individual decisions and dilemmas that mediation activists face in their working relationships with their communities and the formal legal system. Furthermore, scholars studying similar processes in other social movements may find that this stage model of co-optation, in whole or in part, is useful to their analyses of other movements.


Dardig addresses the relationship between higher education and the community. She developed “Urban Connections: Columbus behind the Scenes,” an interdisciplinary course with the purpose of improving students’ connections with the community through activities such as biweekly field trips. The program covers five areas: knowledge about community institutions, connections between academic majors and institutions, ability to analyze institutions, different opportunities within the community, and sharing experiences. By attending this course, students become more aware of their community as well as better prepared for different working situations after graduation.


This article focuses on the relationship between local community-based and nonprofit organization and community-based learning (CBL). Edwards, Mooney, and Heald find that through volunteering, organizations can benefit from collaborating with CBL. The investigation also focuses on student volunteering and off-campus volunteers, finding that student volunteers account for a large part of the volunteer workforce. Therefore, encouraging undergraduate students to pursue volunteer work and encouraging universities to play a supportive role are important. Students who volunteer are often involved with direct action and are thereby important to volunteerism. When volunteering in a local affiliate of a national organization, the students’ work is in general more planned and structured than if volunteering within a nonaffiliated organization where the volunteers are recruited from a wider community.

Fink discusses volunteerism and its history within the working labor organizations in the United States, focusing on the American Federation of Labor. The unions represented workers’ interests and thus unions relied on common interests. Unions are based on different ideologies, which have caused conflict between the socialist and the nonsocialist trade unions; many of the nonsocialist unions criticized the volunteers’ assumptions. The unions, depending on their structure, acted on different levels of society, and local labor was much influenced by volunteerism that helped the organization develop specific social and political objectives. A conflict between local-level and national labor leadership arose as regarding their different approaches to volunteerism. The national labor leadership focused more on economics as a weapon, whereas the local level relied more on political-oriented actions.


Finkelstein and Penner examined motive and role identity, previously studied as predictors of volunteerism, as correlates of another discretionary prosocial behavior, organizational citizenship behavior (OCB). County employees (181 females, 62 males) completed questionnaires that measured frequency of OCB, motives for the behavior and the degree to which the respondents had developed an organizational citizen identity. Motives concerned with the desire to help co-workers and the organization proved to be better predictors of OCB than those concerned with the desire for impression management. A citizen role identity also correlated with citizenship behavior but, contrary to expectation, mediated the relationship between OCB and motive only partly. The findings suggest that similar mechanisms are involved in sustaining both volunteerism and OCB.


Constructs from the functional analysis and role identity models of volunteerism were combined in Finkelstein, Penner, and Brannick’s study of activity and tenure among hospice volunteers. The influence of prosocial personality tendencies on sustained volunteer activity was also examined. The findings were most supportive of a role identity model of sustained volunteerism. Identity and perceived expectations emerged as the strongest predictors of both time spent volunteering and length of service. Initial motives for volunteering showed a weaker than expected relationship with volunteerism. Motives were, however, correlated with role identity and perceived expectations in an interpretable and theoretically coherent manner. The results provided preliminary support for a conceptual framework that integrates the functional and identity approaches to understanding long-term volunteers.

Fisher and Ackerman examine how and to what extent organizations can influence individuals to volunteer for the organization’s cause. Their study applies the social norm perspective to examine the circumstances under which promotional appeals founded on group need and promises of recognition affect an individual’s decision to volunteer. The results of the study found that promised recognition increased volunteer participation only when the organization seeking support was described as needy.


Flynn and Hodgkinson explore how to measure the effect nonprofit organizations have on society. By doing so, it is possible to see to what extent nonprofit organizations and their actions are effective. The book is divided into five parts, including an introduction and two essays. The main three parts of the book focus on the areas of examination—for example, appropriate methods of measurements as well as major issues regarding civil society and governance in relation to the nonprofit sector.


Friedman argues that volunteer anticrime organizations have positively affected notoriously crime-rampant communities. The main portion of this work speaks about the decline in crime as a result of various factors, the effect of concerned community residents in crime-laden neighborhoods, the degree of individual participation in anticrime organizations, and the effectiveness and future of such organizations. One main point of the symposium is that if these volunteer groups are faithfully supported, their successful activities will spread in a sustained manner, thus contributing to an even lower crime rate nationwide. Friedman also suggests that it is important for friends and family to ask one another to volunteer for the anticrime movement because a number of people do not seek out volunteer positions or do not want to participate in an organization alone.


In this article, Gittell and Shtob trace the history of women’s civic and political participation in the United States, beginning in the early 1800s with women’s central role in urban voluntary associations. Considering the extent to which women’s engagement in voluntary associations has served as a means of becoming involved outside the home when political involvement is limited or prohibited, Gittell and Shtob highlight the importance of various civic and women’s organizations in providing women with access to societal power structures and alternative forms of political action. They conclude with the acknowledgment of women’s increasing role in political community organizations.

Handy and Srinivasan explore how volunteers are willing to help and contribute to hospitals. They conducted a study of 31 hospitals in Canada, examining how hospital administrators and staff members handled and distributed volunteers. Hospitals are in need of help because not enough funding is available to hire a full staff, and they have to find alternative ways to distribute the workload required to have a functioning hospital that operates effectively. Handy and Srinivasan concluded that volunteers contribute to hospitals tremendously because of the countless hours they spend in the hospitals doing work that is not necessarily health care related (because of union and hospital rules). However, even with those limitations, volunteers still manage to lend their time and a helping hand to hospitals; the net gains for both the volunteers and hospitals are extremely significant.


Hattis addresses the overwhelming need to assist the estimated 41 million people who do not have health insurance. Many of these individuals receive care from volunteer physicians who work with nonprofit organizations or in free clinics. Because of the malpractice liability risks for volunteer health practitioners, state and federal laws are being created to overcome that barrier for volunteer physicians who want to help. Efforts include changes in care standards for malpractice liability from simple negligence to gross negligence and state-sponsored malpractice insurance.


Heeren suggests that the “emphasis on the continuity in Parsons’s work leads Alexander to neglect some contradictions and questionable assumptions of Parsons.” Heeren emphasizes the priority given by Parsons to cultural elements in the evolution of societies and the role of the spiritual counselor. The idea that “smaller is beautiful” suggests a step toward a more individual-centered community, much like feudalism in Europe, where the focus falls into a think globally, act locally sphere. Heeren criticizes Alexander’s comment on Parsons’s substantive volunteerism seen as evaluating the inconsistencies of implicit values placed on individual autonomy.


Previous literature argues that although voluntary organizations enable the establishment of a more concrete democratic political culture, the relationship between membership in voluntary associations and democratic attitudes remains weak. Hooghe believes that the findings of the previous studies may not reflect true attitudes because the previous surveys asked about only current membership in voluntary associations. In this study, Hooghe uses a face-to-face survey of the Dutch-speaking population in Belgium. Unlike the past studies, this survey asks questions
regarding past and current volunteer participation. He concludes that previous voluntary memberships do in fact strongly affect a person’s feeling of civic engagement and political empowerment. Although many scholars disagree on the relationship between the intensity of volunteer participation and the occurrence of a socialization effect, Hooghe argues that measuring intensity “cannot provide us with any clues with regard to the occurrence” of this phenomenon.


This article examines the changing nature of volunteerism using sociological modernization theories. Hustinx and Lammertyn strive to provide an analytical framework for examining the current conditions of volunteerism. They argue that new social transformations deeply affect the social bases of volunteer participation. The modernization theory is used as a principle for organizing the complex changing patterns of involvement. Hustinx and Lammertyn argue that the modernization theory will better inform and better systematize further research into present-day volunteering.


Jacobs and Glass examine the organizational attributes and news publicity of 739 nonprofit organizations in New York City to determine the characteristics most significant for getting media attention. They find that an organization’s income, paid staff, membership size, and library resources are significantly related to receiving media publicity. Also important is the type of organization. Jacobs and Glass discuss the implications that their findings have for current debates about advocacy and civic engagement in the nonprofit sector.


Jordan defines and clarifies the difference between an employee and a volunteer. She also points out why employers need to know the differences between the two because of the Fair Labor Standards Act (FLSA) wage provisions. The FLSA provisions were enacted because the government did not want employees to work for less than a minimum wage. Jordan concludes that numerous limitations exist on volunteer work for a company without pay. Employers are not only limited in accepting volunteers because of the FLSA restrictions, but also by the fact that the government is afraid that some employers might abuse this privilege and have volunteers work in positions that are actually for paid employees.


With a highlight on religion, Kandil shows the historical, economic, demographic, political, and cultural aspects that have affected the development of volunteerism in the Arab world. Because systematic information is not readily available, Kandil uses examples of religiously based service
programs, university service-learning programs, and local programs to present the idea of civic service in the area. The three main hindrances in the growth of the civic movement include a lack of funding and government assistance, the “absence of a clear vision with respect to the value and potential of civic service,” and a slim percentage of the population that is willing to volunteer. Kandil suggests that further democratization and the proliferation of human rights movements will spur more civic action. Kandil suggests a need for documented case studies of successful organizations in the Arab regions, a study on the social and economic contributions of volunteer organizations, and documentation on the role of the state in establishing civic service programs.


Kottasz explores how the behavior of donors among younger men and women differs according to gender within the United Kingdom. She concludes that men were more eager to donate in the areas of arts and culture if they got something in return, such as invitations to social events. Women, in contrast, tended to donate to organizations such as Amnesty International and in return received personal recognition. In the study, Kottasz discovered that people in general tended to be more willing to donate if the organizations were well known and well established, which might cause a problem for smaller, newer organizations.


By referencing Queen’s University’s 1996 “God and Society in North America” survey, Lam studies the correlation between various dimensions of religiosity and volunteerism. Lam concludes that the participatory, devotional, associated, and theoretical dimensions of religion all influence “secular voluntary association participation” in distinctive manners. Lam found that fundamentalism also positively affected voluntary association participation among Protestants, the group with the highest inclination toward voluntary association participation.


Lewis explains the “three major shifts in the voluntary-statutory relationship during the 20th century.” The three significant shifts were Home Office, the Centrist Report, and the Report of the Commission of the Future of the Voluntary Sector (also known as the Deakin Commission). She also explores why volunteers and the organizations they are from should receive more flexibility and be able to expand because they are indeed helping the people and companies for which they volunteer. Lewis argues that the volunteers comply with all government rules and regulations; therefore, the government should give them some leeway and allow them to do more than it currently permits.

Liao-Troth and Dunn emphasize the core importance of managerial understanding of the values that drive volunteers to seek service experiences. They attempt to debunk current notions of miscommunication, instead putting forward the idea that managers do understand the motivations behind volunteer service, and suggest the need to reevaluate current service reward systems. Questioning the validity of earlier findings concerning communication and understanding between managers and employees, Liao-Troth and Dunn present new evidence of accurate managerial assessments of volunteer motivations.


Longoria examines the results of a study conducted in Houston, Texas, to understand the role of partnership programs between schools and the private sector in establishing volunteer programs to improve urban education. Concerning the development of private-sector and community-based partnerships, the study found that need-based targeting in public schools increased as the scope and institutionalization of the partnership increased. Longoria discusses implications for the management and organization of such partnerships in public schools, emphasizing prospects for comprehensive urban education reforms through public and private partnerships orchestrated by public officials and school administrators.


Lyons focuses on the role of the third sector in Australia. A large amount of his work studies the relationship between the third sector and various fields of civil society, such as health, education, and culture. Lyons approaches the issue from different aspects. He also presents different challenges the sector faces. Lyons combines theories from areas such as economic theory, political analysis of civic engagement, and concepts of the social capital.


Martinez and McMullin observed the Appalachian Trail Conference to identify characteristics and assess motivations of the organization’s active and nonactive members. They investigated the effects of social networks, competing commitments, lifestyle changes, personal growth, and belief of the efficacy of one’s actions on decisions to become and remain active members. They found the determining factors in decisions regarding volunteer activity were competing commitments and efficacy. Active members indicated that the efficacy of their actions was most important in their decision to participate, whereas nonactive members cited the importance of competing commitments in their decision not to participate. Recruitment and retention of volunteers may be aided by increasing the awareness of volunteer programs, ensuring that programs provide results of which individuals are proud, requesting the participation of individuals on both local and national levels, and recognizing volunteers for their contributions.

McBride, Sherraden, and Johnson present the results from the first empirical evaluation of international civic service policies and programs. They identified 210 civic service programs in 57 countries in an attempt to understand the current status of civic service programs as well as their structures, goals, and effects throughout the world. Statistical information from these programs is presented in an attempt to initiate the study of civic service trends within and across nations and cultures worldwide. McBride, Sherraden, and Johnson conclude this study with a recommendation to continue research in various areas related to service development, implementation, and outcomes so that civic service can be established as an international field of study.


McCaffrey outlines different aspects of the development and maintenance of volunteer attorney programs. Programs of this nature have been successful in Minnesota and have helped the legal needs of those with civil cases. In Minnesota, many attorneys volunteer, which in turn has increased the number of volunteer attorney programs. Development of civil legal services programs and volunteer attorney programs started in the early 1900s. McCaffrey outlines important events, such as creation of legal advice clinics, the Legal Services Corporation, and various laws that have affected volunteer attorney programs from their beginnings to the time the article was written.


Moore and Whitt examine social inequality in Louisville, Kentucky, with regard to the nonprofit sector. They research two types of networks for this study: “participation in the network of overlapping board memberships (the ‘structural network’) and interpersonal ties of collegiality and friendship (the ‘social network’).” The study shows that a male advantage exists in the structural network, whereas women are more predominant in the social network. In Louisville, a few women and no people of color held leadership positions according to the study’s results.


Nunn explores the changing patterns of volunteerism in the United States, with a specific focus on the decline of long-term service commitment and emergence of sporadic, “episodic” volunteerism from a growing volunteer base. She sets forth a series of recommendations for fostering more engaging service experiences in order to build social capital and create a stronger civil society. She discusses some of the pressing questions that confront service organizations and volunteer associations in America today and the ways in which service efforts must adapt to increase their effect on the community and reverse declining trends in civic and political engagement.

Oates focuses primarily on two aspects: fresh commitment to inner-city Catholic schools and reorganization of the philanthropic work. The text is based on the religious aspects of philanthropy. Oates presents a historical background to today’s Catholic society and philanthropy work in the United States.


Oesterle, Johnson, and Mortimer’s study examines the volunteer work of young people during the transition to adulthood. More specifically, it discusses the effects that education, work, family, and religion have on continued volunteerism. The study highlights the importance of values embraced through adolescence in the continuance of volunteerism into adulthood. Furthermore, full-time work, early marriage, and the presence of young children in the family hinder volunteer participation. The study also illuminates the importance of civic participation in relation to the success of democracy.


Offer focuses on the study of voluntary action in the United Kingdom from two different perspectives: idealism and nonidealism. This study is based on changes in theoretical approaches in the field of social science as well as a change in the political sphere within Britain. The paper focuses on five areas: (a) voluntary action in theory from the perspectives of idealism and nonidealism, (b) understanding voluntary organizations from the different perspectives, (c) relations between the state and voluntary actions and organizations, (d) different forms of voluntary action as well as classification of voluntary organizations, and (e) new approaches to the study of volunteerism.


O’Neill examines the role of the nonprofit sector in the United States—for example its relationship to social, economic, and political life. He describes the current situation of the third sector in the United States and outlines different scenarios for the future of nonprofit organizations.


Penner studies the effects of demographic, dispositional, and organizational variables in relation to an individual’s sustained commitment to volunteerism. Demographic variables include such things as age, income, and education, whereas dispositional variables refer to personal beliefs and values; personality traits relating to prosocial thoughts, feelings, and behaviors; and volunteer-
related motives. Finally, organizational variables include an organization’s reputation, values, and practices, which influence an individual’s decision to volunteer. Penner presents a conceptual model of the direct and indirect influences on sustained volunteerism. Furthermore, Penner’s study provides suggestions as to how service organizations might attract and retain volunteers.


Penner’s essay focuses on the notion of volunteerism and the difference between volunteering and bystander intervention. In defining volunteerism, Penner notes four attributes: planned action, long-term behavior, nonobligation, and service or religious organizations. In addition to volunteerism, Penner addresses the idea of bystander interventions and suggests that more emphasis should be placed on the study and encouragement of volunteerism. He also examines the demographic characteristics of individuals who are more likely to volunteer, as well as their personal attributes, and the societal pressures placed on persons. The article considers the issue of addressing the root of the problem, not short-term solutions.


This article outlines four major institutional reforms in Canada designed to build relationships between state and voluntary-sector entities necessary for collaborative governing. Creating a distinction between government and governance, Phillips discusses the need for the latter, or collaborative governing with voluntary, private, and other public-sector actors, in response to a diverse population with differing needs and expectations of the state. Reinforcing the concept of civic society development through collaboration, coordination, and political engagement, the article emphasizes the potential role of the voluntary sector in community building, citizenship training, and service delivery.


The thesis of Prouteau’s book is that when a person gives, he or she will receive something back, because a person simply cannot give and receive nothing in return. When Prouteau examined the concept of volunteering, he divided this concept into three categories: productive resource, source of satisfaction, and investment in human or social capital. He found that a person does indeed receive something in return even though that person does not receive pay or compensation. Volunteers who wanted only to lend a helping hand and receive self-satisfaction were compensated tremendously by knowing they had actually helped, without necessarily having to receive something fiscal or tangible in return for their work.


Quarter, Mook, and Richmond focus on the monetary aspect of volunteerism, especially monetary value of volunteer hours; the effect of volunteering on a personal level; and gains of nonprofit organizations, such as increasing the value of goods and services.

In this article, Rausch analyzes the role of local media in relation to volunteer activity in a rural Japan by observing the potential for generating social knowledge and uniting residents’ consciousness about volunteerism and volunteer activity, as well as the influence of volunteer organization leaders on the media and public volunteer-related agendas. Rausch found that most information regarding volunteer activity held by citizen respondents seems gained through newspaper, television, and government information sources. He goes on to suggest that volunteerism is portrayed as not active or important to local society and is often presented in a way that would not stimulate interest in volunteer participation. Although volunteer organization leaders are relatively active in contacting the media, they seem less attentive to establishing or assessing the message they would prefer to have the media deliver to the public. The article suggests that volunteer organizations need to establish their own agenda to work with the media to convey their ideas, as well as to improve public relations by actively targeting the public and local governments.


This report profiles the most significant characteristics of active volunteers. According to Reed and Selbee, the primary characteristic of an active volunteer is a high level of involvement in various forms of contribution and participation, including charitable giving, informal volunteering, social activity, and civic participation. Also relevant to the study is the presence of different patterns of distinctive volunteer characteristics in relation to the region and size of the community.


Robert Putnam has suggested that in recent years, American volunteerism has declined. Rich, the author of this article, states that the preceding comment is being challenged by many scholars. Although a Darwinian selection process does constantly affect the success of American volunteer groups by weaning out those that do not effectively pass public scrutiny, the Internet has facilitated a new and widespread means of promoting volunteering. Rich concludes that successful volunteer organizations are run by leaders who are willing to change in accordance with the needs and demands of their supporters. Regardless of the changes that have occurred in the voluntary sector, America still “leads the world when it comes to richness of organizational life and inventing new forms of voluntarism.”


In this article, Rosenthal considers the influence of civic engagement, gender, and organizational norms as underlying determinants of collaborative leadership. Acknowledging the role of women’s civic activism as an opportunity to develop leadership skills for the subsequent attainment of political careers, Rosenthal evaluates the volunteer backgrounds and leadership styles of women in elected legislative committee chair positions. According to committee chairs surveyed, prior
Volunteer and community service had a greater influence on women’s perceived leadership styles than on those of men. Also reporting a much more collaborative style of leadership among women than men in this high-ranking legislative position, Rosenthal concludes with implications for women’s roles within the organizational context of gendered institutions.


Rotolo analyzes the link between social capital and voluntary association participation in the United States. The study, based on General Social Survey data, shows that volunteer participation has increased from 1984 to 1994 even though it had decreased from 1974 to 1984. Apart from four types of organizations (unions, fraternal organizations, sports-related groups, and Greek organizations), which have seen their level of participation decrease from 1974 to 1994, other groups experienced significant increases or at least stable participation rates. Rotolo suggests future research on the relationship between voluntary association participation and social capital and concludes on an optimistic note about the general participation trend as well as the possibility of social capital development in the United States.


Salamon suggests that the U.S. government fears a decline in civil society and has thus called for an increase in volunteerism among citizens. He also discusses the growing role of nonprofit organizations, their advocacy role as well as their ongoing collaboration with the government. He concludes that volunteerism remains essential.


Salganik and Karweit discuss the difference between volunteerism and governmental control in education by comparing private and public schools. The basis for their discussion is that schools rely on different types of consensus and authority within their systems. The private school is built on a commitment because people choose whether to enroll in such schools, which is not the case with public schools. Private school is based on mutual volunteerism. The discussion focuses primarily on five areas in which a difference exists between public and private schools: legitimacy, consensus, authority, efficacy, and commitment. Institutions are considered legitimate when they accepted, respected, and used. Consensus prevails because parents choose a certain school by its profile (for example, religious values). Authority within private schools is considered more traditional rather than legal or rational, unlike the case within public schools. Efficacy is a result of consensus and traditional authority. Commitment rises within the school community as a result of the combination of the other factors.


Schoenberg discusses the need to address the adaptations made by local volunteer organizations in response to the changing social roles of working-class, middle-class, and older women within the urban neighborhood. She refutes the claim that women stop volunteering when they enter the paid workforce, instead suggesting that they are more likely to engage in volunteer activities that
complement their familial role. Consequently, commonwealth organizations, or those focused on alleviating the problems of the greater community, may need to rely more heavily on paid workers as their volunteer base declines. Schoenberg also comments on the association between paid work and volunteer work among working-class women, recognizing the need for increased part-time opportunities for women who wish to maintain their current level of volunteerism and family involvement.


Schwinn addresses the thesis that households that donate to religious organizations tend to donate more than other people. Households that donated to religious institutions accounted for 87.5 percent of all contributions in 2000. She also suggests that individuals affiliated with religious organizations tended to volunteer more frequently than those who did not.


In this article, Sherer considers several characteristics of volunteers in the Israeli National Service. He examines both motives for service and level of satisfaction or dissatisfaction with volunteer work before offering several suggestions for increasing participation and duration of volunteerism in the National Service and alternative national service programs. The study places particular emphasis on the participant’s social surroundings as a main determinant of motives and the decision to volunteer, with the intention of addressing the socialization of service values. Sherer concludes that participant satisfaction is most affected by working conditions, such as the attitude of co-workers, but it is also affected by organizational recognition, public reaction, and the provision of symbolic rewards.


Skocpol, Ganz, and Munson challenge the view that classic American voluntary groups were largely local and disconnected from government, instead suggesting that the structure of these organizations has emerged regionally and nationally in an institutional form parallel to the structure of the national republican government. The article focuses primarily on the emergence and initial spread of popularly rooted U.S. volunteer federations, emphasizing the relationship between the organizing principles of a powerful republic and local endeavors within an engaged civic society as necessary for the success of democracy.

Smith, Justin Davis. “Civic Service in Western Europe.” *Nonprofit and Voluntary Sector Quarterly* 33, no. 4 (2004): 64S–78S.

In this article, Smith discusses available evidence on civic service in Western Europe, differentiating between civic service and the traditional concept of volunteering. Smith traces the history of the concept in the region and the resurgence of government interest in it over the past 10 years, fueled in particular by the decline in military service brought about by the end of
the Cold War. Though his work supports previous findings that civic service can enhance citizen political engagement and contribute to the generation of social capital, Smith focuses on the challenges facing the voluntary sector in managing its development. He concludes with a review of policy implications and the future direction of service promotion strategies while making recommendations for further research.


Smith examines the positive effects of volunteerism on an individual; however, he questions whether increased levels of volunteerism would be beneficial or feasible for civil society. Smith maintains that an effective volunteer program must be carefully organized, with specific attention paid to program design and implementation. Furthermore, he argues that an organization must be careful to coordinate its expectations for volunteers with their goals and interests.


Tiehen analyzes the effect of women’s professional activities on volunteerism and focuses on the trend in volunteer participation of married women as well as on the evolution of social capital. She evaluates the association between volunteer participation and market status, as well as other factors, such as parental status, family income, and educational attainment, to determine what most influences women’s participation in volunteer activities. Volunteer participation distinguishes the importance of observable characteristics, such as labor market status, from unobservable characteristics, such as the “taste” for volunteering. Tiehen found that even though overall volunteer participation has decreased from 1965 to 1993, the time spent in volunteer activities is more important, with a major difference occurring between single and married people. Although volunteerism has increased from 1985 to 1993 among single people, it has decreased by more than 40 percent among working-age married women. The research concludes that women’s changing labor force status and parental status are major—but not the only—elements in understanding the decline of married women’s volunteer participation and asks for more research on suburbanization and sprawl, television, and generational change for further explanations.


Tossutti addresses the issues of what social positions help or hinder volunteerism and political involvement, specifically among young adults. She suggests that governments should work to encourage volunteerism among young people and create stricter graduation requirements in relation to volunteerism and service. Tossutti also suggests that volunteerism builds social capital, benefits economic prosperity, and creates a more fair distribution of wealth that in turn leads to an increase in voter turnout and political interest. The article discusses the various dimensions of volunteerism: formal, informal, inward, outward, bonding, bridging, thick, and thin.

Tschirhart, Mesch, Perry, Miller, and Lee examine empirical data to support the interest of supervisors of volunteers in using the initial goals of volunteers to determine their expected performance, satisfaction, and objectives. The study looks at a sample of 362 AmeriCorps members to determine whether the goals that stipended volunteers brought to their service influenced outcomes related to those goals a year later. The authors’ research found a definite connection between the initial goals set and the outcome.


Uslaner argues that religion plays a significant role in an individual’s commitment to civic engagement, particularly that of volunteerism. He examines how different religious traditions affect one’s commitment to volunteering. Specifically, he studies the United States and Canada, which boast large religious populations as well as outstanding volunteerism. Furthermore, Uslaner examines the differences in volunteerism in the United States and Canada in relation to different religious traditions, only to conclude that the similarities far outweigh the differences.


Companies are increasingly using the Internet and other technologies to encourage employee volunteerism. Programs have been developed to link employees with organizations as well as to monitor hours and find common philanthropic interests between companies and their employees.

Walter, Roy A. “Volunteerism: Because We Care, Because It’s Right.” *Houston Lawyer* 34, no. 3 (1996): 50.

Rabbi Walter argues that without volunteerism the world would be “an even poorer place,” because volunteerism contributes to society in a positive way by allowing people to help others in need. Our willingness to volunteer is based on our sense of right and wrong. In the article, Walter presents eight different types of helping—based on righteous giving—used by people. He makes the point that different levels of helping exist in volunteerism. Walter also points out the importance of honoring people for their contributions to society.


Voluntary associations are often credited with an essential function in the development of social capital. Wollebaek and Selle examine the effect that participation in voluntary associations has on building social capital. They use intensity (active versus passive participation), scope (many versus few affiliations), and type (nonpolitical versus political purpose) as the dimensions in their study. Wollebaek and Selle challenge the concept that active participation is necessary for the formation of social capital and suggest that more attention be given to passive participation.

Yeung’s article suggests that motivation is the key factor in the development of volunteerism. Yeung further implies that such motivation is important on an individual and sociological level. Moreover, the focus of the article deals with individual reflection of social changes and what factors contribute to the continuation of volunteerism. Yeung goes on to explain the octagonal method and how different elements that contribute to volunteerism and its motivations often overlap in various ways. One example is the role values play in encouraging volunteerism. The octagonal model contains an inward-outward dimension that demonstrates a relationship between oneself and others.