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Behind the Wedding Veil: Child Marriage as a Form of Trafficking in Girls

Elizabeth Warner

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BEHIND THE WEDDING VEIL: CHILD MARRIAGE AS A FORM OF TRAFFICKING IN GIRLS

ELIZABETH WARNER*

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INTRODUCTION

Imagine for a moment that you are twelve years old. You live in a small rural village in India, or Bangladesh, or Ethiopia, or Egypt, or perhaps even the state of Utah in the United States. You are feeling very grown up because a few weeks ago you had your first menstrual period, and by the standards of your village you are now a woman. You are proud of your body, but also apprehensive, because you know that your new status carries with it many expectations and responsibilities that you only dimly understand. One day, your mother announces that there is to be a big celebration. You are told to put on your finest dress, and your hair is washed and curled and dressed with ribbons. You are the center of attention as you approach the area where the entire village is assembled. And then you are told that the purpose of the gathering is a wedding—*your* wedding. The groom and all his family are present, as is the official who is to unite you in wedlock. And after the ceremony you will be going away with your new husband, whom you have never seen before, and you will travel with your new in-laws to your new home. There is no point in protesting; it has all been arranged. Your parents, and everyone else, have decided that it is time you were married. You are twelve years old. How can you say “no” in front of all these people?

Scenarios like this occur every day in much of the world as children, especially girls, are married as soon as they reach puberty and in some cases even earlier.¹ There are many reasons for this. In countries where girls are routinely valued less than boys, and where girls live with their husbands after marriage and, accordingly, cease contributing to the welfare of their birth family, the pressure on an impoverished family to marry off their daughters as soon as possible is tremendous.² Many cultural practices demand a bride-price from the groom, to be paid to the bride’s family, or a dowry which the bride

1. Much of the empirical material in this article is derived from the following three sources: THE FORUM ON MARRIAGE AND THE RIGHTS OF WOMEN AND GIRLS, EARLY MARRIAGE: SEXUAL EXPLOITATION & THE HUMAN RIGHTS OF GIRLS (Nov. 2001) [hereinafter SEXUAL EXPLOITATION & THE HUMAN RIGHTS OF GIRLS], *available at* <http://www.crin.org/docs/resources/publications/1367EarlyMarriage.pdf> (last visited May 24, 2004); THE FORUM ON MARRIAGE AND THE RIGHTS OF WOMEN AND GIRLS, EARLY MARRIAGE: WHOSE RIGHT TO CHOOSE? (May 2000) [hereinafter WHOSE RIGHT TO CHOOSE?], *available at* <http://www.crin.org/docs/resources/publications/WhoseRighttoChoose.pdf> (last visited May 24, 2004); UNITED NATIONS CHILDREN’S FUND, INNOCENTI RESEARCH CENTRE, EARLY MARRIAGE; CHILD SPOUSES, 7 INNOCENTI DIGEST (Mar. 2001) [hereinafter CHILD SPOUSES], *available at* <http://www.unicef-icdc.org/publications/pdf/digest7e.pdf> (last visited May 24, 2004). The scenario outlined in the previous paragraph was drawn from actual testimony reproduced in SEXUAL EXPLOITATION & THE HUMAN RIGHTS OF GIRLS, § 1.

2. See WHOSE RIGHT TO CHOOSE?, *supra* note 1, § 3.1 (discussing how daughters are married off quickly in order to minimize financial outlay on a wasting asset).

herself brings into the marriage, and the girl grows less valuable as she gets older.³ In addition, there are strong religious taboos in Islam and other faiths concerning female sexuality that mandate early marriage as a means of keeping a girl “pure” and preventing her from having sex with men of her choosing.⁴

While it is conceivable that a girl may be content with marriage to a man her parents or other adult guardian have selected, it is difficult not to view such marriages as essentially the sale of human beings too young to make an informed choice in the matter. In actuality, many arranged marriages of young girls condemn these brides to a life of near slavery. They are forced against their will to marry men who may be much older and far more experienced.⁵ They are placed completely under the control of their husbands and their husbands’ families and often subjected to extensive physical and emotional abuse.⁶ They are made to bear children before they are physically ready to handle the rigors and risks associated with pregnancy and childbirth, thus endangering their health and in many cases costing them their lives.⁷ Their education is abandoned, for they no longer have any time, or are forbidden, to go to school.⁸ They are not permitted to work outside the home or earn their own money, and their prospects for any kind of independent life are eliminated.

So why is it that, in this age of increasing prominence of universal human rights that seek to guarantee the dignity and freedom of every individual, so little attention is being paid to this phenomenon?⁹ As

3. See SEXUAL EXPLOITATION & THE HUMAN RIGHTS OF GIRLS, *supra* note 1, at 24-30; Rupa Dhital, *Child Marriage in Nepal*, 1 (2000) (explaining that the dowry paid to the groom is based upon his qualifications and younger brides can get comparatively younger grooms who are less qualified and thus less expensive), available at http://www.cwin-nepal.org/resources/issues/child_marriage.htm (last visited May 24, 2004).

4. See *infra* note 48 and accompanying text.

5. See SEXUAL EXPLOITATION & THE HUMAN RIGHTS OF GIRLS, *supra* note 1, § 1; WHOSE RIGHT TO CHOOSE?, *supra* note 1, § 2.1 (revealing that the age gap varies from country to country, but in many cases girls marry men two to four times their age).

6. See SEXUAL EXPLOITATION & THE HUMAN RIGHTS OF GIRLS, *supra* note 1, at 5 (“Worldwide, early and forced marriage probably represents the most prevalent form of the sexual abuse and exploitation of girls. The fact that the arrangement is socially accepted does not diminish the reality that a girl is deliberately exposed to sexual abuse and exploitation, usually by her parents and family.”); see also WHOSE RIGHT TO CHOOSE?, *supra* note 1, §§ 2.2, 3.5.

7. See WHOSE RIGHT TO CHOOSE?, *supra* note 1, § 3.4 (stating that girls ages fifteen through nineteen are twice as likely to die from childbirth than women in their twenties and that girls younger than fifteen are six times more likely to die).

8. See *id.* § 3.3 (noting that girls, who are often subject to the will of their elder spouses or family members, have minimal say in when and how many children to bear, rendering it nearly impossible to complete their education).

9. See SEXUAL EXPLOITATION & THE HUMAN RIGHTS OF GIRLS, *supra* note 1, at 18.

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this article will demonstrate, most domestic laws and international covenants condemning child abuse, sexual exploitation, forced labor, abduction and slavery explicitly or implicitly provide an exception when the victim is married to the abuser.¹⁰ Laws purporting to set minimum ages for marriage or requiring consent of both prospective spouses usually contain exceptions permitting marriages when parents or government officials give consent instead of the child. The situation is further complicated by laws protecting traditional customary or religious practices, often under the rubric of freedom of religion, which serve to insulate child marriage practices from outside prohibition or regulation. Once a girl is married, however young she is, she is usually treated under domestic law as having reached the age of majority, and laws protecting children no longer reach her. Other laws designed to protect people from abuses such as forced labor or sexual exploitation are written in such a way that it is questionable whether they would ever be applied in a non-commercial setting such as marriage. Even when laws clearly prohibit the types of abuses that occur to when a young girl is married, enforcement is mostly non-existent, as the police and other officials turn a blind eye to what occurs behind the wedding veil. Who would the girl complain to? Who would be there to hear her?

This article examines domestic laws and international treaties that purport to regulate or prohibit the practice of child marriage, with particular attention being given to laws relating to the trafficking of human beings. A number of commentators have suggested that the realities of child marriage make it akin to forced prostitution or forced labor,¹¹ and laws prohibiting trafficking are designed with those acts in mind. Indeed, given the inherent weaknesses of established international treaties such as the Convention on the

In spite of the international concern to develop and implement measures to protect children from slavery, rape and other forms of commercial sexual abuse and exploitation, there appears to be little open acknowledgement that the most widespread abuse occurs in the socially approved domestic setting of marriage. Quite simply, however it is culturally packaged, early marriage is socially licensed sexual abuse and exploitation of a child. So even if the child suffers appalling injuries as a result of domestic violence no one will intervene, for the abuser is her husband. There will invariably have been some transfer of goods or other resources in exchange for the child-bride. This child has been exploited commercially for sex and or services and her human rights disregarded.

Id.

10. See SEXUAL EXPLOITATION & THE HUMAN RIGHTS OF GIRLS, *supra* note 1, at 4 (defining marriage as “a formalized relationship with legal and/or social standing between individual men and women, in which sexual relations are legitimized and as an arena for reproduction and child rearing which has state recognition”).

11. See *infra* notes 153-161 and accompanying text.

Rights of the Child and the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, the application of some of the recently adopted anti-trafficking laws may prove to be a surprisingly muscular approach.

Part I of this article looks at the characteristics of child marriage and examines the reasons why child marriage continues to be so prevalent despite growing international condemnation.¹² Part II provides an overview of domestic laws relating to child marriage.¹³ Part III examines how various international treaties have attempted to deal with the problem or might otherwise be viewed as applicable.¹⁴ Part IV concludes with recommendations for improving the legal framework that can be brought to bear to prohibit child marriage and suggests extra-legal means to change social behavior, such as by implementing direct aid programs, increasing education and employment opportunities for girls, and encouraging the development of less discriminatory religious views concerning the rights of women.¹⁵

I. THE PREVALENCE AND CAUSES OF CHILD MARRIAGE

A. Occurrence of Child Marriage throughout the World

No one knows for certain how prevalent the practice of early marriage is, but estimates undeniably reveal millions of girls under the age of eighteen who are forced into marriage.¹⁶ The major reason for uncertainty is the lack of complete public records in the many countries where children are married.¹⁷ Birth records are not maintained, especially in rural areas, and many marriages are solemnized by local religious or tribal leaders who do not bother to register the marriages with government officials.¹⁸

12. See discussion *infra* Part I.

13. See discussion *infra* Part II.

14. See discussion *infra* Part III.

15. See discussion *infra* Part IV.

16. See WHOSE RIGHT TO CHOOSE?, *supra* note 1, at 6 (documenting the predominance of adolescent marriages in Africa, Latin America and Asia as well as the rest of the world).

17. See CHILD SPOUSES, *supra* note 1, at 4 (stating that very little data exist about marriages under age fourteen, and even less about marriages below age ten). However, anecdotal information and small-scale studies indicate that marriage at very young ages is in fact widespread. *Id.*

18. *Id.* at 7 (remarking that it is extremely difficult to regulate child marriages when they are performed according to customary rites and are not registered); WHOSE RIGHT TO CHOOSE?, *supra* note 1, at 9-10. *But see Birth Registration Law, UNITED NEWS OF BANGL. LTD.*, Feb. 6, 2000 (explaining that Bangladesh has recently

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Some reports indicate that the age at first marriage has been increasing steadily;¹⁹ others dispute this figure because so many marriages go unrecorded and the age of the bride is often unknown.²⁰ However, half of the girls who live in developing countries will be married by their twentieth birthday.²¹ A recent UNICEF study in Niger found that forty-four percent of girls aged twenty to twenty-four were married under the age of fifteen.²² Up to forty-seven percent of girls are married before age fifteen in Bangladesh,²³ and throughout Africa nearly fifty percent of girls are married by the time they are eighteen years old.²⁴ In Nepal, forty percent of women are married before they reach the age of fourteen, and 60.2% of women between the ages of fifteen and nineteen have married.²⁵ In Rajasthan, India, fifty-six percent are married before age fifteen.²⁶ In many parts of Africa and South Asia marriages much

introduced legislation making birth and death registrations mandatory, after six years of study sponsored by UNICEF, and quoting a government official as saying “[T]he government will soon establish a monitoring system for birth registration and by 2005 it will be able to help make birth registration the routine rather than exception in 20 districts and several municipalities.”), available at 2003 WL 4187408.

19. See UNICEF, EARLY MARRIAGE (2002) (citing lack of education and poor record-keeping as contributing factors to early first marriages) [hereinafter UNICEF REPORT], available at http://www.unicef.org/protection/index_earlymarriage.html (last visited May 13, 2004); see also THE WORLD BANK, GENDER IN TRANSITION 59 (2002) (showing that the age of first marriage rose in nearly every country in Eastern and Central Europe between 1990 and 1999), available at [http://lnweb18.worldbank.org/eca/eca.nsf/Attachments/Gender+in+Transition/\\$File/GenderDraftPaper052802cFINAL.pdf](http://lnweb18.worldbank.org/eca/eca.nsf/Attachments/Gender+in+Transition/$File/GenderDraftPaper052802cFINAL.pdf) (last visited May 24, 2004).

20. See Ladan Askari, Note, *The Convention on the Rights of the Child: The Necessity of Adding a Provision to Ban Child Marriages*, 5 ILSA J. INT’L & COMP. L. 123, 125 (1998) (refuting the notion that the age of marriage has actually increased worldwide). According to this author, these assertions are based on incomplete data due to the prevalence of unregistered marriages. *Id.*

21. UNICEF REPORT, *supra* note 19, under heading “The Situation of Women and Girls: Facts and Figures.”

22. *E.g.*, CHILD SPOUSES, *supra* note 1, at 2. A more recent study placed the figure even higher, with seventy-nine percent of girls married by the age of fifteen. *Id.* See WHOSE RIGHT TO CHOOSE?, *supra* note 1, at 9 (showing that the median age at first marriage in Niger is fifteen); Saidou Arji, *Niger: Early Marriage Under Scrutiny* (Feb. 4, 2002) (noting that Niger has the highest rate of early marriage in sub-Saharan Africa), available at http://www.afrol.com/News2002/nir001_early_marriage.htm (last visited May 13, 2004). In the twenty-five to forty-nine age-group, seventy-seven percent married before the age of eighteen. *Id.* Mali and Burkina Faso fall behind Niger, with seventy and sixty-two percent, respectively. *Id.*

23. See UNESCO Case Studies, Bangladesh: Demographic Characteristics of Adolescents, available at <http://www.unescobkk.org/ips/arh-web/demographics/bangladesh2.cfm> (last visited May 24, 2004).

24. See WHOSE RIGHT TO CHOOSE?, *supra* note 1, at 9.

25. See Dhital, *supra* note 3, at 2.

26. See CHILD SPOUSES, *supra* note 1, at 4; see also WHOSE RIGHT TO CHOOSE?, *supra* note 1, at 9 (noting that seventeen percent of women in Rajasthan were married before the age of ten); PARAS DIWAN & PEEYUSHI DIWAN, CHILDREN AND LEGAL

earlier than puberty are not unusual, and marriages of girls between the ages of sixteen and eighteen are common in parts of Latin America and pockets of Eastern Europe.²⁷

While the prevalence of child marriage cuts across many different countries with different cultural and religious traditions, certain factors pertaining to the practice are nearly universal. The marriage of girl-children is almost always arranged by their parents or guardians, whose desires take precedence over the wishes of the child.²⁸ The marriage is a bartered transaction, accompanied by payment of a negotiated bride-price from the groom's family to the bride's family.²⁹ In general the younger the bride, the higher the price she will fetch.³⁰ Girls are usually married to much older men who can afford to pay the bride-price.³¹ The marriage is immediately consummated and the girl made to start bearing children immediately.³² In some cultures, such as the Hmong people from Southeast Asia, there is a tradition of securing young brides by outright abduction and rape,³³ and statutory rape charges have been

PROTECTION 50-51 (1994) (examining laws in India that have attempted to restrain child marriages).

27. See CHILD SPOUSES, *supra* note 1, at 4-5; see also ISABEL FONSECA, BURY ME STANDING: THE GYPSIES AND THEIR JOURNEY 32, 36 (1995) (noting that among European gypsies, or Roma, it is extremely common for girls to be married as soon as they reach puberty, which can occur at age thirteen or even earlier).

28. See WHOSE RIGHT TO CHOOSE?, *supra* note 1, at 15-16 (arguing that in many parts of the world, women are almost completely dominated by the men in their families and have no choice but to comply with their demands).

29. See SEXUAL EXPLOITATION & THE HUMAN RIGHTS OF GIRLS, *supra* note 1, at 27 under the heading *Brideprice and Bridewealth* (defining "brideprice" as the sum needed to purchase a woman for her labor and fertility).

30. See *id.*; WHOSE RIGHT TO CHOOSE?, *supra* note 1, at 12 (explaining that in much of India, Bangladesh, and a few other countries, the practice is reversed, and women must bring a dowry with them into the marriage, which is given to the groom's family). As a general rule, the older the bride, the lower her value and therefore the *higher* the dowry must be. *Id.* See also Askari, *supra* note 20, at 126 (noting that dowries, combined with poverty, lead to a situation where girls are seen as economic burdens for their families).

31. See WHOSE RIGHT TO CHOOSE?, *supra* note 1, at 12.

32. See Bhagyarekha Gupta, *Illegal Child Marriages Remain a Tradition in India*, HOUS. CHRON., June 30, 2002, at A26 (explaining that in cases of marriage before puberty, the girl often does not live with her husband's family until she starts to menstruate), available at 2002 WL 23205804. *But see* CHILD SPOUSES, *supra* note 1, at 9-10 (pointing out that in cases where the girl is married to a man much older, she may be forced to have sex with him regardless of whether or not she has reached puberty).

33. See, e.g., Choua Ly, *The Conflict between Law and Culture: The Case of the Hmong in America*, 2001 WIS. L. REV. 471, 478-81 (2001) (explaining the Hmong tradition of marriage by abduction in which a man who desires to marry a woman or girl simply kidnaps her, with the help of members of his family, and forces her to have sex with him). The two families then negotiate an acceptable commercial arrangement and the marriage is formalized. *Id.* See Deirdre Evans-Pritchard &

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dropped if the accused marries the victim.³⁴ Many girls are forced into marriage, their “consent” obtained upon threat of physical harm.³⁵

Regardless of how it occurs, early marriage takes a terrible toll on a girl’s physical and emotional health. Because of her age, inexperience, and vulnerability, she is likely to be dominated and controlled by her husband, who has the power to keep her a virtual prisoner.³⁶ Rape, beatings and other forms of sexual and domestic violence are common, and early and repeated pregnancies are life-threatening.³⁷ Young mothers also face far greater risks of complications in pregnancy because their bodies are not sufficiently developed, and infant mortality is far greater among young mothers.³⁸ The damage to a girl’s reproductive organs that result from forced intercourse and early childbearing make her far more susceptible to HIV and other diseases.³⁹

The girl’s economic health suffers as well. Her education, if any, usually terminates upon marriage (and certainly by the time she bears

Alison Dundes Renteln, *The Interpretation and Distortion of Culture: A Hmong “Marriage by Capture” Case in Fresno, California*, 4 S. CAL. INTERDISC. L.J. 1, 26-28 (1995) (noting that some United States courts have agreed to forego criminal prosecutions of these abductions if a marriage occurred); Catherine Trevison, *Changing Sexual Assault Law and the Hmong*, 27 IND. L. REV. 393, 405 - 07 (1993) (pointing out the difficulties local authorities face when attempting to prosecute rapes and forced marriages within the Hmong people). Specifically, many judges consider “cultural factors” which tend to mitigate a defendant’s sentence. *Id.*

34. See CHILD SPOUSES, *supra* note 1, at 8 (stating in many Latin American countries, girls as young as twelve can get married with parental consent if the girl is pregnant); see also Kelly C. Connerton, *The Resurgence of the Marital Rape Exemption: The Victimization of Teens by Their Statutory Rapists*, 61 ALB. L. REV. 237, 257-58 (1997) (examining a number of cases in Orange County, California where statutory rape charges were dropped when victim and accused were married, often at the behest of state welfare agency officials).

35. See WHOSE RIGHT TO CHOOSE?, *supra* note 1, at 9; see also Monika Satya Kalra, *Forced Marriage: Rwanda’s Secret Revealed*, 7 U.C. DAVIS J. INT’L L. & POL’Y 197, 215-16 (2001) (describing the experiences of Tutsi women who were forced, by threat of death, into marriage by their Hutu captors during the 1994 genocide in Rwanda).

36. See *id.* (categorizing forced marriage as a form of enslavement, specifically, sexual slavery).

37. See CHILD SPOUSES, *supra* note 1, at 10-11. “Pregnancy-related deaths are the leading cause of mortality for fifteen to nineteen year old girls worldwide. Mothers in this age group face a 20 to 200 per cent greater chance of dying in pregnancy than women aged 20 to 24.” *Id.*

38. See *id.*; see also WHOSE RIGHT TO CHOOSE?, *supra* note 1, at 19-20 (stating that the younger a woman begins to have children, the greater her risk of miscarriage, infant death, malnutrition, cervical cancer, sterility, and maternal death); Mahesh Vijapurkar, *Concern over infant deaths in Maharashtra*, THE HINDU, Sept. 2, 2002 (noting that young girls tend to have many complications during child labor and give birth to small and malnourished babies), available at 2002 WL 25608253.

39. See CHILD SPOUSES, *supra* note 1, at 10 (citing studies that show that girls who have their first pregnancy at an early age have a higher incidence of HIV infection).

her first child), and with repeated childbearing and all the time spent on household chores she loses any opportunity to earn her own living.⁴⁰ Because she is typically married to a much older man, she is likely to be widowed at a relatively young age and left without any means of supporting herself and her family.⁴¹

B. Reasons for Child Marriage

The two major reasons why parents marry off their girl children have to do with economics and the desire to control female sexuality. Girls are considered less valuable than boys, particularly so as they get older.⁴² Poor families do not want to waste scarce resources on their daughters, who leave home when they are married and thus cannot be expected to contribute to the family income or provide support for their parents as they grow old.⁴³ The bride-price that a young girl fetches is needed to support her birth family and pay off debts, and in many cases is a source of funds to purchase brides for her brothers.⁴⁴ For all these reasons, the girl's family benefits more from her marriage at an earlier age.

Entire volumes could be written on why men devote so much effort to controlling and suppressing female sexuality, but the root cause must surely be the desire to establish paternity. So long as there is any chance that a woman could have sex with more than one man or at times and places of her own choosing, her husband can never be sure that her children are also his. The need to keep girls "pure" and virginal before marriage reflects a double standard that has existed throughout human history.⁴⁵ After marriage it is equally important

40. See WHOSE RIGHT TO CHOOSE?, *supra* note 1, at 17-18 (explaining that girls are not sent to school because education is thought to be incompatible with their roles as wives and mothers); see also CHILD SPOUSES, *supra* note 1, at 11-12 (stating that lack of education prevents girls from developing her own sense of identity and leads to lower levels of self-esteem).

41. See WHOSE RIGHT TO CHOOSE?, *supra* note 1, § 3.6. (pointing out that families are reluctant to accept their widowed daughter back into their house).

42. See SEXUAL EXPLOITATION & THE HUMAN RIGHTS OF GIRLS, *supra* note 1, § 1 (explaining that in many cultures, a marriage is really the exchange and purchase of women whose price depends on factors like age and beauty).

43. See WHOSE RIGHT TO CHOOSE?, *supra* note 1, at 11-12 (describing the economic justifications for child marriage); see also CHILD SPOUSES, *supra* note 1, at 6 (noting that a girl's parents are rewarded with money and material goods from the groom when their daughter is married).

44. See WHOSE RIGHT TO CHOOSE?, *supra* note 1, at 12 (commenting that such practices are common among indigenous groups in Uganda).

45. See *id.* at 10 ("For many communities the loss of virginity in girls before marriage is the worst shame that can be brought upon a family."); see also CHILD SPOUSES, *supra* note 1, at 6-7 (noting that many parents will go to great lengths to keep girls from interacting with men outside the family).

that the wife not be allowed to go about alone, lest she engage in some sexual liaison that could produce an illegitimate child.⁴⁶ Unmarried girls are at risk of being attacked by sexual predators, which increases the pressure to marry her off for her own “protection,” for the older she is the greater are questions about whether she is still a virgin and, accordingly, the greater are the chances that she will be viewed as fair game. The problem is further compounded by local beliefs that having sex with a virgin can cure a man of AIDS and other sexually-transmitted diseases or prevent him from contracting them.⁴⁷

Religious justifications for the marriage of girls can be found among several major faiths, Islam⁴⁸ and Hinduism⁴⁹ in particular,

46. See generally CHILD SPOUSES, *supra* note 1, at 6-9 (describing ways women are “protected” by early marriage when placed under male control).

47. See *id.* at 2, 6; WHOSE RIGHT TO CHOOSE?, *supra* note 1, at 13-14 (noting a new trend of marrying women to avoid sexually-transmitted diseases); Fran Hosken, *Child Marriage Especially Popular in Rajasthan*, WOMEN’S INT’L. NETWORK NEWS, July 31, 1998, at 54.

48. JOHN L. ESPOSITO, WOMEN IN MUSLIM FAMILY LAW 15-16 (1982).

Islam considers marriage, which is an important safeguard for chastity, to be incumbent on every Muslim man and woman unless they are physically or financially unable to lead conjugal life. . . . Marriage is central to the growth and stability of the basic unit of society, the Muslim family, the means by which the world is populated with Muslims to concretize and realize God’s Will in history.

Id.; see also UNESCO Legislation Review 1, Early Marriage and Early Childbearing [hereinafter UNESCO Early Marriage] (on file with author); *Compilation of ‘Abd Allah b. Ahmad b. Hanbal in CHAPTERS ON MARRIAGE AND DIVORCE: RESPONSES OF IBN HANBAL AND IBN RAHWAYH 91* (Susan A. Spector trans., 1993) (providing a commentary on the Islamic laws of marriage presented in question-and-answer format and containing numerous hypotheticals of marriages in which the bride has not yet obtained puberty). The following is an excerpt on the subject of whether it is necessary that the bride consent to be married:

I said, “But if she does not grant it?”

He said, “If her father is [her *wali*; that is, the person entitled to exercise authority over her], and she has not reached seven years of age, then her father’s giving her in marriage is valid and she has no option. But if she has reached her ninth year, neither her father nor anyone else should give her in marriage without her permission”

Id. at 92-93. And on the subject of divorce:

I asked my father about a minor girl who is divorced but does not yet menstruate. She waits two months of her *‘idda*, [the statutory waiting period during which a divorced woman may not remarry] but then when she is in the third month, she starts to menstruate. I said to my father, “Does she recommence waiting an *‘idda*, [this time] of three menstrual periods?” He said, “Yes.”

Id. at 141.; DAWOUD S. EL ALAMI, THE MARRIAGE CONTRACT IN ISLAMIC LAW 49-51 (1992) (discussing capacity to marry in the case of girls who have not yet begun to menstruate); ESPOSITO, *supra* at 16-17 (commenting that a girl is presumed to have attained puberty, and thus is eligible to consent to marriage, at the age of nine; her *wali* may give her in marriage at an earlier age, but in certain circumstances she has the right to repudiate the marriage when she turns nine).

which approve of marriages even before puberty. Strong religious justifications also underlie child marriage in Ethiopia.⁵⁰ Again, the primary reason for this is the high value placed on a girl's virginity before marriage and the fear that for each year past puberty doubts about her virginity increase.⁵¹

Another reason for child marriage is the desire for wives who are submissive. An older girl is more likely to have started to form opinions of her own and to question her position in the social order, whereas a younger girl is more dependent on adults and lacks the means to rebel against her fate. And as a practical matter, where child marriage is widely practiced families worry that the older a daughter gets the less likely she is to find a suitable match, because all the good male candidates will have been taken.⁵² Thus, the pressure to marry a daughter early is ratcheted downward.

Throughout history, marriage has been used as a means of settling disputes among warring families or clans. The paramount objective is to end the cycle of revenge or bloodshed by forging new alliances, and the delivery of females as brides to men of the opposing side is a critical part of the bargain.⁵³

II. DOMESTIC REGULATION OF CHILD MARRIAGE

Most countries have laws purporting to establish a minimum age for marriage. In many countries, the basic statutory minimum age for women is eighteen or older (often the minimum age for men is a couple of years older), but at least thirty-four countries (including some jurisdictions in the United States) permit girls to marry below that age.⁵⁴ A handful of countries permit marriage below the age of fifteen, and a few specify no minimum age.⁵⁵ Among countries that do specify a minimum age, the countries allowing the youngest

49. See PARAS DIWAN ET AL., CHILDREN AND LEGAL PROTECTION 47 (1994); see also *Child Marriage, Social Problem in Nepal*, XINHUA GEN. NEWS SVC., May 5, 2002; Dhital, *supra* note 3, at 1.

50. WHOSE RIGHT TO CHOOSE?, *supra* note 1, at 25.

51. Askari, *supra* note 20, at 12.

52. See UNICEF REPORT, *supra* note 19; see also CHILD SPOUSES, *supra* note 1, at 6; Gupta, *supra* note 32.

53. See Martin Fackler, *Forced Marriages Outrage Pakistanis*, ASSOC. PRESS, July 25, 2002, available at 2002 WL 24648685 (noting that recently in Pakistan, four men convicted of murder and facing execution attempted to settle their blood debt by offering several female relatives—including one girl who was only five—in marriage to members of the victims' family). Public outrage over the deal forced the parties to abandon their plans. *Id.*

54. See WHOSE RIGHT TO CHOOSE?, *supra* note 1, at app. 2.

55. See *id.*

marriages include countries like Chile, which permits girls to marry as early as age twelve.⁵⁶

This is, however, only the beginning of the story. At least forty countries provide that customary law may override specific legislation.⁵⁷ Customary law usually means local, tribal or religious law, which often sets a lower age limit for the bride and/or permits early marriage with the consent of the girl's parents or guardian.⁵⁸ Islamic law, Hindu law and other traditional and religious laws explicitly condone marriages of girls at puberty or even earlier with parental consent.⁵⁹ Some countries, in an effort to balance the conflicting demands of secular and religious laws, give jurisdiction over family matters, including marriage, to religious courts.⁶⁰ Many statutory laws also explicitly provide for exceptions to the minimum age with parental consent or where the marriage is approved by a local government official or magistrate.⁶¹

A second serious problem is the lack of consistent birth records in rural or poor areas, making it difficult if not impossible to establish the age of the bride.⁶² About 40 million births go unrecorded each year.⁶³ Many marriages go unrecorded as well, especially if they are performed in a traditional ceremony.⁶⁴ As a result, far more child marriages occur than are probably reported.

56. See *id.* (including other countries in this category such as Ecuador, Panama, Paraguay, Sri Lanka and Venezuela); see also Askari, *supra* note 20, at 133.

57. See WHOSE RIGHT TO CHOOSE?, *supra* note 1, at app. 2.

58. See UNESCO Early Marriage, *supra* note 48, at 2; CHILD SPOUSES, *supra* note 1, at 7.

59. See *supra* note 48 and accompanying text.

60. See generally Andrew Treitel, *Conflicting Traditions: Muslim Shari'a Courts and Marriage Age Regulation in Israel*, 26 COLUM. HUM. RTS. L. REV. 402 (1995) (providing an interesting discussion of how the State of Israel has attempted to strike this balance). Treitel notes that despite minimum marriage age provisions in Israeli secular law, which give a girl the right to terminate an illegally-contracted marriage, no such request for dissolution has ever been made, reinforcing the powerful hold that traditional religious laws and Shari'a courts have over Muslim family life. *Id.* Enforcing secular laws that are in conflict with religious traditions can be just as difficult in countries where secular and religious authorities share the same faith. *Id.* Indonesia has attempted to regulate its marriage age in a manner similar to Israel, but with only marginally greater success. *Id.*; see also Mark Cammack et al., *Legislating Social Change in an Islamic Society—Indonesia's Marriage Law*, 44 AM. J. COMP. L. 45 (1996).

61. See SEXUAL EXPLOITATION & THE HUMAN RIGHTS OF GIRLS, *supra* note 1, under the subheading "Tradition, religion and the legal age of marriage"; see also UNESCO Early Marriage, *supra* note 48, at 2.

62. See *Birth Registration Law*, *supra* note 18, at 4, 7; see also WHOSE RIGHT TO CHOOSE?, *supra* note 1, at 9-10.

63. See CHILD SPOUSES, *supra* note 1, at 15.

64. See *id.*

A third problem is the lack of enforcement of the laws that do exist. Indian law, for example, prescribes criminal penalties for anyone responsible for performing or arranging the marriage of a female under eighteen years old.⁶⁵ However, no proceedings can be initiated unless a complaint is filed, and this almost never occurs.⁶⁶ In Rajasthan, hundreds of child marriages take place every spring in enormous public ceremonies evoking a festival atmosphere.⁶⁷ Local police make only token efforts to enforce the law or refuse altogether.⁶⁸ Similar attitudes prevail in Nepal⁶⁹ and other countries.⁷⁰ Furthermore, even were the laws enforced, they may provide for nothing in the way of sanctions beyond declaring the marriage void, which would leave the girl without any legal protection.⁷¹

Nor are such practices confined to developing countries. The state of Utah in the United States is famous for being the home of a branch of Mormons (also known as the Church of Jesus Christ of the Latter-Day Saints) who once endorsed polygamy. Although the Church outlawed the practice in the nineteenth century, it is still prevalent among certain secretive groups.⁷² Until recently, the law tended to look the other way, even though polygamy is illegal in Utah as it is in every other state. Polygamy was even defended by the American Civil

65. See The Child Marriage Restraint Act, Act. No. 19 (1929) (India) (amended 1978); see also DIWAN ET AL., *supra* note 49, at 50-51.

66. See *id.*

67. See Hosken, *supra* note 47.

On the day of the festival . . . roads are choked with tractors pulling trailers filled with gaily dressed wedding guests. Each year, formal warnings are posted outside state government offices stating that child marriages are illegal, but they have little impact.

'Of course, we know that marrying children is against the law, but it's only a paper law,' said Govind Singh Patel, a village elder.

Id. See also *Child marriages on the Increase*, HINDU, Feb. 7, 2003, available at 2003 WL 13012051A (reporting from another region that tells a similar story of disregard for the law, but for a different reason). "The villagers were reluctant to cancel the weddings [of children as young as nine] as it is popularly believed that such a step is equivalent to the sin committed by the slaughter of seven cows." *Id.*

68. See *id.*; Gupta, *supra* note 32.

69. See Dhital, *supra* note 3.

70. See WHOSE RIGHT TO CHOOSE?, *supra* note 1, at 23 (noting that in Bangladesh, parents have been observed falsely representing the age of their daughters on marriage registration forms, with the complicity of local officials).

71. See CHILD SPOUSES, *supra* note 1, at 7.

72. See *Warren Jeffs Named President of Fundamentalist Church After Father's Death*, CAN. PRESS, Nov. 22, 2002, available at 2002 WL 103505456; see also Michael Vigh, *Forced Marriages Targeted*, SALT LAKE CITY TRIB., Feb. 21, 2003, available at 2003 WL 3674722.

Liberties Union under the rubric of freedom of religion.⁷³ But the recent, highly-publicized trial of Tom Green, a polygamist who was convicted of child rape in 2001 for marrying a thirteen-year-old, has galvanized officials, who now swear that they will more vigorously enforce the law as a result.⁷⁴ In the same year, the Utah Legislature passed a tough new law in response to increasing reports of coerced marriages of underage girls in that state.⁷⁵ The law provides for criminal penalties for parents who consent to the marriage of their underage children, and for those who perform or facilitate the marriage.⁷⁶

Only a handful of countries set a marriage age above eighteen. China's law prescribes a minimum marriage age of twenty for women and twenty-two for men.⁷⁷ These high ages are the result of China's determined high-profile effort to curb its population growth. Marriages performed at an earlier age are invalid, and couples who violate this law are denied certain government benefits and services. China's measures have had a notable effect. In recent years the average age for first marriage for women in China has increased to 24.5 years.⁷⁸

But China is the exception to a disappointing set of general rules. When one looks at domestic laws, one sees over and over again provisions permitting the marriage of children, usually by exception

73. See Camille S. Williams, *Participating in the Public Forum: Why Today's Polygamists Must be Prosecuted*, MERIDIAN MAG., June 26, 2001, available at <http://www.meridianmagazine.com/publicforum/020830polygamy.html> (last visited June 29, 2004).

74. See *id.* The description in this article of polygamy in Utah reads like it is taking place in a developing country:

[A] 40-year-old polygamist pretends to marry a 13-year-old virgin in a religious ceremony with the intent [of] having sex with her and producing 7 to 10 children by her by the time she is 30 years old[.] This same girl will be involuntarily taken out of public school in the eighth grade, if she has been allowed to attend school at all, never to return. This child's children will be born without medical care. This child at age 30 will have no birth certificate, no education, no job . . . no respect, no self-esteem, no real life.

Id. See also Patty Henetz, *Polygamous Predators Don't Deserve Religious Protections*, ASSOCIATED PRESS, Aug. 15, 2002.

75. See UTAH CODE ANN. §§ 30-1-2, 30-1-9, 30-1-9.1 (2003). See generally David MacArthur, *Performing Unlawful Marriages*, 2001 UTAH L. REV. 1132 (2001).

76. See UTAH CODE ANN. § 30-1-9.1 (noting that Utah legislators have made it a third degree felony for a parent to consent to the marriage of a minor child); UTAH CODE ANN. § 30-1-5 (2003); see also Vigh, *supra* note 72 (citing the case of Lu Ann Kingston, who at age fifteen was forced by her family into becoming the fourth wife of a polygamist).

77. See Xiaoqing Feng, *A Review of the Development of Marriage Law in the People's Republic of China*, 79 U. DET. MERCY L. REV. 331, 332 at n.4 (2002).

78. See UNESCO Early Marriage, *supra* note 48, at 3-4.

to minimum age and consent laws that enable the will of parents, guardians or government or religious officials to trump the wishes of the marriage partners.⁷⁹

III. INTERNATIONAL CONVENTIONS RELATING TO CHILD MARRIAGE

International human rights conventions have addressed sexual exploitation, forced labor and other forms of slavery, child abuse, and trafficking in human beings, as well as upholding basic human freedoms such as the right to practice one's religion, go to school, carry on a trade, and seek legal remedies for violations of rights. Many of these conventions have provisions relating to marriage. It is easy to criticize laws for not conforming exactly to one's agenda for solving a given problem. Nonetheless, it is striking how poorly existing international human rights and women's rights conventions address the practice of child marriage or the forms of abuse that can occur within such a marriage.⁸⁰

One problem with many of these Conventions, aside from their general lack of vision, is that they are not self-executing; they instead constitute promises by the adopting parties to enact domestic legislation and adopt other measures to achieve the desired objectives, which, even if mandatory, are often stated in language too general and aspirational to constitute enforceable norms in and of themselves.⁸¹ For example, nearly all of the conventions which contain provisions on marriage avoid specifying a mandatory minimum age for the parties and leave that determination to individual States, as well as the determination of the age of majority, which is to say the age at which a person will be considered an adult. And while many conventions provide that marriage must be freely consented to by bride and groom, there is no recognition of the special vulnerabilities of children, whose "consent" can be easily coerced or unduly influenced by adults.

79. See WHOSE RIGHT TO CHOOSE?, *supra* note 1, at 49-52; CHILD SPOUSES, *supra* note 1, at 7-9.

80. See SEXUAL EXPLOITATION & THE HUMAN RIGHTS OF GIRLS, *supra* note 1, at 10-13 ("[I]n spite of international agreements to implement measures to protect children from slavery, discrimination and other forms of sexual abuse and exploitation, there appears to be little recognition that the same forms of abuse occur within the domestic setting of marriage.").

81. There is, of course, the further problem that the failure to comply with a treaty may not be directly actionable by a citizen of a State that has failed to comply, let alone by any other individual or organization. A discussion of the issue of treaties, whether self-executing or not, creating private rights of action is beyond the scope of this paper.

A second limiting factor is that many conventions pay great deference to local cultural and religious practices, exempting those practices from the application of many other laws, including laws that prohibit the marriage of female children or set minimum age requirements. When a convention is insufficiently deferential to local laws, states may establish reservations against key provisions.⁸²

A third problem with international conventions generally is that their existence does not automatically create an enforcement mechanism, let alone a private right of action. This failure to have an enforcement mechanism means that a private citizen may not have the right to sue her government for its failure to live up to the terms of a convention. Thus, it may be the case that the only party who can bring a cause of action against a State for violating an international

82. See Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13, 19 I.L.M. 33 (1980) [hereinafter CEDAW] (noting that CEDAW had 175 parties and 98 signatories as of February 7, 2004), available at <http://www.untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty10.asp>. The following is a sample reservation against Art. 16, which guarantees equal rights between men and women in marriage by Algeria (acceded May 22, 1996):

The Government of the People's Democratic Republic of Algeria declares that the provisions of article sixteen concerning equal rights for men and women in all matters relating to marriage, both during marriage and at its dissolution, should not contradict the provisions of the Algerian Family Code.

Id.

Similarly, following is a reservation by Egypt (acceded July 16, 1980):

Reservation to the text of article 16 concerning the equality of men and women in all matters relating to marriage and family relations during the marriage and upon its dissolution, without prejudice to the Islamic *Sharia's* provisions whereby women are accorded rights equivalent to those of their spouses so as to ensure a just balance between them. This is out of respect for the sacrosanct nature of the firm religious beliefs which govern marital relations in Egypt and which may not be called into question and in view of the fact that one of the most important bases of those relations is an equivalency of rights and duties so as to ensure complementary [sic] which guarantees true equality between the spouses. The provisions of the *Sharia* lay down that the husband shall pay bridal money to the wife and maintain her fully and shall also make a payment to her upon divorce, whereas the wife retains full rights over her property and is not obliged to spend anything on her keep. The *Sharia* therefore restricts the wife's rights to divorce by making it contingent on a judge's ruling, whereas no such restriction is laid down in the case of the husband.

Id. at 231. Iran has filed the following reservation with respect to the Convention on the Rights of the Child ("CRC"), *infra* note 90 (upon signature): "The Islamic Republic of Iran is making reservation to the articles and provisions which may be contrary to the Islamic *Sharia*, and preserves the right to make such particular declaration, upon its ratification." (Upon ratification) "The Government of the Islamic Republic of Iran reserves the right not to apply any provisions or articles of the Convention that are incompatible with Islamic Laws and the international legislation in effect." United Nations, Multilateral Treaties Deposited with the Secretary-General, Status as at 31 December 2000, vol. I at 280 (ST/LEG/SER.E/19) [hereinafter UN Treaty Status 2000].

agreement may be another State that is a party to the convention.

Nonetheless, it is worth examining the various international conventions that can be read to prohibit or restrict child marriage. Even if an individual victim forced into matrimony cannot maintain a cause of action under such a convention, the failure of a State to live up to its obligations can be held up to public scrutiny or otherwise be subject to disapproval and sanctions.

*A. Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages*⁸³ (“*Marriage Convention*”)

As its name indicates, the Marriage Convention was designed expressly to ensure that marriages are the consensual act of knowledgeable adults or near-adults, and in particular to eliminate “child marriages and the betrothal of young girls before the age of puberty.”⁸⁴ Article 1.1 of the Marriage Convention provides that “[n]o marriage shall be legally entered into without the full and free consent of both parties, such consent to be expressed by them in person after due publicity and in the presence of the authority competent to solemnize the marriage and of witnesses, as prescribed by law.” But as we have seen, a young girl cannot be expected to fully understand the implications of consenting to be married and is vulnerable to undue pressure from her family and powerful cultural demands which are not in her best interests. Furthermore, there are ways to draft laws which could undermine the notion of consent. A law could be enacted, for example, which specifies that the mere recital of the wedding vows would stand as conclusive evidence of consent, regardless of any later showing of duress or coercion.

Even worse, Article 1 of the Marriage Convention goes on to state that, where the “circumstances are exceptional” and the “competent authority” is satisfied that a party has consented to the marriage (either to him or to another “competent authority”), that party need not even be present during the ceremony.⁸⁵ Nor is “competent authority” defined, and it seems clear that this term was designed to encompass religious and other partisan authorities so long as

83. Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, Nov. 9, 1962, 521 U.N.T.S. 231 [hereinafter *Marriage Convention*]. As of Feb. 5, 2004, the United States had not ratified this treaty.

84. *Id.* at 232 (noting that the preamble is not a binding provision, even though it declares that “[s]tates . . . should take all appropriate measures with a view to abolishing such customs, ancient laws and practices by ensuring, *inter alia*, complete freedom in the choice of a spouse, eliminating completely child marriages and the betrothal of young girls before the age of puberty . . .”).

85. *See id.* at 234.

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marriage ceremonies performed by them are given legal effect under domestic law. Thus, the Marriage Convention clearly does not go far enough in specifying what is meant by “consent” or how consent is to be determined (or disputed). This omission is especially disappointing when one considers that the Marriage Convention is explicitly directed at a class of people whose “consent” is so easily manipulated or forced.

Article 2 of the Marriage Convention requires States Parties⁸⁶ to specify in domestic legislation a minimum age for marriage.⁸⁷ But there is no absolute minimum, except for the admonition in the preamble against marriages before puberty, which by virtue of its placement is not mandatory. Furthermore, Article 2 creates an exception to the age requirement where a “competent authority has granted a dispensation as to age, for serious reasons, in the interests of the intending spouses.”⁸⁸ Once again, there is the problem of who is a “competent authority”; and it is not difficult to envision such an authority granting a “dispensation” for the very reasons that young girls are married off in the first place: her family is impoverished, the older she gets the less likely are her marriage prospects, etc. A further problem is that the age of a child is often not provable, because reliable, official birth records are not maintained.⁸⁹ The reader can be excused for being nonplussed by the failure of the Marriage Convention not to impose a mandatory requirement that the marriage age be set no earlier than puberty, which at least is a standard that can be objectively determined, regardless of the presence or absence of reliable birth records.

The Marriage Convention contains no monitoring or reporting requirements, making it difficult to ascertain the degree of its effectiveness in preventing child marriages. Though it professes admirable goals, this Convention has all the bite of a toothless man without his dentures.

86. The term “States Parties” in this paper will refer to those countries which have signed and ratified the subject agreement.

87. See Marriage Convention, *supra* note 83, at 234.

States Parties to the present Convention shall take legislative action to specify a minimum age for marriage. No marriage shall be legally entered into by any person under this age, except where a competent authority has granted a dispensation as to age, for serious reasons, in the interest of the intending spouses.

Id.

88. *Id.*

89. See CHILD SPOUSES, *supra* note 1, at 15 (suggesting that children whose births go unregistered have no defenses against age-related rights abuses).

B. Convention on the Rights of the Child ("CRC")⁹⁰

The CRC, intended as a comprehensive treaty on the rights of children, contains no explicit provision on marriage, which is odd, if not downright baffling. (Perhaps the drafters thought the subject was already covered by the Marriage Convention.) However, there are a number of provisions which could arguably apply to child marriage and are worth examining.

Article 1 of the CRC provides that "a child means every human being below the age of eighteen years, unless under the law applicable to the child, majority is attained earlier."⁹¹ The word "majority" is deliberately not defined in the CRC and is left to local law to determine. Consider how problematic this provision is in the case of a married female child. In a society where a woman's value is defined entirely by reference to her marital status and her ability to bear children, a married female is likely to be viewed as having attained adult, or "majority," status regardless of her age, all the more so once she has borne a child of her own. One could therefore argue that the entire CRC becomes irrelevant to her at that point. And indeed, many domestic laws explicitly provide that a person attains majority upon marriage regardless of her age,⁹² thus creating an exception to the general "rule of 18" that eviscerates the CRC mandate where it is most needed.⁹³

Assuming this hurdle can somehow be overcome and the CRC remains applicable to a married girl-child, other provisions may potentially be invoked. Article 2 of the CRC prohibits "discrimination" of any form against children, including on the basis of sex,⁹⁴ and Article 3 provides that "[i]n all actions concerning

90. See Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 28 I.L.M. 1456, 1577 U.N.T.S. 3 [hereinafter CRC]. As of Apr. 19, 2004, the United States had not ratified this treaty.

91. *Id.* at art. 1.

92. See SEXUAL EXPLOITATION & THE HUMAN RIGHTS OF GIRLS, *supra* note 1, at 8, 21-22 (observing that once girls are married, their rights as children vanish as national legislation requires that they be treated as married women); see also CHILD SPOUSES, *supra* note 1, at 2 (observing that upon marriage, a girl is considered a woman, even if she is only twelve).

93. See Harmful Traditional Practices Affecting the Health of Women and Children, Fact Sheet No. 23 (1995) (noting that the Office of the High Commissioner for Human Rights remarked that such laws deprive married girls of any rights under the CRC), *available at* <http://www.unhchr.ch/html/menu6/2/fs23.htm> (last visited Mar. 2, 2004).

94. CRC, *supra* note 90, at art. 2(1).

States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national,

children . . . the best interests of the child shall be a primary consideration,”⁹⁵ and that States Parties must “undertake to ensure the child such protection and care as is necessary for his or her well-being”⁹⁶ The CRC also provides that all children shall have the right to protection from all forms of physical or mental violence, injury, abuse, maltreatment or exploitation; the right to health; the right to education; the right to protection from abduction, sale or trafficking; the right to rest and leisure, the right to protection from economic exploitation and the right to protection from all forms of exploitation prejudicial to the child’s welfare.⁹⁷ Given the horrific consequences of child marriage outlined earlier, it is not inconceivable to think that the practice could be attacked as violative of at least some of these provisions.

Article 24.3 provides that States Parties shall take measures to abolish “traditional practices prejudicial to the health of children.”⁹⁸ This provision, which was probably adopted with female genital mutilation in mind, may be the best clause to invoke against child marriage, given the extreme health risks associated with sexual intercourse and childbearing before the girl’s body is sufficiently mature.

But there are other provisions of the CRC that could be construed to sanctify child marriage, in direct contradiction to the provisions just cited. Article 14.2 directs States Parties to “respect the rights and duties of parents . . . to provide direction to the child in the exercise of his or her right [to freedom of religion] in a manner consistent with the evolving capacities of the child.”⁹⁹ This is one of many provisions in the CRC that grants deference to the rights of parents to control aspects of their children’s lives, particularly in the case of religion, education, and cultural heritage.¹⁰⁰ One could argue that the CRC explicitly protects the right of a father to instruct his daughter on how to be a good Muslim (or, for that matter, a good Mormon) and to honor and obey the father’s pious decision to marry

ethnic or social origin, property, disability, birth, or other status.

Id.

95. See CRC, *supra* note 90, at art. 3(1).

96. *Id.* at art. 3(2).

97. *Id.* at arts. 19, 24, 28, 31-32, 34-36.

98. *Id.* at art. 24(3).

99. *Id.* at art. 14.2.

100. See, e.g., *id.* at art. 5 (directing States Parties to “respect the responsibilities, rights and duties of parents . . . to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention”).

off his daughter at age five. After all, at that age, isn't the parent so much wiser than the child on the child's religious obligations? And doesn't freedom of religion imply that outsiders not second-guess the father's decision to "direct" his infant daughter into marriage as sanctified by the Koran and other religious teachings?¹⁰¹

Given all these shortcomings and ambiguities, one cannot look to the CRC as providing a strong framework for prohibiting child marriage, which is unfortunate.

*C. Convention on the Elimination of All Forms of Discrimination
Against Women*

Unlike the CRC, the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW")¹⁰² contains provisions that explicitly deal with marriage. Similar to the Marriage Convention, Article 16.1 of CEDAW provides for equality between men and women on the right to enter into marriage, the right to freely choose a spouse and the right to enter into marriage only with free and full consent.¹⁰³ Article 16.2 states that the betrothal and marriage of a child shall have no legal effect, and States must specify a minimum age for marriage.¹⁰⁴ This provision does what the Marriage Convention fails to do in that it explicitly outlaws child marriage.¹⁰⁵

101. See ESPOSITO, *supra* note 48.

102. CEDAW, *supra* note 82.

103. See *id.* at art. 16.1.

States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

The same right to enter into marriage;

The same right freely to choose a spouse and to enter into marriage only with their free and full consent.

Id. The convention goes on to provide that men and women shall have equal rights to decide on the number and spacing of their children, to own and dispose of property, and to have the same personal rights as husband and wife, including the right to pursue an occupation. *Id.*

104. CEDAW, *supra* note 82, at art. 16.2. The full text of Article 16.2 reads, "The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory."

105. However, it must be noted that CEDAW has the highest rate of reservations of any human rights treaty. See Askari, *supra* note 20, at nn.56-59 and accompanying text ("[T]he government of Malaysia 'declares that Malaysia's accession is subject to the understanding that the provisions of the Convention do not conflict with the provisions of the Islamic Sharia' law and the Federal Constitution of Malaysia.'). United Nations, Multilateral Treaties Deposited with the Secretary-General, at 233 (U.N. Doc. ST/LEG/SER.E/19) (2000). Saudi Arabia similarly reserves against any provisions that conflict with Islamic law, while Thailand reserves against Art. 16 in its entirety. *Id.* at 236.

However, the term “child” is left undefined, and in fact appears as a kind of anomaly in CEDAW, which does not otherwise address problems specific to children. The best one can say here is that the term “child” is defined by reference to the other laws, in which case, despite the absolute ban on child marriage contained in Article 16.2, we are really no better off than we were before. We still have not achieved a prohibition that applies regardless of local custom, regardless of domestic provisions relating to the age of majority, and regardless of whether consent to the marriage is given by the child’s parent or guardian or a public official.

D. Human Rights Conventions

The Universal Declaration of Human Rights (“UDHR”)¹⁰⁶ was adopted in 1948 as a resolution of the United Nations General Assembly. The UDHR is not a binding treaty, but has served as a basis for subsequent human rights treaties, and parts of the UDHR have arguably acquired the status of customary international law.¹⁰⁷ Under Article 16.1 of the UDHR, men and women “of full age” (the phrase is not defined) have the right to marry and are entitled to equal rights as to marriage.¹⁰⁸ Article 16.2 goes on to state that marriage shall be entered into only with the free and full consent of the intending parties.¹⁰⁹ Two subsequent conventions that were inspired by the UDHR—the International Covenant on Civil and Political Rights,¹¹⁰ and the International Covenant on Economic, Social and Cultural Rights¹¹¹—contain virtually identical provisions.¹¹² These provisions do not take us any further than the provisions of the Marriage Convention, and there is the further complication that each of the UDHR and its progeny also contain provisions preserving religious freedoms, which as we have seen could be viewed as sanctifying the right of a father to marry off his daughter if his religion permits him to do so. Once again, we must look to other international sources for

106. G.A. Res. 217, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948).

107. See BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW 848 (3d ed. 1999).

108. See U.N. GAOR, 3d Sess. at art. 16.1, U.N. Doc. A/RES/217A(111) (1948).

109. See *id.* at art. 16.2.

110. See G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966) [hereinafter CCR].

111. See G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966) [hereinafter ESCR]. As of December 31, 2000, the United States had not ratified this treaty.

112. See CCR, *supra* note 110, at art. 23; ESCR, *supra* note 111, at art. 10.1 (agreeing on the issue of consent and a clause on the general right to marry is not present in the ESCR).

sanctuary.

E. Conventions Prohibiting Slavery and Forced Labor

The Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (“Anti-Slavery Convention”)¹¹³ requires States Parties to take all necessary action to bring about the abolition of, *inter alia*, “any institution or practice whereby . . . [a] woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group.”¹¹⁴ As with so many other conventions concerning the right to marry, little or no thought has been given here to the special circumstances and vulnerabilities of children. One must assume first that a minor girl would be considered a “woman” under this provision,¹¹⁵ and once again, there is the difficult issue of determining whether the girl has been given the right to refuse the marriage. Nonetheless, this provision at least addresses a fact pattern common to many child marriages and condemns it as a form of slavery—the buying and selling of a human being.

The Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor (“Child Labor Convention”)¹¹⁶ defines a child as any person under the age of

113. Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 266 U.N.T.S. 3.

114. *Id.* at art. 1(c).

Slavery or practices similar to slavery shall include any]institution or practice whereby:

A woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group; or

The husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise; or

A woman, on the death of her husband is liable to be inherited by another person.

Id. In addition, Article 2 of the Anti-Slavery Convention requires States Parties to prescribe, “when appropriate, suitable minimum ages of marriage, to encourage the use of facilities whereby the consent of both parties to a marriage may be freely expressed in the presence of a competent civil or religious authority, and to encourage the registration of marriages,” using language similar to that adopted later by the Marriage Convention. *Id.* at art. 2.

115. Given that so many domestic laws provide that a person attains the age of majority upon marriage, this provision is maddeningly ambiguous. Is a young girl forced into marriage to be considered a “woman” by virtue of her post-marriage adult status under domestic law? She is still a girl (i.e., a non-adult) *before* the marriage, and it is far from clear whether the Anti-Slavery Convention is intended to address her circumstances.

116. ILO Convention C182, June 17, 1999 (date of adoption) [hereinafter Child Labor Convention], *available at* <http://www.ilo.org/ilolex/english/convdisp1.htm>.

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eighteen¹¹⁷ and contains provisions whereby States Parties must undertake to adopt specific measures to prevent “all forms of slavery and practices similar to slavery.”¹¹⁸ This phrase is clearly intended to relate back to the Anti-Slavery Convention,¹¹⁹ and would therefore presumably cover instances of forced marriage. In contrast to other Conventions, which are silent as to implementation, Article 7 of the Child Labor Convention requires States Parties to take all necessary measures, including criminal sanctions, to implement and enforce its provisions, and specifically admonishes States Parties to take into account “the special situation of girls.”¹²⁰ This Convention thus makes Article 1 of the Anti-Slavery Convention specifically applicable to girls. However, the consent exception, and all the associated difficulties with determining whether a child can be deemed to have consented to being married, remain unresolved.

It is worth mentioning the Convention Against Torture, and other Cruel, Inhuman or Degrading Treatment or Punishment (the “Torture Convention”).¹²¹ This convention defines torture to include

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person . . . for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.¹²²

Some have argued that forced marriages such as occurred during the genocidal rampages in Rwanda in 1994 would qualify as torture under this definition.¹²³ The requirement of official “consent or acquiescence” would clearly be present when the marriage is performed by a governmental officer; it would remain to be shown that the marriage itself inflicted “severe pain or suffering.” In light of the appalling circumstances accompanying child marriage as outlined in Part I above, it would seem quite possible that such a showing could be made in many cases, and therefore that a Member State, by not

117. *Id.* at art 2.

118. *Id.* at art. 3.

119. The Preamble to the Child Labor Convention states that “some of the worst forms of child labor are covered by other international instruments” including the Anti-Slavery Convention. *Id.* at pmb1.

120. *Id.* at art. 7.2(e).

121. Convention Against Torture, and other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 146 U.N.T.S. 85, as modified, 24 I.L.M. 535.

122. *Id.* at art. 1.

123. See, e.g., Kalra, *supra* note 35, at 215-16 (describing forced marriage as a form of enslavement and torture).

taking stronger measures to eliminate child marriage, could be in violation of its obligations under the Torture Convention.

F. African Charter on the Rights and of the Welfare of the Child, 1990 ("African Charter")

The African Charter¹²⁴ was adopted by the Organization of African Unity in Nairobi, Kenya, on June 27, 1981. Fifty-three countries are parties to this convention.

In contrast to the other international conventions we have examined, the African Charter flatly prohibits the marriage of persons under eighteen years old. Article XXI (2) provides: "Child marriage and the betrothal of girls and boys shall be prohibited, and effective action including legislation shall be taken to specify the minimum age of marriage to be eighteen years." This is the most explicit provision of any of the international treaties discussed herein. It unequivocally sets the minimum age of marriage at eighteen and brooks no exceptions for local religious or other cultural practices, nor does it allow for exceptions based upon the consent of a local authority or the parents or guardians of the children concerned. An Oxfam report optimistically states that this law is a reflection of changes in attitudes toward child marriages in recent years.¹²⁵ The only drawback to this convention is that there are not more States that are parties to it. Again, one longs for the ability to insert this provision into the CRC and the Marriage Convention, where it so clearly belongs.

124. *Organization of African Unity: Banjul Charter on Human and Peoples' Rights*, 21 I.L.M. 58, 59 (1982) (entry into force Oct. 21, 1986). The United States is not a party to this Convention.

125. See Susanne Louis B. Mikhail, *Child Marriage and Child Prostitution: Two Forms of Sexual Exploitation*, in *GENDER, TRAFFICKING & SLAVERY* 43-44 (Rachel Masika ed., 2002).

[E]arly marriages in general and child marriage in particular are increasingly frowned upon in many Middle Eastern and North African countries. This change has been manifested in various international statements [such as the African Charter]. . . . Not only is child marriage becoming a source of criticism: the discourse of comparing child marriages with child prostitution is also taking a new course. Increasingly, it is argued that the differences between child marriage and child prostitution are neither as many nor as profound as they were traditionally regarded to be, and that both practices share a number of characteristics.

Id.

G. Anti-Trafficking Conventions

1. Early International Agreements

International laws addressing trafficking in human beings have evolved considerably over the past 100 years. Two early conventions adopted among European states were concerned primarily with the transportation of white women across international borders for purposes of prostitution. The first of these treaties adopted in 1904¹²⁶ provided for the exchange of information among States Parties¹²⁷ and provided for the repatriation of prostitutes of foreign nationality,¹²⁸ but did not attempt to punish the persons responsible for transporting them. The second convention in 1910¹²⁹ added provisions calling for the punishment of persons who forcibly transported a woman across a border “for immoral purposes”¹³⁰ or, even with her consent, “a girl who is a minor”¹³¹ but only provided minimal protection for the victims. A woman forced into prostitution or other prohibited activity received no assurance under these early conventions that she would not be prosecuted under domestic law.

Subsequent conventions were adopted in 1921¹³² and 1933,¹³³

126. See International Agreement for the Suppression of the “White Slave Traffic,” Mar. 18, 1904, 1 L.N.T.S. 83 [hereinafter 1904 Convention], *amended by* Protocol amending the International Agreement for the Suppression of the White Slave Traffic, May 18, 1904, and the International Convention for the Suppression of the White Slave Traffic, May 4, 1910, May 4, 1949, 30 U.N.T.S. 23 [hereinafter 1949 Protocol]. The 1949 Protocol included a procedural clause for the accession of additional States. *Id.* at arts. 3-4.

127. See 1904 Convention, *supra* note 126, at art. 1 (requiring States Parties to “name some authority charged with the co-ordination of all information relative to the procuring of women or girls for immoral purposes abroad . . .”).

128. See *id.* at art. 3. The 1904 Convention did not address or even define the practice of prostitution itself, which was thought to be a domestic issue.

129. See International Convention for the Suppression of the “White Slave Traffic,” May 4, 1910, 98 U.N.T.S. 101 [hereinafter 1910 Convention], and as amended by 1949 Protocol, *supra* note 126. The 1949 Protocol added certain procedural clauses for accession and denunciation. 1949 Protocol, *supra* note 126, at arts. 8, 10.

130. 1910 Convention, *supra* note 129, at art. 2. One may fairly question whether the undefined phrase “immoral purposes” represents an improvement over the undefined word “prostitution” in the 1904 Convention.

131. *Id.* at art. 1; see also International Convention for the Suppression of the Traffic in Women and Children, March 31, 1922, 9 L.N.T.S. 415, art. 5 [hereinafter 1921 Convention] (noting that the 1910 Convention defined “under age” as less than the age of twenty, while the 1921 Convention raised that age to twenty-one).

132. See 1921 Convention, *supra* note 131, *amended by* Protocol to Amend the Convention for the Suppression of the Traffic in Women and Children, Sept. 30, 1921, and the Convention for the Suppression of the Traffic in Women of Full Age, Oct. 11, 1933, Nov. 12, 1947, 53 U.N.T.S. 13 [hereinafter 1947 Protocol].

133. See International Convention for the Suppression of the Traffic in Women of Full Age, Oct. 11, 1933, 150 L.N.T.S. 431, *amended by* 1947 Protocol, *supra* note 132.

which strengthened monitoring requirements, extended protection to children of both sexes and provided that the consent of the victim (regardless of age) was irrelevant to the question of whether an offense had indeed occurred. These early conventions sometimes used the term “traffic” as a shorthand reference to describe the transportation of persons for prohibited purposes, but did not formally define the term.

In 1950, another convention was adopted which was intended to supersede the earlier treaties (the “1950 Convention”).¹³⁴ The 1950 Convention expanded the scope of previously prohibited acts to cover victims of both sexes, regardless of age; it also eliminated the use of force or coercion as an element of the offense and dropped the requirement that the prohibited actions be international in character. The 1950 Convention further required States Parties to criminalize the keeping or managing of brothels or the knowing rental of a building for purposes of prostitution.¹³⁵ The trafficking of a person for purposes other than prostitution, however, remained beyond reach.¹³⁶

2. *The Trafficking Protocol of 2000*

In 2000, a major new international initiative arose with respect to trafficking in persons. The United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (the “Trafficking Protocol”) was adopted.¹³⁷ For the first time, trafficking for purposes other than

134. See Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, Mar. 21, 1950, 96 U.N.T.S. 271 [hereinafter 1950 Convention]; *id.* at art. 28 (noting that the 1950 Convention provided that it would supersede the 1904, 1910 and 1921 Conventions when it had been signed by all of the signatories of those earlier conventions); see also JEAN FERNAND-LAURENT, ACTIVITIES FOR THE ADVANCEMENT OF WOMEN: EQUALITY, DEVELOPMENT AND PEACE 17 (1985) (noting that the 1950 Convention “now reflects the philosophy of the overwhelming majority of members of the international community.”).

135. See 1950 Convention, *supra* note 134, at art. 2.

136. For further discussion of the 1950 Convention and prior treaties, see Nora V. Demleitner, *Forced Prostitution: Naming an International Offense*, 18 *FORDHAM INT’L L.J.* 163 (1994); Stephanie Farrior, *The International Law on Trafficking in Women and Children for Prostitution: Making it Live up to its Potential*, 10 *HARV. HUM. RTS. J.* 213 (1997).

137. Report of the Ad Hoc Committee on the Elaboration of a Convention Against Transnational Organized Crime on the Work of its First to Eleventh Sessions, 55th Sess., Agenda Item 105, U.N. Doc. A/55/383 (2000) [hereinafter Trafficking Protocol], available at http://www.unodc.org/pdf/crime/a_res_55/res5525e.pdf (last visited Apr. 21, 2004). The Trafficking Protocol will enter into force ninety days after the date of deposit of the 40th instrument of ratification. *Id.* at art. 17. The

prostitution (often euphemistically referred to as “immoral purposes” in prior conventions) was addressed. The Trafficking Protocol defined “trafficking in persons” to include:

the recruitment, transportation, transfer, . . . or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, . . . 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.¹³⁸

In addition to encompassing a broad range of actors who participate in, profit from or facilitate the unlawful transfer of a human being, the *purpose* of the unlawful transfer is not limited to prostitution, but includes other forms of “exploitation”:

Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs. . . .¹³⁹

The Trafficking Protocol goes on to provide that the consent of a victim of trafficking is irrelevant where any of the means set forth above has occurred; and, further, that the mere “recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation” shall be considered to be trafficking regardless of the means used.¹⁴⁰ “Child” is defined to mean any person under eighteen.¹⁴¹ This is by far the most expansive definition of trafficking in any of the international conventions addressing the subject and is designed to include the widest possible range of actors.

The Trafficking Protocol requires States Parties to adopt criminal penalties for trafficking, attempted trafficking, participating as an accomplice in trafficking and organizing or directing other persons in trafficking.¹⁴² In addition, the Trafficking Protocol provides an extensive regime for data collection and exchange,¹⁴³ prevention and

Trafficking Protocol does not explicitly supersede earlier conventions dealing with trafficking, and it is a matter of debate as to the extent to which those earlier conventions remain in effect. As of May 13, 2004, the Trafficking Protocol had been signed by 147 countries and ratified by sixty-two.

138. *Id.* at art. 3(a).

139. *Id.*

140. *Id.* at art. 3(c).

141. *Id.* at art. 3(d).

142. *Id.* at art. 5.

143. *Id.* at art. 10.

education programs,¹⁴⁴ and providing protection to the victims of trafficking.¹⁴⁵

Some of the most innovative features of the Trafficking Protocol are found in its concern for the victims. States Parties are to “consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking” including housing, counseling, medical care, employment, and educational and training opportunities.¹⁴⁶ States Parties are also required to establish comprehensive policies and programs to prevent and combat trafficking, and to “alleviate the factors that make persons, especially women and children, vulnerable to trafficking, such as poverty, underdevelopment and lack of equal opportunity,” and to “adopt or strengthen legislative or other measures, such as educational, social or cultural measures . . . to discourage the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking.”¹⁴⁷

When considered in the context of efforts to prevent child marriage, the Trafficking Protocol has a number of extremely attractive features. Unlike previous conventions on the subject, the Trafficking Protocol does not define its subject matter in terms of the victim’s sexual morality, but in terms of specific exploitive acts, regardless of whether those acts are otherwise permitted under domestic law.¹⁴⁸ The act does not have to occur trans-nationally; purely domestic instances of trafficking are covered. There are no exceptions for traditional or religious practices, and there is no loophole exonerating a trafficker who marries or causes the marriage of his victim. Consent is irrelevant to whether the crime of trafficking has occurred.¹⁴⁹ At first glance, this appears to eliminate the

144. *Id.* at art. 9.

145. *Id.* at arts. 6-9.

146. *Id.* at art. 6.

147. *Id.* at art. 9.

148. *See id.* at art. 3 (defining “trafficking” broadly without regard to whether the conduct in question might otherwise be legal); *see also* Victims of Trafficking and Violence Protection Act 2000, Pub. L. 106-386, 114 Stat. 1464 § 112 (2000) (strengthening prosecution and punishment for existing laws to create a more expansive law that criminalizes trafficking for commercial sexual exploitation, regardless of whether a separate crime is involved). These provisions represent a significant departure from prior law. *See also, e.g.*, 18 U.S.C. § 2421 (making it a crime to transport a person in interstate or foreign commerce “with intent that such individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense . . .”). The utility of this law, known as the Mann Act, was limited to criminal sexual activity and would not have applied to the transport of a person for the purpose of sexual activity that was legal (such as stripping in a properly-licensed nightclub) or for purposes of marriage. *Id.*

149. *See* Trafficking Protocol, *supra* note 137, at art. 3(b) (explaining that consent

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considerable problem of trying to determine whether a child can be said to have consented to be married, although as noted below, the issue does not entirely go away.

The Trafficking Protocol goes even further in stating that trafficking includes the “recruitment . . . transfer . . . or receipt of a child for the purposes of exploitation” regardless of whether force or coercion is used or whether money changes hands.¹⁵⁰ The marriage of a girl-child inevitably results in her “transfer” from her birth family to that of her husband, so that aspect is easily satisfied. If the marriage can also be considered a form of “exploitation,” then States Parties are required under the Trafficking Protocol to make it a crime and to establish programs and policies to prevent it.¹⁵¹ States Parties are further encouraged to adopt rehabilitation programs to assist the child victim in escaping her abuser and creating an independent life.¹⁵²

3. Child Marriage as a Form of Exploitation

Is the marriage of a child a form of “exploitation” as defined under the Trafficking Protocol? Three principal approaches suggest themselves. Child marriage could be considered a form of sexual exploitation, forced labor or “slavery or practices similar to slavery.” The application of any of these terms to marriage is admittedly problematic. Marriage is an explicitly sanctified, essentially private, legal relationship which society as a whole and governments in particular are loathe to interfere with this relationship. There will likely be a great deal of resistance toward classifying child marriage as being on a par with the forms of commercial exploitation envisioned by the Trafficking Protocol.¹⁵³

of victim is not a defense when trafficking has occurred); see also Jo Doezema, *Who gets to Choose? Coercion, Consent, and the UN Trafficking Protocol*, in GENDER, TRAFFICKING AND SLAVERY, *supra* note 125, at 21-23 (noting that there were bitter and protracted debates over this provision during the Trafficking Protocol negotiations, centering on whether prostitution can be considered to be such an inherent violation of human rights that no rational person would ever consent to it). The compromise that was reached eliminated lack of consent as a required element but also included force, coercion and other acts that necessarily imply that full and knowing consent is not achieved. *Id.* at 24.

150. Trafficking Protocol, *supra* note 137, at art 3(a).

151. See *id.* at art. 5 (mandating criminalization of exploitation and asking countries to take measures to combat trafficking by organized groups).

152. See *id.* at art. 6 (describing the obligations of State Parties to provide assistance and protection to victims of trafficking).

153. See *id.* at art. 1.3 (noting that the offenses established in the Trafficking Protocol are deemed to be offenses under the Convention Against Transnational Organized Crime). It is not also necessary to establish that these offenses were committed by an organized criminal group in order for the protections to apply. *Id.*

The difficulties of “piercing the wedding veil” to make a finding of exploitation are illustrated by the inability of existing laws to regulate a related industry: the mail-order bride business. Despite a large body of empirical and statistical evidence demonstrating that prospective mail-order brides are treated as commoditized sexual products and lack the economic and social status to protect themselves from abusive relationships, the mail-order bride business flourishes almost entirely free from regulation.¹⁵⁴ Laws prohibiting prostitution, forced labor, and involuntary servitude have not been brought to bear to prosecute the organizers or husbands involved.¹⁵⁵ Only when a mail-order bride attempts to leave her marriage does the law take effect, in which case the marriage is usually denounced as a sham and the bride is prosecuted, usually under immigration laws.¹⁵⁶

The Trafficking Protocol will not by itself undo a marriage; we still need domestic laws to accomplish this. However, if a child bride is deemed to come within the Protocol’s provisions as implemented by domestic law, she should at least be able to leave her husband if she wants, receive protection as a trafficking victim, and take steps toward an independent life. At the same time, the law can be brought to bear against the “traffickers,” usually a girl’s family and her husband’s family who “transferred” and “received” her into an exploitive relationship. The Trafficking Protocol, therefore, may represent the most comprehensive approach of any of the existing international conventions when it comes to prosecuting and minimizing the damage caused by child marriages.¹⁵⁷ However, while it may be relatively easy to make the factual case that exploitation has occurred

154. See SEXUAL EXPLOITATION & THE HUMAN RIGHTS OF GIRLS, *supra* note 1, at 29 (noting that mail-order bride businesses are not bound by rules of full disclosure nor are they obligated to inform women of their rights); see also Donna R. Lee, *Mail Fantasy: Global Sexual Exploitation in the Mail-Order Bride Industry and Proposed Legal Solutions*, 5 ASIAN L.J. 139, 153-54 (1998) (arguing that countries in which the mail-order bride industry is prevalent are also those whose governments have been slowest to take action against the businesses and thus the practice flourishes); Eddy Meng, *Mail-Order Brides: Gilded Prostitution and the Legal Response*, 28 U. MICH. J.L. REFORM 197, 200-01 (1994) (explaining that the mail-order bride industry has seen an increase in business in the last thirty years).

155. Meng, *supra* note 154, at 241-46 (describing the tendency of legislatures to target the women involved and putting forth ways the current legal system can target the consumer husbands and mail-order bride agencies instead).

156. *Id.* at 209-16 (explaining how the conditional permanent resident (CPR) status forces women to stay with their consumer husbands, regardless of the circumstances, or else face deportation to their home countries).

157. *Child Marriage*, UNITED NEWS OF BANGL. LTD., Jan. 24, 2003, available at 2003 WL 4186933 (reporting that at least one local NGO appears to be adopting the rhetoric of trafficking in its efforts to combat child marriage). A survey conducted by Palli Gono Sanghati Parishad has attributed the increasing rate of child marriage in certain regions of Bangladesh to “child trafficking.” *Id.*

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in a specific case, convincing a policy-maker that child marriage is so *inherently* exploitive that it violates the Trafficking Protocol and must be banned outright is a greater challenge.

Sexual Exploitation

The Trafficking Protocol defines “exploitation” to include “the exploitation of the prostitution of others or other forms of sexual exploitation.”¹⁵⁸ There can be no doubt that girl-children are married for the purpose of enabling their husbands to have sex with them, among other reasons. In fact, the institution of marriage was created to provide a legally sanctioned structure within which sex is permissible and even encouraged. Therein lies the trouble with calling marriage a form of sexual exploitation. Since sex is one of the fundamental objects of marriage and marriage is a fundamental societal relationship, a finding of sexual exploitation in the context of child marriage must turn on the existence of power and control, which create a climate in which the girl has no free choice and which raise the difficult issues of consent and voluntariness, despite the attempt in the Trafficking Protocol to eliminate consent of the victim as a relevant issue.

Calling child marriage a form of prostitution is especially difficult, since the girl by definition is having sex with only one man and not in a commercial setting.¹⁵⁹ Monogamous relationships do not fit the pattern of holding oneself out for hire to whomever agrees to pay the fare, and marriage is a legally protected relationship that by definition cannot also constitute a crime, a fact made clear by the many laws which define prostitution to be “illicit” or “immoral,” which is to say extra-legal sexual activity. Even though money or other property often changes hands in consideration for the marriage of a female child, the marriage itself remains private and socially approved. Nonetheless, there are striking parallels between child marriage and child prostitution: characterization of the transaction as essentially the sale of a human being who is expected (in the case of marriage, required by law) to provide sexual favors; the power exerted over the child by the adults who have arranged the sale/marriage; the economic and social vulnerability of the child; and the fact that the

158. Trafficking Protocol, *supra* note 137, at art. 3(a).

159. The Trafficking Protocol does not define “prostitution,” but the term is generally held to mean an arrangement in which a woman agrees (or is forced) to have sex with a number of men in exchange for compensation, paid either to her or to a person who controls her; thus it is a commercial practice, a means of making money.

child is bonded to her purchaser/husband without the right to end the relationship.¹⁶⁰

This is not to say that child marriage cannot be viewed as a form of sexual exploitation. But doing so necessarily involves examining the degree of freedom that the girl has to enter into or remain in the relationship, and it also involves convincing State actors to look behind the wedding veil and view a historically sanctified act as worthy of condemnation.

Forced Labor

One of the sad realities of the marriage of a girl-child is that her life so often becomes one of unremitting servitude to her husband and her husband's family. She must care for the children she is forced to bear. She must tend to her husband's needs and those of his household, and if she is unfortunate enough to be other than a first wife or to be disliked by her mother-in-law, she can expect to be given the dirtiest, hardest chores.¹⁶¹

As in the case of calling child marriage a form of sexual exploitation, viewing child marriage as a form of forced labor involves looking behind the wedding veil; the difference is that labor is not viewed as the object of marriage the way sex is, and accordingly there may be less resistance to criminalizing a child marriage on this basis. On the other hand, a society whose members are subject to grinding poverty is unlikely to see the laboring of a girl bride as being any different in character from the relentless work that all of them must perform to stay alive. The difference, again, must turn on whether that labor is *forced*—whether the girl has the right to say no. And that necessarily involves examining the fact that her marriage is a relationship she cannot leave and again calling into question the very nature of marriage itself and the elaborate and entrenched social structure that surrounds it.

Slavery or Practices Similar to Slavery

As noted above, the Anti-Slavery Convention defines “slavery or practices similar to slavery” to include arrangements in which a woman is promised in marriage in exchange for a consideration paid to another and without her having the right to refuse. It seems likely

160. See Mikhail, *supra* note 125, at 43-49.

161. Askari, *supra* note 20, at 131 (noting that child brides are often treated worse than house servants because their jobs possess the same hazards of unpaid labor, such as long hours, dangerous work and physical punishment, yet child brides do not receive any pay or benefits for their work).

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that, since the same phrase appears in the Trafficking Protocol, interpreters will look to the Anti-Slavery Protocol for guidance, although this is not assured.¹⁶² The advantage of this definition is that it does not look at circumstances occurring after the marriage has occurred, but at the circumstances surrounding the act of marriage itself. Once again, however, one must address the issue of voluntariness or consent.

More generally, slavery can be characterized as a situation where a person is subject to the absolute control of another person without the ability to enter into other relationships or to move about freely.¹⁶³ As in the case of forced labor, it may be relatively easy to make this determination in an individual case, but making the general case is a far more difficult matter given the exalted state that marriage holds in society.

4. Prospects

The Trafficking Protocol offers a lot of promise as a means of combating child marriage. Child marriage is clearly the transport of a child from the control of one set of adults to another. Money or other property usually changes hands in consideration of the transfer. A child is involved, so there is no need to demonstrate coercion or fraud or use of force. As a result of this transfer of control, a young human being is subject to sexual and physical abuse and exploitation and her life is put at risk.

Although it does not by its terms ban child marriage, the Trafficking Protocol is an attractive framework for preventing child marriage because of its extensive architecture of cooperation, reporting, monitoring and support services for the victim. Once the Trafficking Protocol goes into effect, it should serve as an excellent weapon for non-governmental organizations (NGOs) and other elements of society fighting to prevent child marriage.

IV. RECOMMENDATIONS AND CONCLUSIONS

There can hardly be any doubt that the marriage of girl-children causes them terrible harm, including risks to their health from premature sexual intercourse and childbearing, the loss of their freedom, and the curtailment of their self-development. Domestic laws are largely inadequate and far too deferential to regional cultural

162. For example, a given State may not be a signatory to both treaties.

163. See Slavery Convention, art. 1 (1927) (defining the scope of the Convention's protections), available at <http://www.unhchr.ch/html/menu3/b/f2sc.htm> (last visited June 29, 2004).

and religious customs that permit child marriages. In addition, they are largely unenforced. Most international conventions that initially look promising ultimately disappoint by not explicitly banning the practice or containing too many exceptions. Furthermore, many states have made reservations to provisions in those conventions that could otherwise have proved effective in the battle against child marriages.

A. Elements of Model Legislation

A number of conventions, such as the Trafficking Protocol, contain useful provisions that could be brought to bear in the fight against child marriage. However, no single law contains all the necessary elements to ban it entirely. The following is a list of provisions that need to be included to ensure a sufficiently tight network of laws.

An unambiguous prohibition of marriage of girls under eighteen and a requirement that any such purported marriages will be null and void, regardless of customary or other local laws to the contrary and regardless of whether the girl has consented to be married or whether money or property has changed hands (though these factors could help establish a *prima facie* case). Any exceptions to this rule would be narrowly construed, would require the approval of an impartial magistrate and would be permitted only for the most serious reasons, such as pregnancy. Another, more radical option would be to make such a marriage voidable at the initiative of the girl, regardless of whether the marriage had been consummated. This would enable the girl to continue to receive, at her option, whatever protections she may have at law by virtue of the marriage, such as the right to inherit property or keep her children, while simultaneously allowing her to leave a marriage forced on her before she is mature enough to comprehend the ramifications.

Strict criminal and civil penalties applicable to anyone who officiates, facilitates, or participates in such a marriage, including the girl's or the groom's parents, regardless of whether the parties exchange money or property or the girl or third parties consent to the marriage.

Mandatory birth registration and marriage registration to track the ages of the brides.

Protection and support regimes for rescued child brides, as mandated by the Trafficking Protocol.

Monitoring and reporting systems that track the progress of individual states in reducing the incidence of child marriage.

Criminalization by individual states of the practice of their citizens

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going to foreign countries to marry young girls, regardless of whether those marriages are legal in those foreign countries. International law permits this exercise of jurisdiction by a state over its citizens, and several nations already use legislation like this to punish citizens who engage in acts of tourism while abroad.¹⁶⁴

It must be noted that amending international conventions is extremely difficult, as each signatory to the original convention must approve the amendments. A convention that is too strict would either not have many signatories or the signatories would reserve against the provisions they do not like. Judging from the reservations made to the CRC and CEDAW, one can expect those nations where child marriage is most prevalent to express reservations to tough clauses like the ones listed above. The most practical approach to enacting the necessary laws will probably involve a combination of international and domestic efforts.

B. Extra-legal Measures

Given the multiplicity of laws already on the books that are not being enforced, it is clear that the effort to eradicate child marriage will not succeed without a determined social and political effort - not only to vigorously enforce the current laws and enact tough new ones, but also to change prevailing attitudes and provide incentives for certain cultures to change their behavior. In an environment of grinding poverty, pernicious discrimination, and generally limited opportunities for females, early marriage is most often seen as a girl's only available option in life.

In order for these attitudes to change, society must provide young women more options. Policy-makers must understand that improving the status and welfare of girls, so that they delay marriage and produce fewer children, is one of the most significant ways of improving the welfare of society as a whole. Study after study confirms that the income and health of a population improves when

164. See, e.g., Crime (Child Sex Tourism) Amendment Act 1994, (amending part IIIA of the Crimes Act 1914) (Austl.). This law makes it a crime for an Australian citizen or resident to engage in certain sex acts while outside Australia with a person who is under sixteen. *Id.* at § 50BA(1). Unfortunately, this law provides that it is a defense to prosecution if the defendant can show that he was married to the child at the time. *Id.* at § 50CB. Sweden is also considering a law that would refuse to recognize certain immigrant marriages even if those marriages are legal in the countries the immigrants came from. See *Swedish Government Proposes Restrictions on Youth Marriages*, ASSOC. PRESS, Oct. 18, 2002.

women delay childbearing.¹⁶⁵ The education of women produces a rising tide that lifts all boats.

Certainly, such a tremendous shift in social policy will take time. The following is an action list of extra-legal programs that should be considered by governments and by non-governmental organizations (NGOs) alike.

Consider programs that pay girls to delay marriage, such as one being tested in certain regions of India. Girls receive a substantial cash payment if they are still single at age eighteen. The beauty of such a program is it costs little to administer and is very effective when applied to people in poverty-stricken areas. The payments relieve the pressure on poor families' economic incentive to marry their daughters off as soon as possible and instead encourage them to keep girls in school.¹⁶⁶

Promote alternative interpretations of religious texts to rebut the notion that early marriage is required or approved. This is being tried in Sri Lanka.¹⁶⁷

Strengthen the political will by emphasizing the clear link between the economic improvement of a society and delayed and reduced childbearing.¹⁶⁸

Strengthen international commitments to reduce child mortality, improve access to reproductive health care for women and improve access to health care for society as a whole, which will reduce the incentives for families to produce as many children as possible. Foreign aid programs can target these specific goals or condition receipt of aid on improvement in reducing the incidences of child marriage.

Provide free compulsory education for girls through secondary school, as well as vocational training programs, micro-loans and other

165. See, e.g., *Does Population Matter?*, *ECONOMIST*, Dec. 7, 2002, at 74 (indicating that the "demographic dividend" that produces economic growth is most pronounced when the population of young adults is growing faster than the population of children or older adults, which is only possible when women delay childbearing until they become adults themselves, and produce fewer children). Furthermore, it is the poorer elements of society that benefit the most from this demographic shift. *Id.* See also *CHILD SPOUSES*, *supra* note 1, at 15 (averring that delaying marriage to post-adolescence ultimately grants young women higher social status and greater autonomy).

166. See *CHILD SPOUSES*, *supra* note 1, at 15 (describing the financial incentive for young women in India to delay marriage until at least eighteen years of age).

167. *Id.* (noting that while traditionally low, Islamic law has helped raise the average age of marriage to twenty-five).

168. See *Does Population Matter?*, *supra* note 165 (theorizing that decreases in family size will enable more women to enter the labor market, thus creating a more productive workforce).

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economic measures to provide girls with alternatives to marriage and give them the means to lead independent productive lives.

Focus on changing men's attitudes, in order to reduce discrimination and violence against women.

C. Conclusions

Drafting laws to prohibit child marriage is easy. Convincing people to change their ways and enforce laws that are on the books is a far more difficult matter. International and domestic laws have been far too deferential to traditional and religious practices that violate individual human rights and harm society as a whole. States lack the political will, to say nothing of the funding, to enforce laws on the books, especially in remote rural areas. People learn to ignore laws that go unenforced or when they feel that such laws intrude upon their cultural heritage or violate their religious obligations.

But it is possible to change entrenched attitudes, even when they have existed for hundreds of years and even when they are justified in the name of religion or traditional culture. The practice of *sati* in India, whereby a widow was pressured into immolating herself on her husband's funeral pyre, has largely died out, due to a committed effort by the British Raj and Christian missionaries in the nineteenth century that combined tough enforcement of laws prohibiting the practice and extensive public education campaigns. *Sati* had been practiced for centuries and was justified by Hindu mythology, but its justification on religious grounds was emphatically refuted by reference to other sacred texts.¹⁶⁹

An even more impressive success story can be found by examining the tradition of footbinding, which was practiced in China among women of all social classes for nearly a thousand years, but which ended abruptly in the early twentieth century. The practice had been nearly universal, lauded in poetry and song as the essence of femininity. Once again, Western Christian missionaries and NGOs played an important role in the campaign to eradicate it, by speaking out against the practice in their schools and providing financial incentives to parents who did not bind their daughter's feet. Footbinding was described as going against the tenets of Confucianism. In addition, Chinese people were told that foreigners

169. See Erika Sussman, Comment, *Contending with Culture: An Analysis of the Female Genital Mutilation Act of 1996*, 31 CORNELL INT'L L.J. 193, 225-37 (1998) (reporting that by citing to scripture, the anti-*sati* movement appealed to the *sati* supporters, by demonstrating to those who supported the practice on religious grounds that the religious text upon which they based their support for *sati*, in fact, ran contrary to Hinduism).

regarded footbinding as a barbarous practice that would greatly inhibit China's ability to conduct foreign trade.¹⁷⁰ As a result, there was an abrupt and complete change in public attitude, which thoroughly supported new laws banning the practice.¹⁷¹

Though marriage is one of civil society's most important and fundamental institutions, it is properly an institution for adults only. In some ways, banning child marriage should be easier than banning other harmful traditional practices, such as *sati*, footbinding or female genital mutilation. Like the latter practices, advocates do not seek to stop marriage entirely, only to make the parties wait a little longer before entering into it. Ending child marriage does little harm to traditional cultural practices and produces enormous economic benefits. Society in general and young girls in particular are better off for it.

170. *Id.* at 218 (arguing that the practice hindered China's integration with the modern world).

171. *Id.* at 222-23 (discussing how the shift in societal attitudes was influenced primarily by the increased education of women and widespread use of the printing press).