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SEXUAL USE, ABUSE AND EXPLOITATION OF CHILDREN: CHALLENGES IN IMPLEMENTING CHILDREN'S HUMAN RIGHTS

Roger J.R. Levesque*

INTRODUCTION

Despite initial optimism, the New World Order has not yet led to an expansion of human rights protections or to the creation of new rights-protective regimes.¹ For example, the extent to which children's basic human rights will be recognized and protected remains unclear.² This lack of attention to

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¹ See, e.g., Jack Donnelly, *Human Rights in a New World Order: Implications for a New Europe*, in HUMAN RIGHTS IN THE NEW EUROPE: PROBLEMS AND PROGRESS 7, 7, 20-30 (David P. Forsythe ed., 1994) (noting that threats to human rights have been unleashed by nationalist movements); Roger J.R. Levesque, *International Children's Rights Grow Up: Implications for American Jurisprudence and Domestic Policy*, 24 CAL. W. INT'L L.J. 193, 201 n. 41 (detailing the development of the New World Order and the continuing focus on international security rather than human rights issues).

² See Levesque, *supra* note 1, at 201 (noting the place of children in the New World Order); Gary B. Melton, *Is There a Place for Children in the New World Order?*, 7 NOTRE DAME J.L. ETHICS & PUB. POL'Y 491, 493-529 (1993) (after examining the plight of children in poverty, war zones, and developing countries, the author asks and answers: whether there will be a place for children in the New World Order, "I hope so"). Even though the Convention on the Rights of the Child has been ratified by a number of nation states, it is unclear what the impact of the Convention ultimately will have. See Convention on the Rights of the Child, opened for signature Jan. 26, 1990, G.A. Res. 25, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/RES/44/25 (1989), 28 I.L.M. 1457; see also Roger J.R. Levesque, *The Internationalization of Children's Rights: Too Radical for American Adolescence?*, 9 CONN. J. INT'L L. 237, 284 (1994) (noting that commentators and Nation States that have ratified the Convention are interpreting obligations narrowly).

Increasing international strife contributes to the distressingly large number of children in war zones. See generally THE PSYCHOLOGICAL EFFECTS OF WAR AND

children's rights in the New World Order is particularly disturbing when one considers that the sexual maltreatment of children³ is a global problem that is increasing in scope yet essentially goes unnoticed.⁴

The failure to conceptualize sexual maltreatment within the existing framework of international human rights law⁵ is distressing. The global community recognizes that children possess human rights,⁶ including the right to be protected

VIOLENCE ON CHILDREN (Lewis A. Leavitt & Nathan A. Fox eds., 1993) (containing a series of articles relating to the effects of war and violence on children's development); JAMES GARBORINO ET AL., NO PLACE TO BE A CHILD: GROWING UP IN A WAR ZONE (1991) (examining the lives of children in urban America); Magne Raundalen & Gary B. Melton, *Children in War and Its Aftermath: Mental Health Issues in the Development of International Law*, 12 BEHAV. SCI. & L. 21, 21-34 (1994) (describing the evolving international framework aimed at alleviating the effects of war on children).

It seems that several countries have been moving rapidly toward the physical betterment of their children's lives. See UNICEF, THE STATE OF THE WORLD'S CHILDREN 1994, at 1-56 (1994) (detailing specific progress against major threats to the health and well-being of the world's children). In the United States, however, more children than ever before are living in crisis. See CHILDREN'S DEFENSE FUND, THE STATE OF AMERICA'S CHILDREN: YEARBOOK 1994, at 1-16, 63-71, 73-77 (1994) (detailing the rise of children living in poverty and with violence without adequate health care and nutrition); see also DAVID A. HAMBURG, TODAY'S CHILDREN: CREATING A FUTURE FOR A GENERATION IN CRISIS 39-48 (1992) (succinctly summarizing the crisis facing children in the United States); *id.* at 51-333 (detailing ways in which the crisis could be met appropriately); U.S. ADVISORY BOARD ON CHILD ABUSE AND NEGLECT, DEPT OF HEALTH & HUMAN SERVS., NEIGHBORS HELPING NEIGHBORS: A NATIONAL STRATEGY FOR THE PROTECTION OF CHILDREN 1-15 (1993) (detailing the "national emergency" in child protection).

³ See, e.g., Gary B. Melton, *It's Time for Neighborhood Research*, 16 CHILD ABUSE & NEGLECT 911, 912 (1992) (noting that the national emergency in child protection reflects an international crisis).

⁴ Sexual maltreatment is quickly becoming a global issue. See Margot Hornblower, *The Skin Trade: Poverty, Chaos and Porous Borders Have Turned Prostitution into a Global Growth Industry, Debasing the Women and Children of the World*, TIME, June 21, 1993, at 44; Michael S. Serrill, *Defiling Children*, TIME, June 21, 1993, at 52; see also *infra* notes 103-09 and accompanying text.

⁵ See *infra* note 9. The failure to view maltreatment as a basic human right is evidenced by its omission from UNICEF's annual report on children's issues. See, for example, UNICEF, *supra* note 2, at 64-83, which focuses on mortality, nutrition, health, education and economic factors as indicators of children's welfare. But see CHILDREN'S DEFENSE FUND, *supra* note 2, at 88 (reporting rates of maltreatment and neglect).

⁶ See Levesque, *supra* note 1, at 197-202 (detailing the international changes in the manner in which children are viewed). See generally MARY A. MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES (1994).

from some forms of sexual maltreatment.⁷ Yet, in application, the focus of protection for children has been limited to prostitution and pornography.⁸ Commentators have failed to argue for the expansion of these protections or for the basic human right to be free from sexual maltreatment.⁹

The lack of interest in a more expansive view of sexual maltreatment should not be surprising to those familiar with international human rights law: there are virtually no explicit, enforceable international protections against sexual maltreatment of children.¹⁰ Although the right to be free from sexual exploitation sometimes has been perceived as a human right, it usually has been limited to health or economic issues requiring

⁷ See *infra* notes 122-32.

⁸ This has been the mandate of a Special Rapporteur, commissioned in 1990. See *Rights of the Child, Sale of Children, Child Prostitution and Child Pornography*, U.N. Commission on Human Rights, 50th Sess., Agenda Item 22, at 3, U.N. Doc. E/CN.4/84 (1994) (submitted by Mr. Vitit Muntarbhorn, Special Reporter) [hereinafter *Child Prostitution*].

⁹ As an international human rights issue, sexual maltreatment has focused on female genital mutilation. These discussions are interesting in that they continue even though protection against such treatment is not a right explicitly recognized in human rights instruments. Cf. Geraldine van Bueren, *Child Sexual Abuse and Exploitation: A Suggested Human Rights Approach*, 2 INT'L J. CHILDREN'S RIGHTS 45, 45 (1994) (advocating for the protection and prevention of child sexual abuse by including such abuse within international human rights law). This lack of recognition has been a major obstacle to those combating female circumcision. See Karen Engle, *Female Subjects of Public International Law: Human Rights and the Exotic Other Female*, 26 NEW ENG. L. REV. 1509, 1513-14 (1992); Robyn C. Smith, *Female Circumcision: Bringing Women's Perspectives into the International Debate*, 65 S. CAL. L. REV. 2449 (1992); Comment, *What's Culture Got To Do With It? Excising the Harmful Tradition of Female Circumcision*, 106 HARV. L. REV. 1444, 1957 nn.94-98 (1993). It is important to note that these discussions limit their examination to the sexual maltreatment of girls; the sexual maltreatment of boys has yet to be investigated. See, e.g., Kristen Lee, *Female Genital Mutilation: Medical Aspects and the Rights of Children*, 2 INT'L J. CHILDREN'S RIGHTS 35, 35 (1994) (choosing not to examine male circumcision since it "cannot be considered an infringement upon the health or rights of boys and young men").

Even anthropologists, the group expected to report cultural practices, generally have failed to address the varieties of sexual maltreatment across cultures. See Jill E. Korbin, *Child Sexual Abuse: Implications from the Cross-Cultural Record*, in CHILD SURVIVAL: ANTHROPOLOGICAL PERSPECTIVES ON THE TREATMENT AND MALTREATMENT OF CHILDREN 247 (Nancy Scheper-Hughes ed., 1987) (noting anthropologists' complacency about reporting incest and improper sexual conduct within the family). See generally David Finkelhor & Jill Korbin, *Child Abuse as an International Issue*, 12 CHILD ABUSE & NEGLECT 3 (1988) (examining dimensions of child abuse and suggesting a strategy for an international approach to policy development concerning child abuse).

¹⁰ Van Bueren, *supra* note 9, at 45.

only progressive implementation.¹¹ In addition, the right to be free from sexual abuse commonly has not been regarded as a human rights issue.¹² Moreover, some practices, such as the sexual use of children in ritualistic initiation ceremonies, have never even been issues of concern to commentators.¹³

This Article addresses the general failure to view children's protection from sexual maltreatment as a basic human rights issue and examines this right in the context of international human rights law.¹⁴ Part I examines instances of the sexual use of children where the children are being used sexually in cultures that view such practices as a necessary prerequisite to healthy development and full participation in society. This discussion considers the inherent conflict between individual rights and cultural norms, and evaluates the available international protections for children. Part II discusses the sexual exploitation of children, particularly how children are sexually exploited for purely economic gain. This section examines how the international protections against exploitation may conflict with the rights of nations and individuals to utilize their own economic and social resources. Part III then analyzes the sexual abuse of children, in situations where clear prohibitions against sexual interactions with children exist and where such acts generally are viewed as harmful. The section frames the argument for protection against sexual abuse in terms of conflict between children's rights and family rights.

Finally, this Article concludes by emphasizing the complexity of sexual maltreatment and the need for diverse responses to address the rights involved. Previous commentaries have overemphasized cultural sensitivity, protection for

¹¹ See *infra* notes 16-17 and accompanying text.

¹² Van Bueren, *supra* note 9, at 45 (the reason for this failure is that human rights have been viewed as the law of nations, rather than private law).

¹³ It is important to differentiate active sexual use in rituals from rituals that prepare children for sexual activities. The latter have been well-studied, as in female ritual mutilation. See *infra* notes 15-18. The former has not received any attention from legal commentators. Indeed, only anthropologists seemingly have been interested in ritual use of children, especially the use of boys. See *infra* notes 20-31 and accompanying text.

¹⁴ Several of the aspects of the discussion of specific types of child sexual maltreatment also are applicable to other types of abuse. The types of maltreatment are being offered only as a means to examine issues relevant to the broader category of child sexual maltreatment.

families' privacy, and consideration for communities' economies. Any serious response to protect children from sexual maltreatment necessitates intruding on cultures and families, as well as infringing upon countries' economic and social resources. Putting aside issues of morality and implementation, the history and current trends in international law dictate such intervention.

I. THE SEXUAL USE OF CHILDREN: CULTURAL VS. INDIVIDUAL RIGHTS

In terms of children's rights, the practice of female genital mutilation has been one of the most poignant controversies at the heart of the conflict between peoples' rights to cultural autonomy and individual self-determination.¹⁵ Two arguments against female circumcision are most persuasive: (1) it is a traditional practice with prejudicial consequences to the health of children, and thus should be abolished; and (2) that genital mutilation is torture.¹⁶ Although intuitively accurate, both approaches are inherently limited. For example, if health was the major issue, the "health" approach already would have led to the eradication of the practices. That is, as nations are under the obligation to promote "healthy" practices to the extent that they have the resources, and the resources needed to abolish genital mutilation essentially are minimal,¹⁷ if health was the issue, the eradication of the practice should be easily attained.

¹⁵ See *supra* note 9.

¹⁶ Female circumcision may directly conflict with a child's right to the highest attainable standard of health. See *Convention on the Rights of the Child*, *supra* note 2, at art. 24(3) ("States Parties have to take all effective and appropriate measures towards eradication of all traditional practices affecting the health of children."). See, e.g., *Report of the U.N. Seminar on Traditional Practices Affecting the Health of Women and Children*, Commission on Human Rights, 44th Sess., Annex, Agenda Item 4, U.N. Doc. E/CN.4/Sub.2/48 (1991); see also Lee, *supra* note 9, at 41-43.

¹⁷ In addition to the cost of disseminating information and educating the public, there are minimal resource implications attached to prohibiting female circumcision through national legislation. See Jennifer Schirmer et al., *Anthropology and Human Rights: A Selected Bibliography*, in HUMAN RIGHTS AND ANTHROPOLOGY 121, 190 (Theodore E. Downing & Gilbert Kushner eds., 1988) (noting the importance of education in combating female circumcision and the fear that simply viewing genital mutilation as a health issue and offering operations in hospitals will further institutionalize the practice and make it more difficult to eradicate).

Additionally, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment does not define torture such that it covers genital mutilation.¹⁸ Furthermore, both approaches leave unchallenged other traditional practices—such as certain masculinity rituals—that make use of children in sexual ways.¹⁹ These practices provide examples of the unavoidable conflict between individuals' human rights or group rights of "peoples" and potential international obligations to intervene.

A. *The Sexual Use of Children*

Recently, several indigenous Melanesian cultures have gained a degree of notoriety as anthropologists have "discovered" and begun to pay theoretical and comparative attention to reporting and explaining behaviors that have been given the controversial label "homosexual societies."²⁰ Although various

¹⁸ The U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, 39th Sess., 93d plen. mtg., Annex, Agenda Item 99, at 3, U.N. Doc. A/RES/39/46 (1984) (entered into force June 26, 1987) [hereinafter *Convention Against Torture*], incorporates the notion of intentional infliction of severe mental or physical pain for "such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed . . . 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." *Convention Against Torture*, art. 1; see also CENTER FOR THE STUDY OF HUMAN RIGHTS, *TWENTY-FOUR HUMAN RIGHTS DOCUMENTS* 72 (1992). This definition is rather restrictive, since it excludes most of female circumcision. See Andrew Byrnes, *The Committee Against Torture*, in UNITED NATIONS AND HUMAN RIGHTS 509, 520 (Philip Alston ed., 1992) (arguing that when procedures are done by state-run or licensed hospitals the relationship with the state is sufficient to come within the meaning of Article 1, although the Committee Against Torture did not find it to be so); Hillary Charlesworth et al., *Feminist Approaches to International Law*, 85 AM. J. INT'L LAW 613, 628 (1991); Van Bueren, *supra* note 9, at 49 ("The majority of female circumcisions, however, are not inflicted with such tortious intent nor are they directly linked to the state, as they are traditionally performed by private individuals, and frequently done with the girls' consent.").

Perhaps more importantly, female circumcision is not classified as torture by the Inter-African Committee on Traditional Practices Affecting Women and Children, nor in the African Charter on the Rights and Welfare of the Child. See Van Bueren, *supra* note 9, at 50.

¹⁹ See *infra* note 31.

²⁰ The most popular of these societies is located in New Guinea. Cf. BRUCE M. KNAUFT, *SOUTH COAST NEW GUINEA CULTURES: HISTORY, COMPARISON, DIALECTIC* 8 (1993). The extent to which this characterization is accurate and the pervasive-

forms of same-sex ritual behavior have been reported in these societies, the aspects relevant to a discussion of child sexual use are those which involve the homosexual use of boys.²¹

The Sambia of New Guinea is the most well-documented society that routinely makes use of homosexual rituals involving young boys.²² Like several New Guinea peoples, the Sambia believe that male maturation does not occur as an innate biological process.²³ The Sambia believe that masculinity must be forced or initiated through the intervention of cultural practices.²⁴ masculinity can be achieved only through sequenced rites of transition.²⁵ These rites involve subjecting boys to numerous tests and brutal hazing—some of which involve physical beating, thrashing and nose-bleeding rites.²⁶

ness of these practices has been the subject of controversy. *Id.* at 8-9, 45-85, 117-26; see also D.K. FEIL, *THE EVOLUTION OF HIGHLAND PAPUA NEW GUINEA SOCIETIES* 176-99 (1987) (discussing homosexual rituals in "homosexual societies" and doubting the utility of viewing societies under such a rubric).

²¹ See generally FEIL, *supra* note 20, at 177-78; THEODORE LIDZ & RUTH W. LIDZ, *OEDIPUS IN THE STONE AGE: A PSYCHOANALYTIC STUDY OF MASCULINIZATION IN PAPUA NEW GUINEA* 81-105 (1989). The most prolific writer in the area has been Gilbert Herdt. See e.g., GILBERT H. HERDT & ROBERT J. STOLLER, *INTIMATE COMMUNICATIONS: EROTICS AND THE STUDY OF CULTURE* (1990); *RITUALIZED HOMOSEXUALITY IN MELANESIA* (Gilbert H. Herdt ed., 1984); Gilbert H. Herdt, *Semen Depletion and the Sense of Maleness*, 3 *ETHNOPSYCHIATRICA* 79, 79-116 (1980).

²² Gilbert Herdt's prolific work will form the basis of our discussion. See GILBERT H. HERDT, *THE SAMBIA: RITUAL AND GENDER IN NEW GUINEA* (1987) [hereinafter HERDT, *THE SAMBIA*]; GILBERT H. HERDT, *GUARDIANS OF THE FLUTES: IDIOMS OF MASCULINITY* (1981) [hereinafter HERDT, *GUARDIANS OF THE FLUTES*]; *RITUALS OF MANHOOD: MALE INITIATION IN PAPUA NEW GUINEA* (Gilbert H. Herdt ed., 1982) [hereinafter *RITUALS OF MANHOOD*].

²³ For a listing of other societies that practice similar rituals and believe that boys must be "made" into men by ritual activation, see DAVID G. GILMORE, *MANHOOD IN THE MAKING: CULTURAL CONCEPTS OF MASCULINITY* 153 (1990).

²⁴ The Sambia believe that women have a special internal organ, called *tingu*, present from birth, that slowly matures them naturally. Boys also have the same organ at birth, but they are weak and inactive, and require semen to grow. See HERDT, *GUARDIANS OF THE FLUTES*, *supra* note 22, at 167-72.

²⁵ See HERDT, *GUARDIANS OF THE FLUTES*, *supra* note 22, at 203-54.

²⁶ See HERDT, *THE SAMBIA*, *supra* note 22, at 101-69 (describing the several stages of initiation). Nose bleeding is considered to be the most painful ritual aimed at causing authentic physical and psychological trauma. *Id.* at 139-45; HERDT, *GUARDIANS OF THE FLUTES*, *supra* note 22, at 224. The method is simple: sharp, stick-stiff grasses are forced up the boys' nostrils until the blood flows copiously. *Id.* at 225. In other rituals, the boys are flailed violently with sticks, switches or bristly objects until their skin is "opened up" and the blood flows. *Id.* at 222; see also HERDT, *THE SAMBIA*, *supra* note 22, at 184-85 (describing ritual nose bleeding and its necessarily traumatic effects).

Several other commentators have reported other societies to have similar

In addition to the usual bloodletting and hazing found in several indigenous cultures, Sambia rituals also involve a period of "homosexuality" in which youngsters are forced to perform fellatio on older boys or adult men.²⁷ The Sambia believe that repeated ritual insemination triggers the process of male development,²⁸ that semen ingestion provides boys with the substance or "seed" of growing masculinity. The Sambia hold firmly to these practices and contend that failure to perform masculinization rites will lead to the destruction of their culture.

These masculinization rituals,²⁹ appropriately interpreted, are a necessary passageway to manhood, including "exclusive heterosexuality," marriage and procreation.³⁰ All aspects of the rituals, including the series of "semen transactions," are

rituals and have described their "cruel, brutal, and sadistic" processes. Donald F. Tuzin, *Ritual Violence Among the Iahita Arapesh: The Dynamics of Moral and Religious Uncertainty*, in *RITUALS OF MANHOOD*, *supra* note 22, at 321, 325. One group of commentators described a part of male initiation as follows:

Now the instruments used for bleeding the nose are not simply jabbed into the nostrils, but driven deeply with a stone or wooden pounder to cause very profuse bleeding. Similarly the glans penis is not simply incised, but small wedges of flesh removed from either side, producing deep, half-inch-long gashes that occasionally penetrate the urethra. The lacerated glans then is struck sharply and repeatedly with the blade of the bamboo knife used in the cutting and also is rubbed vigorously with salt or nettles.

Philip L. Newman & David J. Boyd, *The Making of Men: Ritual and Meaning in Awa Male Initiation*, in *RITUALS OF MANHOOD*, *supra* note 22, at 239, 275; *see also*, JEAN LA FONTAINE, *INITIATION* 119-25 (1986) (describing how the Gisu cut young boys' foreskin); C. STANLEY URBAN & S. THOMAS URBAN, *ANTI-PRIMITIVISM AND THE DECLINE OF THE WEST: THE SOCIAL COST OF CULTURAL IGNORANCE* 117-33 (1993) (examining masculine puberty rites involving circumcision, incision, subincision and bloodletting); *id.* at 140-49 (examining female puberty rites involving circumcision).

²⁷ HERDT, *GUARDIANS OF THE FLUTES*, *supra* note 22, at 232-42 (noting that boys are assigned to older men who are not close blood relatives).

²⁸ HERDT, *GUARDIANS OF THE FLUTES*, *supra* note 22, at 236 (noting that repeated inseminations are needed to "create a pool of maleness" deposited in a young boy's inactive *tingu*). It is believed that the semen actually strengthens the boy's bones and builds muscles, until eventually, with enough semen ingested, the boy begins puberty. *See also* HERDT, *THE SAMBIA*, *supra* note 22, at 102-03 (calling the entire process "ritualized masculinization," a process that requires the "[o]ral ingestion of semen—ritualized fellatio . . . [so that] after years of ritualized homosexuality and body treatment . . . [the process creates] a means of stimulating their maleness and masculinity").

²⁹ HERDT, *GUARDIANS OF THE FLUTES*, *supra* note 22, at 205.

³⁰ HERDT, *GUARDIANS OF THE FLUTES*, *supra* note 22, at 3; *see also id.* at 218-19, 234-36 (describing the importance of semen ingestion for the development of masculinity).

necessary events integral to the symbolic world of Sambia's culture. These rituals continue, despite attempts by the Australian government to eradicate them.³¹

The Sambia induction of boys into manhood through a series of culturally imposed rituals highlights several of the difficulties involved in trying to respect both cultural and individual rights. Although it is an integral part of Sambia's culture, the ritualization process clearly uses boys in ways that otherwise would violate the human dignity provisions of most human rights treaties.³² The Sambia provide a specific example of the need to balance both cultural and individual rights³³ in international law and to determine the extent to which children are to be protected against sexual use.

³¹ HERDT, *THE SAMBIA*, *supra* note 22, at 210-11. For an examination of the impact of the West in Melanesian society, see generally John Barker, *Christianity in Western Melanesian Ethnography*, in *HISTORY AND TRADITION IN MELANESIAN ANTHROPOLOGY* 144 (James G. Carrier ed., 1992) and *SOCIAL CHANGE IN THE PACIFIC ISLANDS* (Albert B. Robillard ed., 1992). See also JOHN H. BODLEY, *VICTIMS OF PROGRESS* (3d ed. 1990) (influential analysis of the impact of modernization and economic development on tribal cultures).

³² Taking a Western human rights perspective, the practices invariably violate what every human rights instrument affirms: "the inherent dignity . . . and equal and inalienable rights of all members of the human family." Convention on the Rights of the Child, *supra* note 2, pmbl. ¶ 1; see also LOUIS HENKIN, *THE RIGHTS OF MAN TODAY* 131-32 (1978) (arguing that human rights ideology rests on "respect for the individual welfare, autonomy, and dignity of men and women").

³³ This balance is rather important because commentators tend to discuss cultural rights in a vacuum and to disagree about the extent to which culture and/or individual rights are to be protected. Compare R.J. VINCENT, *HUMAN RIGHTS AND INTERNATIONAL RELATIONS* 37-57, 111-52 (1986) (arguing for a "basic needs doctrine," which focuses on cultural pluralism and gives priority to subsistence rights) with JACK DONNELLY, *UNIVERSAL HUMAN RIGHTS IN THEORY & PRACTICE* 109-25 (George A. Lopez ed., 1989) (arguing for the universal recognition of human rights and for weak cultural relativism and further arguing for core rights which must be recognized by all societies which are connected to human dignity) and HENKIN, *supra* note 32, at 131-32 ("Occasional tensions between individual rights and public good, or between competing rights, may require accommodation between them, but that too has to be achieved within the human rights ideology, with respect for the individual welfare, autonomy, and dignity of men and women today and tomorrow."). But see SMITH, *supra* note 9, at 2452-73, 2503 (challenging an anthropological theory proposing that female ritual circumcision is integral to tribal cultures); Comment, *supra* note 9, at 1995 (arguing that "the promotion of universal human rights is not a mutually exclusive alternative to the maintenance of cultural identity and tradition").

B. *Cultural and Group Rights vs. Individual Rights*

The difficulty in deciding which rights are to be respected in Sambian society reflects the international community's goal of preserving the right to traditional cultural practices while simultaneously ensuring individuals' dignity and rights. The twin concepts of cultural rights and peoples' autonomy found in international instruments are vital to understanding the position of international law and the role of nation states in ensuring rights. If existing international instruments are taken seriously, children's individual rights should take precedence over abusive cultural practices.

The stature of cultural rights in international law is demonstrated by the documents comprising the International Bill of Human Rights, a core list of internationally recognized human rights.³⁴ The Universal Declaration of Human Rights ("Universal Declaration"),³⁵ the authoritative statement on fundamental rights,³⁶ fails to define cultural rights, however. The Universal Declaration simply asserts that "[e]veryone, as a member of society, . . . is entitled to . . . cultural rights indispensable for his dignity"³⁷ and that everyone "has the right freely to participate in the cultural life of the community."³⁸

³⁴ For the fundamental sources of cultural rights, see U.N. CHARTER arts. 55, 56, the Universal Declaration of Human Rights ("UDHR"), G.A. Res. 217A (III), U.N. Doc. No. A/810, at 71 (1948), and the International Covenant on Economic, Social and Cultural Rights ("ICESCR"), adopted by the General Assembly of the United Nations on Dec. 16, 1966 (registered *ex officio* on Jan. 3, 1976), 993 U.N.T.S. 3. See also Vladimir Kartashkin, *Economic, Social and Cultural Rights*, in THE INTERNATIONAL DIMENSIONS OF HUMAN RIGHTS 111, 127-30 (Karen Vasak & Philip Alston eds., 1982) (describing what cultural rights are); Joakim E. Parker, *Cultural Autonomy: A Prime Directive for the Blue Helmets*, 55 U. PITT. L. REV. 207 (1993) (discussing cultural rights in the context of humanitarian intervention). See generally Lyndel v. Prott, *Cultural Rights as Peoples' Rights in International Law*, in THE RIGHTS OF PEOPLES 93 (James Crawford ed., 1988).

³⁵ See *supra* note 34.

³⁶ It is important to emphasize that declarations (and resolutions) adopted by the General Assembly are not binding upon the member states. Only conventions adopted by the United Nations and ratified by the legislature of each member state can convert a convention into international law. IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 554 (3d ed. 1979). Despite the fact that the UDHR frequently is regarded as part of the law of the United Nations, it still is not binding upon its signatories. *Id.* at 571.

³⁷ UDHR, *supra* note 34, at art. 22.

³⁸ UDHR, *supra* note 34, at art. 27(1).

Two conclusions may be drawn from the "cultural rights" protected by the Universal Declaration. First, the notion of cultural rights is rather nebulous and ill-defined.³⁹ Second, cultural rights are possessed by individuals.⁴⁰ These two observations are central to how cultural rights are conceived in later documents.

The International Covenant on Economic, Social and Cultural Rights ("ICESCR")⁴¹ attempts to further specify the nature of cultural rights.⁴² At first glance, it seemingly provides merely a vague restatement of cultural rights by recognizing "the right of everyone . . . to take part in cultural life."⁴³ A closer examination, however, reveals that, in addition to the general grant of cultural rights, several other basic rights are placed within the context of cultural activities, including: rights to religion,⁴⁴ work,⁴⁵ protection of the family,⁴⁶ and education.⁴⁷ For example, the right to work is recognized within this document only when the right promotes "cultural development."⁴⁸ Thus, the ICESCR recognizes that a group's "cultural right" is at least partially defined by its practices in the areas of religion, work, family, and education.⁴⁹ According to the ICESCR's rather unusual views, however, the content of cultural rights consists of rights bestowed onto individuals.⁵⁰

The International Covenant on Civil and Political Rights ("ICCPR")⁵¹ similarly recognizes and offers protection to cul-

³⁹ Cf. DONNELLY, *supra* note 33, at 154-55.

⁴⁰ Cf. DONNELLY, *supra* note 33, at 156-58.

⁴¹ ICESCR, *supra* note 34. More than two-thirds of the world's nations have ratified or acceded to ICESCR, recognizing it as a definitive statement of human rights. See Committee on Economic, Social and Cultural Rights, *Report on the Sixth Session*, 6th Sess., Annex I, at 2, 103-12, Annex II, at 113, Supp. No. 3, U.N. Docs. E/1992/23, E/C.12/1991/4 (1992).

⁴² Indeed, the ICESCR was meant to be interpretive of the UDHR's provisions. FRANK NEWMAN & DAVID WEISSBRODT, *INTERNATIONAL HUMAN RIGHTS* 2-3 (1992).

⁴³ ICESCR, *supra* note 34, at art. 15, para. 1, 993 U.N.T.S. at 9.

⁴⁴ ICESCR, *supra* note 34, at art. 2, para. 2, 993 U.N.T.S. at 5.

⁴⁵ ICESCR, *supra* note 34, at art. 6, para. 1, 993 U.N.T.S. at 6.

⁴⁶ ICESCR, *supra* note 34, at art. 10, para. 1, 993 U.N.T.S. at 7.

⁴⁷ ICESCR, *supra* note 34, at art. 13, para. 1, 993 U.N.T.S. at 8.

⁴⁸ ICESCR, *supra* note 34, at art. 6, para. 2, 993 U.N.T.S. at 6.

⁴⁹ This definition is similar to that of *Webster's New Collegiate Dictionary* (ed. 1988). "The integrated pattern of human behavior which includes thought, speech, action and artifacts and depends upon [the human] capacity for learning and transmitting knowledge to succeeding generations." *Id.* at 336.

⁵⁰ See ICESCR, *supra* note 34, at art. 15, 993 U.N.T.S. at 9.

⁵¹ International Covenant on Civil and Political Rights ("ICCPR"), Dec. 16,

tural rights. It provides for the right of people, "in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."⁵² While this provision directly addresses the rights of minority groups, and arguably is more widely applicable,⁵³ the rights remain limited. The rights given are individual and are for "persons belonging to such minorities,"⁵⁴ rather than for groups of minorities.⁵⁵

The cultural rights expressed in the International Bill of Rights also are recognized in several regional documents⁵⁶ and in a number of treaties. Especially noteworthy is the emphasis placed on protecting cultures by the International Convention on the Elimination of All Forms of Racial Discrimination⁵⁷ and the Convention on the Elimination of All Forms of Discrimination Against Women.⁵⁸ In addition, numerous cultural protections have been recognized in the Convention on the Rights of the Child.⁵⁹ Despite this recognition, protections

1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

⁵² *Id.* at art. 27.

⁵³ See Parker, *supra* note 34, at 213 n.52 (citing authority).

⁵⁴ See Parker, *supra* note 34, at 213 n.52.

⁵⁵ For an historical analysis of article 27, see MARC J. BOSSUYT, GUIDE TO THE "TRAVAUX PRÉPARATOIRES" OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 493-98 (1987) (giving no indication that the right was other than to be bestowed onto individuals). For a recent analysis of the term "minority" applied in international law, see Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minority, E.91.XIV.2, 1-15 (1992); see also *id.* at 16-103 (examining minority rights in terms of persons belonging to ethnic, religious, and linguistic minorities).

⁵⁶ See, e.g., AFRICAN [BANJUL] CHARTER ON HUMAN AND PEOPLES' RIGHTS, June 27, 1981, art. 1, O.A.U. Doc. CAB/LEG/67/3/Rev. 5, 21 I.L.M. 58 [hereinafter AFRICAN CHARTER]; American Convention on Human Rights, Nov. 22, 1969, arts. 12, 17, 26, O.A.S.T.S. No. 36, 9 I.L.M. 99; European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, arts. 9, 12, 213 U.N.T.S. 221, 230, 232.

⁵⁷ The treaties dealing with discrimination are particularly on point. See International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature Mar. 7, 1966, art. 1, 660 U.N.T.S. 195, 5 I.L.M. 352 (1966) (entered into force Jan. 4, 1969).

⁵⁸ Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, art. 1, U.N. Doc. A/RES/34/180 (1979), 19 I.L.M. 33, 36. The Women's Convention is particularly interesting, for it also aims to have nation states modify "social and cultural patterns of conduct . . . [to achieve] the elimination of . . . practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women." *Id.* at art. 5(a), 19 I.L.M. at 37.

⁵⁹ Convention on the Rights of the Child, *supra* note 2, at arts. 4, 29, 30, & 31

remain limited, both in scope⁶⁰ and in application.⁶¹

Although nations have agreed that cultural rights do indeed exist, these rights are restricted because they are framed in terms of individual rights. Despite this limitation, group rights in fact have been recognized and offered international protection. At least in theory, social and cultural rights may take precedence over individual rights when the rights of "peoples" are involved.

The notion of peoples' rights has a venerable tradition. For example, the U.N. Charter provides protection for sovereignty rights by delineating "respect for the principle of equal rights and self-determination of peoples" as one purpose for the United Nations.⁶² The ICESCR also explicitly aims to protect peoples' sovereignty when determining whether to maintain cultural practices. It provides that "[a]ll peoples have the right to self-determination. By virtue of that right they may freely determine their political status and freely pursue their economic, social and cultural development."⁶³ The ICCPR contains an identical provision: "All peoples have a right of self-determination."⁶⁴ In addition, as they have with cultural rights, several regional documents have adopted provisions that specifically protect "peoples" from state interference with their practices.⁶⁵

Although definitely recognizing and offering protection to

(protecting children's right to enjoy their own culture and participate in cultural activity).

⁶⁰ For example, although the Convention on the Rights of the Child does give deference to cultural traditions, it clearly places emphasis on the best interests of the child. *Id.* at 1459; see also Levesque, *supra* note 2, at 288-91 (detailing the potentially radical impact the "best interests" standard would have had on American jurisprudence).

⁶¹ For example, the Convention on the Rights of the Child recognizes cultural rights, but they are granted to children as individual rights. Convention on the Rights of the Child, *supra* note 2, at arts. 30, 31.

⁶² U.N. CHARTER, art. 1, ¶ 2.

⁶³ ICESCR, *supra* note 34, at art. 1, para. 1, 993 U.N.T.S. at 5.

⁶⁴ ICCPR, *supra* note 51, at art. 1(1). The right, however, is limited in that it is to be respected "in conformity with the provisions of the Charter of the United Nations." *Id.* at art. 1(3).

⁶⁵ See, e.g., AFRICAN CHARTER, *supra* note 56, at art. 17(3), 21 I.L.M. at 61 ("The promotion and protection of morals and traditional values recognized by the community shall be the duty of the State."); *id.* at art. 20, 21 I.L.M. at 62 ("All peoples shall have the right to . . . self-determination. They shall . . . pursue their . . . social development according to the policy they have freely chosen.").

"peoples," the nature and extent of these rights also remain unsettled. When first included in the Covenants, the nature of these rights was not defined, and the *Travaux Préparatoires*, a work on the legislative history of the Covenants, shed little light on their contents.⁶⁶ It was not clear what constituted "peoples"⁶⁷ and their general right to "self-determination."⁶⁸ There are at least two plausible alternative interpretations of peoples' self-determination rights. In theory, it is possible to distinguish between "external" self-determination—by which a people determine their future international status—and "internal" self-determination—by which a people may influence the internal political order of the nation state in which they live.⁶⁹ The extent to which either approach recognizes and adequately protects "peoples'" rights remains limited. For example, the drawback of the "external" approach is that the group rights found in the documents discussed above are protected through individual rights.⁷⁰ The limitation of the "internal" approach is that international law generally only recognizes nation states, not groups within states.⁷¹

⁶⁶ See, e.g., BOSSUYT, *supra* note 55, at 33-38 (providing the history of the meaning of self-determination).

⁶⁷ For the accepted definition of indigenous populations, see Study of the Problem of Discrimination Against Indigenous Populations, Sub-Commission on Prevention of Discrimination and Protection of Minorities ("Cobo Report"), U.N. Doc. E/CN.4/Sub.2/1983/21/Add.8 Sec. 379 (1983).

⁶⁸ For an analysis of this clause of the covenant, see Antonio Cassese, *The Self-Determination of Peoples*, in *THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS* 92-113 (Louis Henkin ed., 1981). Cassese notes that the right does not entail the right of minorities to self-determination. *Id.* at 96. He further notes that the right to self-determination refers to sets of provisions found in the Covenants, such as peaceful assembly, vote, etc. *Id.* at 97-98; see also Mary E. Turpel, *Indigenous Peoples' Rights of Political Participation and Self-Determination: Recent International Legal Developments and the Continuing Struggle for Recognition*, 25 CORNELL INT'L L.J. 579, 601 (1992) (concluding that the recent political attention has "done little to resolve the conflicts between indigenous peoples and states").

⁶⁹ Catherine J. Iorns, *Indigenous Peoples and Self Determination: Challenging State Sovereignty*, 24 CASE W. RES. J. INT'L L. 199, 268-77 (1992) (adopting a similar approach); cf. Erica-Irene A. Daes, Explanatory Note Concerning the Draft on the Rights of Indigenous Peoples, 3-6, E/CN/Sub.2/1993/26/Add.1.

⁷⁰ Cf. Ian Brownlie, *The Rights of Peoples in Modern International Law*, in *THE RIGHTS OF PEOPLES* 1, 2 (James Crawford ed., 1988).

⁷¹ See, e.g., Lynn H. Miller, *GLOBAL ORDER: VALUES AND POWER IN INTERNATIONAL POLITICS* 19-128, 169-98 (1994) (examining the Westphalian approach, principle reliance on nation-state sovereignty, to ensure international order and human rights); Richard Falk, *The Rights of Peoples (In Particular Indigenous Peoples)*, in

Developments since the Covenants were adopted also do not favor peoples' self-determination from recognized nation states. In practice, the internationally recognized right to self-determination, despite its seeming breadth, has been treated as an extremely narrow right.⁷² Commentators agree that self-determination has evolved to focus specifically on decolonialization.⁷³

The limited purpose of such self-determination has taken a decisive turn, however. The right to cultural and peoples' self-determination has reemerged as a universal principle.⁷⁴ In 1989, the United Nation's International Labor Organization adopted the Convention Concerning Indigenous and Tribal Peoples in Independent Countries ("Peoples' Convention").⁷⁵ The Peoples' Convention is currently the most comprehensive and ambitious approach to protecting indigenous and tribal cultures.⁷⁶ Not surprisingly, it focuses on self-definition

THE RIGHTS OF PEOPLES, *supra* note 34, at 17, 17-37 (arguing for a non-statist approach to peoples' rights).

⁷² DONNELLY, *supra* note 33, at 147-48 (noting same and proposing that the right has been restricted because of States' fears of secession and governments' fears of revolution); see also Daes, *supra* note 69, at 2. See generally Benedict Kingsbury, *Claims by Non-State Groups in International Law*, 25 CORNELL INT'L L.J. 481 (1992); Johan D. van der Vyver, *Sovereignty and Human Rights in Constitutional and International Law*, 5 EMORY INT'L L. REV. 321 (1991); Iorns, *supra* note 69, at 199.

⁷³ See, e.g., Cassese, *supra* note 68, at 108-13; see also DONNELLY, *supra* note 33, at 148; Daes, *supra* note 69, at 5-6; cf., Iorns, *supra* note 69, at 236-85.

⁷⁴ Cf. Jost Delbruck, *A More Effective International Law or a New "World Law"?—Some Aspects of the Development of International Law in a Changing International System*, 68 IND. L.J. 705, 714-15 (1993); Ellen Messer, *Anthropology and Human Rights*, 22 ANN. REV. ANTHROPOL. 221, 222-25 (1993) (describing the emergence of indigenous peoples' rights as the "fourth generation").

⁷⁵ Convention Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, 28 I.L.M. 1382 [hereinafter Peoples' Convention]; see also Russel L. Barsh, *An Advocate's Guide to the Convention on Indigenous and Tribal Peoples*, 15 OKLA. CITY U. L. REV. 209, 210-11 (1990) (describing the difficulties the Convention faced during its adoption); Richard Herts, *Legal Protection for Indigenous Cultures: Sacred Sites and Communal Rights*, 79 VA. L. REV. 691, 711 (1993) (describing gist of Convention).

⁷⁶ The goal of the Convention was to de-emphasize the integration and assimilation approach that had marked earlier documents. See Russel L. Barsh, *Current Developments: Indigenous Peoples: An Emerging Object of International Law*, 80 AM. J. INT'L L. 369, 370-76 (1986) (reporting the focus of earlier Conventions and the development of the concept of indigenous peoples); Robert A. Williams, Jr., *Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World*, 1990 DUKE L.J. 660, 663 n.4, 676-82 (noting the significance of the Cobo Report and detailing the emergence of

(rather than self-determination) by giving groups the right to participate actively in national decision-making and to govern their own economic, social and cultural development.⁷⁷

Despite the far reach of the Peoples' Convention, the rights found therein remain limited. For example, indigenous peoples have the "right to retain their own customs and institutions" only as long as they are not "incompatible with fundamental rights defined by the national legal system . . . [or] with internationally recognized human rights."⁷⁸ Even the definition of "peoples" is limited and "shall not be construed as having any implications as regards the rights which may attach to the term under international law."⁷⁹ In addition, the Convention generally does not recognize peoples' rights; it is mainly a "procedural convention."⁸⁰ Even when rights actually are recognized, they are limited.⁸¹

Given that the Peoples' Convention, in the words of one commentator, is "seriously inadequate,"⁸² the most important forum to emerge out of the peoples' self-determination movement has been that of the United Nations Working Group on Indigenous Populations.⁸³ The Working Group has been

indigenous rights in contemporary international law).

⁷⁷ Barsh, *supra* note 75, at 211-34 (summarizing the major parts of the Convention). The extensiveness of the rights leads to the interpretation that, although the Convention does not refer explicitly to a right of self-determination, self-government, or autonomy, it plainly achieves the same result indirectly. *Cf. id.* at 215. The Convention guarantees respect for indigenous institutions, which together amount to recognition of indigenous peoples as distinct societies possessed of their own representative institutions. As Barsh notes, the Convention's use of "peoples" was used in a way of affirming that indigenous peoples had an identity of their own and that they comprised organized societies rather than groups of individuals sharing some racial or ethnic characteristic. *Id.* The International Labor Organization secretariat clearly stated, however, that no right to self-determination had been created. *Id.* at 231-34.

⁷⁸ Peoples' Convention, *supra* note 75, at art. 8(2).

⁷⁹ Peoples' Convention, *supra* note 75, at art. 1(3).

⁸⁰ *Cf.* Howard R. Berman, *International Human Rights Standards—Setting: The Case of Indigenous Peoples*, PROCEEDINGS OF THE 81ST ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 282 (1987).

⁸¹ For example, the Convention recognizes cultural rights which generally are limited and linked to language and education. *See* Barsh, *supra* note 75, at 230-31. In terms of cultural rights, protections also are championed to this extent. *See* Raidza Torres, *The Rights of Indigenous Populations: The Emerging International Norm*, 16 YALE J. INT'L L. 127, 159 nn.162-65 (1991) (focusing on the protection of native languages).

⁸² Berman, *supra* note 80, at 193.

⁸³ The Working Group was created by the United Nations Economic and Social

charged with the task of remedying current limitations in international law and developing international legal standards for indigenous human rights.⁸⁴

The most notable and potentially revolutionary achievement of the Working Group has been the drafting of a Universal Declaration on Rights of Indigenous Peoples ("Peoples' Declaration").⁸⁵ Unfortunately, the current draft contains an assortment of provisions which, as a whole, do not clarify how peoples' rights should be approached.⁸⁶ The majority of provisions simply bestow the rights onto "indigenous peoples," without specifying whether these rights are possessed by the group or the individual. For example, the draft provides that "indigenous peoples have the right to self-determination."⁸⁷ Some provisions state that indigenous peoples have a collective right,⁸⁸ while others bestow rights onto "every indigenous in-

Council in 1982. See Hurst Hannum, *New Developments in Indigenous Rights*, 28 VA. J. INT'L L. 649, 660-62 (1988) (describing the emergence of the Working Group as a central focus of indigenous human rights standard-setting activities in the international legal process); see also Barsh, *supra* note 75, at 209-13 (discussing international concern about the rights of indigenous peoples with special attention to the UN activity); Russel L. Barsh, *Indigenous North America and Contemporary International Law*, 62 OR. L. REV. 73 (1983) (tracing the development of international human rights law respecting indigenous peoples and arguing that real progress has occurred only in the last 20 years with the coming of UN involvement); Falk, *supra* note 71, at 17 (discussing the statist concept of human rights, concluding that new approaches are needed to adequately protect indigenous peoples' basic rights).

⁸⁴ For the Working Group's specific mandate, see E.S.C. Res. 34, U.N. ESCOR, Sess. No. 1, Supp. No. 1, at 26-27, U.N. Doc E/1982/82 (1982); *Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities*, U.N. DOC. E/CN.4/Sub.2/495 (1981).

The Working Group resulted from the recommendations made by the "Cobo Report," which had focused on the inadequacy of existing human rights standards in protecting indigenous peoples, the need for a UN sponsored declaration leading to a convention recognizing, among other indigenous human rights, the right to indigenous self-determination. See Jose R. Martinez Cobo, *Study of the Problem of Discrimination Against Indigenous Populations*, 38th Sess. at 1-2, U.N. Doc. E/CN.4/Sub.2/1986/7/Add.4, U.N. Sales E.86.XIV.3 (1986). For a discussion of the report, see Barsh, *supra* note 75, at 371.

⁸⁵ See Williams, Jr., *supra* note 76, at 665-66.

⁸⁶ *Discrimination Against Indigenous Peoples: Report of the Working Group on Indigenous Populations on its Ninth Session*, U.N. ESCOR Commission on Human Rights, 43d Sess., Agenda Item 14, at 50-60, U.N. Doc. E/CN.4/Sub.2/1993/29 (1993) [hereinafter *Working Group Report*].

⁸⁷ *Id.* at art. 3; see also *id.* at arts. 11-14, 16-36.

⁸⁸ *Id.* at art. 6 (collective right to live in freedom, peace and security as distinct peoples).

dividual.”⁸⁹ Lastly, some provisions approach indigenous peoples’ rights in terms of both individual and collective rights. For example, the Peoples’ Declaration proclaims that “[i]ndigenous peoples have the collective and individual right not to be subjected to ethnocide and cultural genocide”⁹⁰ and “to maintain and develop their distinct identities and characteristics.”⁹¹

Although the Peoples’ Convention could lead to greater protection of cultural rights,⁹² and the Peoples’ Declaration, though unenforceable,⁹³ could foster greater recognition of collective rights,⁹⁴ it remains to be seen how expansively rights will be interpreted. Moreover, several international trends clearly limit the expansion of these rights. First, when indigenous peoples litigate their “peoples” rights in national courts, they tend to lose.⁹⁵ Second, the unprecedented move toward one global order has generally resulted in social development resembling the Westernization of nation states.⁹⁶ Ad-

⁸⁹ *Id.* at art. 5 (individual has the right to a nationality).

⁹⁰ *Id.* at art. 7.

⁹¹ *Working Group Report*, *supra* note 86, at art. 8.

⁹² Barsh, *supra* note 75, at 234-35 (arguing that if properly advocated, the Convention could lead to considerable protections for indigenous peoples’ rights).

⁹³ Declarations are not enforceable; they do not have implementing mechanisms. *See supra* note 36.

⁹⁴ *Cf. Iorns*, *supra* note 80, at 199.

⁹⁵ The clearest example of peoples tending to lose is the recent litigation in the U.S. Supreme Court. For example, in recent years the Court has consistently sided on the side of the plenary power of the federal government over Indian affairs and has accepted the proposition that “all aspects of Indian sovereignty are subject to defeasance by Congress.” *Escondido Mut. Water Co. v. LaJolla Band of Mission Indians*, 466 U.S. 765, 788 n.30 (1984). For a discussion of the frequent use of the phrase, see Robert A. Williams, Jr., *Learning Not to Live With Eurocentric Myopia: A Reply to Professor Laurence’s Learning to Live With the Plenary Power of Congress Over the Indian Nations*, 30 ARIZ. L. REV. 439, 446 (1988). As a result, the Court has authorized the destruction of Indian religious sites and practices, suppression of traditional forms of tribal government, forced removal of Indian children from their homes and involuntary sterilization of Indian women. *See Williams, Jr.*, *supra* note 76, at 692-93 nn.112-13 (citing Supreme Court cases and federal government policies having the above effect).

⁹⁶ *Cf. VINCENT*, *supra* note 33, 92-108 (examining the move toward a “one world society”); *see also Delbruck*, *supra* note 74, at 724-25 (concluding that “international law is changing into the ‘internal law’ of a World Community”); Michael Smith, *Modernization, Globalization and the Nation-State*, in *GLOBAL POLITICS* 253-68 (Anthony G. McGrew et al. eds., 1992) (examining the move toward a “global society” and its effect on nation states).

Significantly, at the international level, interest in furthering indigenous

ditionally, despite the international law's movement away from its laissez-faire approach to intranation-state behavior,⁹⁷ international relations remain concerned with laws between states, while individuals and peoples continue to enjoy benefits only through the medium of their nationality, by their belonging to states.⁹⁸ Lastly, the prevailing theme of all international human rights documents rests on respect for the dignity of persons and their own individual, human rights.⁹⁹ Such notions of individuality and human dignity tend to be Western concepts which are likely to continue dominating international law. There is little room for indigenous concepts of personhood and individuality.¹⁰⁰ Given these trends, it is difficult to re-

peoples' rights continues to be sporadic. See *Report of Working Group on indigenous Populations* 11th Sess. at 38, E/CN.4/Sub.2/1993/29 (pointing out that the International Year of the World's Indigenous Peoples, 1993, "was the poorest and smallest event of its kind in the history of the United Nations").

⁹⁷ For an examination of the Grotian approach to international law, see generally Cornelius F. Murphy, Jr., *The Grotian Vision of World Order*, 76 AM. J. INT'L L. 477 (1982). See also Miller, *supra* note 71, at 30-31, 209-17 (describing the impact of Hugo Grotius, the father of modern internal law, and his theory that the international system should be characterized by a laissez-faire system of sovereign states).

Precisely because of the Grotian approach to international law, human rights have traditionally been excluded from international scrutiny. International relations typically do not involve a state's treatment of its own citizens. The increasing recognition of human rights has led to the restriction of state sovereignty and the principle of non-intervention, indicating changes in international legal order. See *supra* note 71 and accompanying text.

⁹⁸ See, e.g., U.N. CHARTER, art. 2, ¶ 7 ("Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter . . ."); see also Maivan C. Lam, *Making Room for Peoples at the United Nations: Thoughts Provoked by Indigenous Claims to Self-Determination*, 25 CORNELL INT'L L.J. 603, 621-22 (1992). But see *supra* notes 68-76 and accompanying text.

⁹⁹ See generally HUMAN DIGNITY: THIS CENTURY AND THE NEXT (Rubin Gotesky & Ervin Laszlo eds., 1970) (containing a series of essays delineating the fundamental place of human dignity in human rights).

¹⁰⁰ See Alan Howard, *Cultural Paradigms, History, and the Search for Identity in Oceania*, in CULTURAL IDENTITY AND ETHNICITY IN THE PACIFIC 259-78 (Jocelyn Linnekin & Lin Poyer eds., 1990) (describing the differences between Western and Oceanic perspectives of human nature and distinguishing the Western concept as physically bound, genetically determined, self-actualizing and individual); John D. Waiko, *Human Rights: The Melanesian View*, 6 HUM. RTS. TEACHING 18, 18-26 (1987) (detailing differences between Western and Melanesian cultures). As one renowned commentator has characterized it, instead of being thought of as "individuals," persons in these cultures are better considered to be *consociates*. CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* 364-67 (1973). As we have seen in the

main confident that any new declaration or convention bestowing rights on indigenous peoples will effect unprecedented changes in international relations.

Examining the sexual use of children from a purely international law perspective demonstrates that children's *individual* rights must be respected, even when they conflict with their culture's rights. The reasoning is clear: the right that forms the basis of international law is respect for human dignity and individual autonomy. Simply put, although nation states increasingly may have duties to protect certain cultural practices and groups, decisions regarding which customs will be preserved must be oriented toward the promotion and protection of universal human rights recognized in international law. The preservation of cultures, however, is not the only formidable obstacle to ensuring children's right to protection from sexual maltreatment. Even when international law seems especially well-suited to address issues of sexual maltreatment, other concerns inevitably arise. The role of economics in sexual exploitation is a powerful case in point.

II. CHILD SEXUAL EXPLOITATION: CONFLICTS BETWEEN ECONOMIC AND INDIVIDUAL RIGHTS

The sexual exploitation of children may be defined as maltreatment for economic gain, whether to benefit specific individuals, communities or societies. The extent, causes and consequences of child sexual exploitation are complex and require a variety of international protections for children. Despite the apparent amenability to international regulation and reaction, the rise of child sexual exploitation is unlikely to be stemmed in the near future.¹⁰¹ The international community has failed to appreciate children's basic right to be free from sexual maltreatment and has not addressed the increasing

case of the Sambia, culture plays an important part in the symbolic construction of the individual, with its own symbols, meanings and indigenous categories. See *supra* notes 31-43 and accompanying text.

¹⁰¹ Sexual exploitation only recently has become a global issue, particularly for a number of Asian countries where the problems are linked to "sex tourism" and the sale of children for sexual exploitation. See *Reports of the Trafficking in Children Between Lao Peoples Democratic, Myanmar, China, Cambodia and Thailand*, U.N. Doc. E/CN.4/1993/SR.56.

exploitation of children.

One of the most devastating aspects of globalization has been the escalating rise of sex-tourism and its direct contribution to an increase in child sexual exploitation. Over one million children a year are forced into the sex market.¹⁰² The vast majority of these child prostitutes are concentrated in poor countries.¹⁰³ For instance, it is estimated that there are 800,000 child prostitutes in Thailand, 400,000 in India, and 250,000 in Brazil.¹⁰⁴ In the Philippines, estimates range between 40,000 and 60,000, two-thirds of whom are male.¹⁰⁵ In Sri Lanka, about 30,000 boys aged six to fifteen are thought to work as prostitutes.¹⁰⁶ Although poor countries have been the area of international interest when examining sexual exploitation, even the wealthiest of nations have large numbers of children trapped in prostitution. Estimates of the number of child prostitutes in the United States, for instance, range from 90,000 to 300,000.¹⁰⁷

Although children take part in sex tourism in several other countries,¹⁰⁸ the situation in Thailand is arguably the most excessive. Children below sixteen years of age make up 40% of the total number of prostitutes in Thailand.¹⁰⁹ Of the estimated 800,000 child prostitutes,¹¹⁰ most are between four-

¹⁰² RON O'GRADY, *THE CHILD AND THE TOURIST: THE STORY BEHIND THE ESCALATION OF CHILD PROSTITUTION IN ASIA* 137 (1992) (citing the Norwegian government reports to the UN Working Group on Slavery).

¹⁰³ Cf. *Report of the Working Group on Slavery*, 12th Sess., at 16-18, E/CN.4/Sub.2/1987/25.

¹⁰⁴ Serrill, *supra* note 4, at 52. Note, however, that some estimates are much higher, such as the estimate reported to the Working Group on Contemporary Forms of Slavery finding that there were more than four million children in Brazil who relied on prostitution. *Report of the Working Group on Contemporary Forms of Slavery* 8th Sess., at 7-8, E/CN.4/Sub.2/1993/30 [hereinafter *Working Group on Slavery*].

¹⁰⁵ See Rudolf Grimm, *Despite Restrictions, Sex Tourism Continues to Attract Germans*, STAR TRIB., Nov. 21, 1993, at 5G.

¹⁰⁶ *Id.*

¹⁰⁷ Serrill, *supra* note 4, at 52.

¹⁰⁸ See, e.g., Marilyn Goldstein, *Human Rights, If You're the Right Sex*, NEWSDAY, Dec. 13, 1993, at 8 (describing the situation in South Korea and the Philippines); see also Khe Sanh, *Fighting for Prosperity*, BOSTON GLOBE, May 8, 1994, at 1 (describing how sex tourism continues to be part of post-war Vietnam).

¹⁰⁹ *Id.*; see also Wendy Lee, *Prostitution and Tourism in South-East Asia*, in WORKING WOMEN: INTERNATIONAL PERSPECTIVES ON LABOUR AND GENDER IDEOLOGY 79, 89-100 (Nanneke Redclift & M. Thea Sinclair eds., 1991) (describing the current crisis in prostitution linked to tourism).

¹¹⁰ More conservative estimates, such as those provided by the Police Depart-

teen and sixteen years of age, and some are as young as ten.¹¹¹ Because the situation in Thailand has reached such overwhelming proportions, it has been the subject of considerable research. The situation illustrates well the complexity of exploitation and the lack of international response. For example, one of the most striking aspects of research is the revelation that recruiting agents no longer need to apply much physical violence to lure children and youth into the sex trade.¹¹² This is largely because parents have become accomplices to the exploitation of their children. According to the Center for the Protection of Children's Rights, in 1989, 63% of girls under sixteen were brought to prostitution by their own parents; 21% were brought by neighbors or friends who also were sending their children to the brothels; 16% were brought by agents.¹¹³

Although desperate family poverty continues to play a role,¹¹⁴ it has been suggested that it is no longer the only root cause of child prostitution. Material objects and the evidence of good incomes of many prostitutes are factors that encourage increasingly more children into the trade.¹¹⁵ Moreover, child

ment of Thailand, estimate the number of child prostitutes under the age of sixteen to be about 80,000. Siriporn Skrobaneck, *Child Prostitution in Thailand*, in FIRST NATIONAL ASSEMBLY ON CHILD DEVELOPMENT: REPORT 178, 181 (1990).

¹¹¹ CENTER FOR THE PROTECTION OF CHILDREN'S RIGHTS, THE TRAFFICKING OF CHILDREN FOR PROSTITUTION IN THAILAND 12 (1991) [hereinafter TRAFFICKING OF CHILDREN].

¹¹² Skrobaneck, *supra* note 110, at 181.

¹¹³ Skrobaneck, *supra* note 110, at 181. Popular press reports, however, focus on the abduction of children. See, e.g., *Child Abuse Targeted*, ATLANTA J. & CONST., June 1, 1994, at A7 (noting that of the 800,000 child prostitutes in Thailand, "many [had been] deceived into their work or abducted" but failing to note the roles of families and communities in child exploitation).

¹¹⁴ Gayle Reaves, *Trading Away Youth: Impoverished Thai Parents Sell Girls into Prostitution*, DALLAS MORNING NEWS, Mar. 21, 1993, at 1A (providing a thorough examination of the nature and crisis in child prostitution in Thailand and how poverty stricken families traffic their own children into prostitution).

¹¹⁵ Selling children into prostitution earns families "rapid cash income for the exchange of expensive electric appliances such as colour television[s], frigidaire[s], or fashionable houses." Skrobaneck, *supra* note 110, at 180; see also TRAFFICKING OF CHILDREN, *supra* note 111, at 12 (noting cases in which fathers exchanged their daughters for 125cc motorbikes); Charles H. McCaghy & Charles Hou, *Family Affiliation and Prostitution in a Cultural Context: Career Onsets of Taiwanese Prostitutes*, 23 ARCHIVES SEXUAL BEHAV. 251, 259-64 (1994) (analyzing the typology of career onsets for prostitution and noting that only 10% mentioned negative family experiences as precipitating factors in the decision to enter prostitution and finding that over one-half of the sample listed familial obligations and upgrading personal financial status as primary factors for entry into prostitution).

prostitution has become a way of life for several rural villages.¹¹⁶ Indeed, children are no longer only exploited to support themselves and their families: some villages depend on child prostitution to fill a "common public fund," which is used to pay for such resources as village schools and equipment.¹¹⁷

The economic aspects of child economics, therefore, cannot be ignored. Estimates are that sex-tourism has become a \$10-billion-a-year industry,¹¹⁸ which clearly has been exacerbated by globalization and the easy availability of international transportation.¹¹⁹ Given that sex tourism involves several nations, it would seem amenable to international prohibition, regulation and intervention. Yet, as discussed below, international response remains inadequate. This is rather intriguing since, unlike situations involving cultural practices, international law has long prohibited the exploitation of children.

The international prohibition against child sexual exploitation dates back to the League of Nations and to general provisions prohibiting the exploitation of children.¹²⁰ Prior to the current international statement on child sexual exploitation, there were at least three arguments that could have been used to obtain an international response to child sexual exploitation. These approaches provide a useful comparison to the current international statement prohibiting exploitation, particularly since some are much more persuasive and extensive.

The first explicit and enforceable prohibition against general exploitation is found in the ICESCR, which obliges states parties to make "punishable by law" the employment of children in work harmful to their morals and health.¹²¹ Although

¹¹⁶ Skrobanek, *supra* note 110, at 181.

¹¹⁷ Skrobanek, *supra* note 110, at 180-81.

¹¹⁸ Cf. Merle English, *Some U.S. Tourists Use Child Prostitutes*, *NEWSDAY*, June 27, 1993 at 3 (citing figures and the fight against tourism); Goldstein, *supra* note 108, at 8 (noting sex tourism is Thailand's "number one foreign currency earner").

¹¹⁹ See O'GRADY, *supra* note 102, at 138.

¹²⁰ See Levesque, *supra* note 1, at 202-217 (detailing the historical development of children's rights); see also Philip E. Veerman, *Review of Children's Freedom from Sexual Exploitation*, 2 INT'L J. CHILDREN'S RIGHTS 117, 118 (1994) (noting that international protections concerned with child sexual exploitation date to the early 1900's). See generally PHILIP E. VEERMAN, *THE RIGHTS OF THE CHILD AND THE CHANGING IMAGE OF CHILDHOOD* (1992).

¹²¹ ICESCR, *supra* note 34, art. 10, para. 3, 993 U.N.T.S. at 7. Article 10(3) provides the following protection: "Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their

the ICESCR contains provisions against exploitation, the extent to which it could be used to combat sexual exploitation is inherently limited by its failure to identify sexual exploitation. The failure to link sexual exploitation to work is also seen in a number of other documents which do not prohibit sexual exploitation specifically.¹²²

The second approach proposes that states are under a duty to prevent and eradicate sexual exploitation to the extent that states must prohibit degrading treatment.¹²³ On its face, it would seem that child sexual exploitation could be construed to fall within the concept of degrading treatment. In reality, however, the argument is difficult to make. For example, because sexual exploitation of children has become a way of life for several communities, it would be difficult to argue against the voluntariness of individual children's decisions when they are brought into exploitative situations by their parents and are responsible for the economic well-being of their families and villages.¹²⁴ Consent becomes difficult to gauge, given the confluence of factors weighing into the equation, including entry

morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law." Note that the Universal Declaration, although focusing on the inherent dignity of all, had no explicit provisions against exploitation. Even if it did, declarations are not enforceable. *See supra* note 36.

¹²² For example, the following do not include provisions against sexual exploitation: AFRICAN CHARTER, *supra* note 56; American Convention on Human Rights, *supra* note 56; and the European Convention for the Protection of Human Rights, *supra* note 56. *See also* CENTER FOR THE STUDY OF HUMAN RIGHTS, *supra* note 18, at 147.

¹²³ Several documents place states parties under an obligation to prohibit degrading treatment. *See* ICCPR, *supra* note 51, at art. 7; UDHR, *supra* note 34, at art. 5.

It is important to emphasize that there is a convention entirely devoted to the prevention of degrading treatment. *See* 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, reprinted in HUMAN RIGHTS: A COMPILATION OF INTERNATIONAL INSTRUMENTS 233 (1993) [hereinafter Convention for the Suppression of Traffic & Prostitution]. This Convention does protect children from exploitation. It remains relatively weak, however, because it states explicitly that the offenses "shall in each State be defined, prosecuted and punished in conformity with its domestic law." *Id.* at art. 12. For other weaknesses of the Convention, see *Working Group on Slavery, supra* note 103, at 11 (noting that there has yet to be a committee to monitor the application and implementation of the Convention). *See also id.* at 36.

¹²⁴ *See* Reaves, *supra* note 114, at A7.

into prostitution because of poverty, family disintegration, and migration from rural to urban areas.¹²⁵

Similar to the exploitation-as-degradation argument is the contention that some forms of child sexual exploitation could be characterized appropriately as institutionalized slavery and may even constitute a slave trade.¹²⁶ Pursuant to such instruments as the ICCPR¹²⁷ and the American Convention,¹²⁸ nation states are under a duty to eradicate immediately those specific instances of sexual exploitation which amount to slavery or slavery-like practices. Indeed, even states not party to those Conventions have, pursuant to customary international law, an obligation to prohibit slavery-like practices.¹²⁹

The exploitation-as-slavery argument has potentially powerful and far-reaching consequences. Under this argument, all nations are under an obligation to assist in the eradication of child sexual exploitation. At a minimum, such obligations would include a nation's stopping its citizens from taking part in sex tourism. Unfortunately, by this logic virtually all nations are violating one of the most basic human rights since only one country—Germany—has opted to prohibit its citizens from indulging in the child sexual exploitation trade.¹³⁰

¹²⁵ See *supra* notes 114-15 and accompanying text; see also OVE NARVESEN, THE SEXUAL EXPLOITATION OF CHILDREN IN DEVELOPING COUNTRIES 65-66 (1989) (concluding that the following are the primary causal factors in child sexual exploitation: urbanization, colonialism, military expansionism, commercialization, tourism and restrictive religious and cultural traditions).

¹²⁶ For example, some have proposed that incarceration into brothels amounts to such action. See Van Bueren, *supra* note 9, at 55.

¹²⁷ ICCPR, *supra* note 51, at art. 8(1) ("No one shall be held in slavery; slavery and the slave-trade in all forms shall be prohibited."); *id.* at art. 8(2) ("No one shall be held in servitude."); *id.* at art. 8(3)(a) ("No one shall be required to perform forced or compulsory labour.").

¹²⁸ American Convention, *supra* note 56, at art. 6(1) ("No one shall be subject to slavery or to involuntary servitude, which are prohibited in all their forms, as are the slave trade and traffic in women.").

¹²⁹ Genocide, slavery, murder and the "disappearance" of individuals, prolonged arbitrary detention, systematic racial discrimination, and consistent patterns of gross violations of internationally recognized human rights are identified as falling within the customary international law of human rights. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987). The *Restatement* also describes the source of customary international law as deriving from "a general and consistent practice of States followed by them from a sense of legal obligation." *Id.* at § 102(2).

¹³⁰ Only Germany currently prohibits "sex tours" into Asia, although Great Britain, Australia and New Zealand are considering similar legislation. See Teresa Ooi,

Given the lack of international response and lack of explicit protection against child sexual exploitation, the Convention on the Rights of the Child has been a welcome attempt to clarify the nature of sexual exploitation and the international duties involved. To that end, the Convention has been a remarkable achievement. For example, Article 34 explicitly urges nation states to prevent the inducement or coercion of children into unlawful sexual activity, the exploitative use of children in prostitution or other unlawful sexual practices, and the exploitative use of children in pornographic performances and materials.¹³¹ In addition, Articles 35 and 36 respectively offer protection against the "abduction, . . . sale of or traffic in children,"¹³² and against "other forms of exploitation to any aspects of the child's welfare."¹³³ Lastly, Article 32 "recognizes the right of the child to be protected from economic exploitation,"¹³⁴ while Article 39 forcefully states that "States Parties

Australia Seeks to Outlaw Sex Tours, STRAITS TIMES, May 20, 1994, at 9. France has recently approved a draft law making citizens liable to prosecution at home for sex offenses committed abroad. See GUARDIAN, Dec. 11, 1993, at 18 (noting that travel agencies actually advertise trips for the purpose of having sexual relations with girls in Thailand and boys in the Philippines—although sex with children is illegal in France). Even if these laws are passed, their effectiveness is questionable. See, e.g., Rudolf Grimm, *supra* note 105, at 5G (noting that 50 to 70% of German men visiting Thailand, Kenya, South Korea and the Philippines do so for sex).

¹³¹ Convention on the Rights of the Child, *supra* note 2, art. 34. Article 34 reads:

States parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

- (a) The inducement or coercion of a child to engage in any unlawful sexual activity;
- (b) The exploitative use of children in prostitution or other unlawful sexual practices;
- (c) The exploitative use of children in pornographic performances and materials.

For a legislative history of article 34, see THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD: A GUIDE TO THE "TRAVAUX PRÉPARATOIRES" 429-37 (Sharon Detrick ed., 1992) [hereinafter TRAVAUX PRÉPARATOIRES].

¹³² Convention on the Rights of the Child, *supra* note 2, art. 35.

¹³³ Convention on the Rights of the Child, *supra* note 2, art. 36.

¹³⁴ The Convention further continues by stating that the child is also to be protected "from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development." *Id.*

shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse"¹³⁵

Through these five articles explicitly addressing exploitation, the Convention has made it clear that all states parties are obliged to take all national, bilateral and multilateral measures to combat sexual exploitation.¹³⁶ Yet, these extensive protections remain unsatisfactory. For example, the focus on "exploitative use" of children for prostitution and pornography¹³⁷ leaves open the interpretation that the use of children for prostitution and pornographic purposes could be construed as non-exploitative.¹³⁸ As the language now stands, the Convention could be interpreted as allowing children to be "exploited" so long as they consent.¹³⁹ In addition, the prohibitions against inducement or coercion of children into unlawful sexual practices take only a limited approach to combating exploitation.¹⁴⁰ Lastly and most significantly, the Convention does

¹³⁵ Convention on the Rights of the Child, *supra* note 2.

¹³⁶ Note that the previous children's declarations, the Declaration of Geneva and the 1959 Declaration of the Rights of the Child only had provided that children must be protected against all forms of exploitation. See Levesque, *supra* note 1, at 209-11.

¹³⁷ The Convention on the Rights of the Child, *supra* note 2, at art. 34(b) & 34(c).

¹³⁸ This is reinforced by the fact that the Netherlands attempted unsuccessfully to delete the word "exploitative." See TRAVAUX PRÉPARATOIRES, *supra* note 131, at 433.

¹³⁹ As we have seen, children seem to be "consenting." For many, it essentially has become a way of life. See *supra* notes 114-15 and accompanying text.

The focus on consent and unlawful activity was necessary, because, for example, the age of majority varies across nation states and, as the Convention covers children up to the age of eighteen, it could in effect prohibit sexual activity between husbands and wives under the age of 18. See TRAVAUX PRÉPARATOIRES, *supra* note 131, at 450. But see *id.* at 50-51 (noting that the delegation of China and USSR found it difficult to accept the inclusion of "unlawful," since they could not imagine that children's sexual practices could be lawful).

Despite this limitation, it is clear that there already exists international instruments aimed at the protection of children against being "procured, enticed or lead away for the purposes of prostitution . . . even with their consent." See Convention for the Suppression of Traffic & Prostitution, art. 1, *supra* note 123, at 234.

¹⁴⁰ For example, there are no provisions against distribution of child pornography. This recommendation was made but rejected. For legislative history to that effect, see TRAVAUX PRÉPARATOIRES, *supra* note 131, at 447-48 (the representative of Norway proposed that "specific reference be made to the commercial distribution and sale of child pornography which was an important aspect of sexual exploita-

not prohibit children who have reached the age of sexual emancipation to become prostitutes or engage in pornography. This limitation is significant because many countries either have no laws relating to emancipation or consider children as young as thirteen to be sexually emancipated.¹⁴¹

Despite the limitations of these attempts to address the rights of children, it is clear that there are now distinct prohibitions and protections against sexual exploitation. Unfortunately, though these arguments against sexual exploitation may be relatively strong, the complexity and pervasiveness of the problem eludes solutions even when strict mandates exist.¹⁴² For example, it would be difficult to argue that the government of Thailand condones sex tourism. It is certainly aware of the problem¹⁴³ and its negative consequences,¹⁴⁴ and has reacted.¹⁴⁵ Yet, this exploitation continues at a

tion;" the representative of Senegal proposed that measures prohibiting child pornography include penalties or other sanctions to ensure effective enforcement).

¹⁴¹ According to a survey conducted by the International Catholic Child Bureau, legal protections for children against such exploitation as child pornography vary widely. See Douglas Hodgson, *Sex Tourism and Child Prostitution in Asia: Legal Responses and Strategies*, 19 MELB. U. L. REV. 512, 523 (1994) (finding that a major obstacle to protecting children from child prostitution is the lack of uniformity concerning children's ages of consent and noting that several countries allow children as young as 12 or 13 to engage in sexual relations). Although countries had passed laws protecting children from exploitation, the minimum age of consent varied significantly. For example, in Thailand, there was no minimum age of sexual consent for boys, and girls were protected only up to the age of 13. *Id.* It further noted that laws dealing with child pornography dealt mainly with offenses of production and distribution. *Id.* For a sampling of different ages at which children are sexually emancipated, see David T. Evans, *Falling Angels?—The Material Construction of Children as Sexual Citizens*, 2 INT'L J. CHILDREN'S RTS. 1, 6-9 (1994).

¹⁴² Paulo David, *Review of The Sexual Exploitation of Children: Field Responses*, 2 INT'L J. CHILDREN'S RTS. 116, 117 (1994) (reviewing the work of non-governmental organizations combatting child sexual exploitation and the major difficulties encountered in implementing programs).

¹⁴³ Goldstein, *supra* note 108, at 8 (noting that sex-tourism "goes on with the knowledge and sometimes connivance of governments").

¹⁴⁴ See, e.g., *Editorial*, GUARDIAN, Dec. 11, 1993, at 18 (noting that sex tourism has contributed immensely to the HIV/AIDS epidemic in Thailand and has become uncontrollable among 13- to 20-year-old females).

¹⁴⁵ For example, the government of Thailand, in addition to commissioning research, see *supra* note 110, also has recently instituted a number of programs to discourage child prostitution. See Serrill, *supra* note 4, at 52 (noting that Chuan Leekpai, the Thai prime minister, had announced a campaign to wipe out child prostitution). This rather progressive and ambitious program includes the following: (1) a public campaign to educate parents on possible violence against child prostitutes; (2) a revision of laws to enhance rights of children; (3) the provision of legal

phenomenal rate.¹⁴⁶

The current inability to stem the rise of child sexual exploitation compels two distressing conclusions. First, the usefulness of even clear mandates remains uncertain: even when strict standards warrant action, the international community does not necessarily respond. Second, calling attention to an escalating social problem does not automatically jolt the international community into action. The sexual maltreatment of children in Western societies exemplifies some of the barriers to eradication of such abuses. Whether sexual maltreatment can be appropriately addressed, even when there has been a societal commitment to its abolition, therefore remains to be seen.

III. THE SEXUAL ABUSE OF CHILDREN: RECONCILING FAMILY PRIVACY WITH INDIVIDUAL RIGHTS

A. *Responses to the Sexual Abuse of Children*

Although the sexual abuse of children has been documented throughout history, societies' willingness to recognize the sexual use of children as abuse has varied considerably. In the United States, for example, even though child abuse was initially "discovered" in the early 1960s,¹⁴⁷ it was not until the

aid for children and parents; (4) creation of emergency centers for victims of child prostitution; (5) more stringent enforcement of existing laws on child prostitution; and (6) discouragement of sex tourism. Forrest Smith, *Thai Government Doesn't Condone Sex Trade*, DALLAS MORNING NEWS, July 17, 1993, at 31A. However, the extent to which these provisions have provided and continue to provide protection to children against sexual exploitation obviously remains limited. Serrill, *supra* note 4, at 52 (noting that "few expect much to come of such efforts"). Thailand's reaction to the problem of sex tourism is a recent change. As recent as 1986, the Deputy Prime Minister of Thailand had encouraged sexual entertainment to attract tourists. See JUDITH ENNEW, *THE SEXUAL EXPLOITATION OF CHILDREN* 99 (1986).

¹⁴⁶ See *supra* text and accompanying notes 109-17.

¹⁴⁷ This discovery usually is attributed to Henry Kempe's 1962 address on the battered child to the American Medical Association. See Margaret A. Lynch, *Child Abuse Before Kempe: An Historical Literature Review*, 9 CHILD ABUSE & NEGLECT 7 (1985); see also BEVERLY GOMES-SCHWARTZ ET AL., CHILD SEXUAL ABUSE: THE INITIAL EFFECTS 13-14 (1990) (providing a brief synopsis of the discovery of sexual abuse in the United States); SANDY K. WURTELE & CINDY L. MILLER-PERRIN, PREVENTING CHILD SEXUAL ABUSE: SHARING THE RESPONSIBILITY 1-3 (1992) (briefly summarizing the development of the social recognition of child sexual abuse); Erna Olafson et al., *Modern History of Child Sexual Abuse Awareness: Cycles of Discov-*

late 1970s that child sexual abuse was perceived as a social problem requiring immediate attention.¹⁴⁸ Since its discovery, the nature of sexual abuse has been controversial. A major dispute involves the definition of sexual abuse.¹⁴⁹ The debate is significant because definitions dictate the extent to which abuse is recognized and the form social responses will take. Definitional concerns aside, however, other aspects of the nature of sexual abuse are highly controversial—particularly in areas relating to its causes, harm, treatment, and prevention—and often empirical evidence tends not to match public assumptions.

The scope of child sexual abuse has become difficult to gauge because incidence and prevalence studies paint different pictures.¹⁵⁰ For example, the National Committee for the Prevention of Child Abuse, basing their findings on their annual fifty-state survey of child-abuse reports, recently estimated that there are between 360,000 and 408,000 reports of sexual abuse filed annually; in 1992 this would account for a significant percentage of the almost three million reports of child maltreatment.¹⁵¹ The problem with these figures, however, is

ery and Suppression, 17 CHILD ABUSE & NEGLECT 7, 16 (1993).

¹⁴⁸ GOMES-SCHWARTZ ET AL., *supra* note 147, at 14. Discovery refers to the process by which social problems are raised to the level of cultural observation, which allows for reactions by social, political and professional groups. In the case of child sexual abuse, child advocates and feminist groups helped make the general public and professionals aware of the prevalence of child sexual abuse in the 1970s. *See generally* JEFFREY J. HAUGAARD & N. DICKON REPPUCCI, *THE SEXUAL ABUSE OF CHILDREN: A COMPREHENSIVE GUIDE TO CURRENT KNOWLEDGE AND INTERVENTION STRATEGIES* 3-5 (1988).

¹⁴⁹ The classic definition of sexual abuse was offered by Henry Kempe: "involvement of dependent, developmentally immature children and adolescents in sexual activities they do not fully comprehend, to which they are unable to give informed consent, or that violates the social taboos of family roles." Henry Kempe, *Incest and Other Forms of Sexual Abuse*, in *THE BATTERED CHILD* 198 (Henry Kempe & Ray E. Helfer eds., 1980). Cases in which children are raped or otherwise sexually abused by their peers or children younger than themselves are often discounted as instances of child sexual abuse. Diana E.H. Russell, *The Incidence and Prevalence of Intrafamilial and Extrafamilial Sexual Abuse of Female Children*, in *HANDBOOK ON SEXUAL ABUSE OF CHILDREN: ASSESSMENT AND TREATMENT ISSUES* 19 (Lenore E.A. Walker ed., 1988); *see also* WURTELE & MILLER-PERRIN, *supra* note 147, at 3-6 (noting the diverse definitions of child sexual abuse).

¹⁵⁰ Incidence studies examine "the number of new cases occurring within a specific time period, usually a year." WURTELE & MILLER-PERRIN, *supra* note 147, at 6. Prevalence studies examine "the proportion of a population that reports having been sexually victimized during childhood." *Id.*

¹⁵¹ For current trends in child abuse reporting and fatalities, see Karen

that a large number of reports are never substantiated. Existing estimates of substantiated cases are considerably lower. For example, the National Center on Child Abuse and Neglect, for the year 1992, reports "only" 918,263 *substantiated* cases of child maltreatment, of which 14% involved sexual abuse.¹⁵²

Most professionals believe that incidence figures underestimate the scope of the problem, a proposition supported by prevalence figures.¹⁵³ Prevalence reports, which would measure the percentage of the population reporting sexual victimization in childhood, range from 7% to 62% for girls, and 3% to 16% for boys.¹⁵⁴ These reports also consistently show that 25 to 30% of sexually abused children are under the age of seven and the modal age of such abuse is ten years.¹⁵⁵ Despite such differences in estimates, it is clear that maltreatment is gaining increasing recognition as a social issue. The dramatic increase in reports of maltreatment—331% from 1976 to 1992—reflects this growing awareness.¹⁵⁶

McCurdy & Deborah Daro, *Child Maltreatment: A National Survey of Reports and Fatalities*, 9 J. INTERPERSONAL VIOLENCE 75, 77-81 (1994) (detailing the changes in reporting since the early 1980s).

¹⁵² U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES ("DHHS"), CHILD MALTREATMENT 1992: REPORTS FROM THE STATES TO THE NATIONAL CENTER ON CHILD ABUSE AND NEGLECT 14 (1994).

¹⁵³ WURTELE & MILLER-PERRIN, *supra* note 147, at 7; see also David Finkelhor & Gail L. Zellman, *Flexible Reporting Options for Skilled Child Abuse Professionals*, 15 CHILD ABUSE & NEGLECT 335, 335-41 (1991) (noting that over 40% of mandated reporters violate reporting laws and proposing solutions for improving compliance); David Finkelhor, *The Main Problem is Still Underreporting, Not Overreporting*, in CURRENT CONTROVERSIES ON FAMILY VIOLENCE 273, 273-85 (Richard J. Gelles & Donileen R. Loseke eds., 1993) (examining reasons why large numbers of neglected and abused children never find their way to child protective records).

¹⁵⁴ WURTELE & MILLER-PERRIN, *supra* note 147, at 8; see also Carol R. Hartman & Ann W. Burgess, *Sexual Abuse of Children: Causes and Consequence*, in CHILD MALTREATMENT: THEORY AND RESEARCH ON THE CAUSES AND CONSEQUENCE OF CHILD ABUSE AND NEGLECT 95, 98-99 (Dante Cicchetti & Vicki Carlson eds., 1989) (reporting findings from incidence and prevalence studies).

¹⁵⁵ N. Dickon Reppucci & Jeffrey J. Haugaard, *Problems with Child Sexual Abuse Prevention Programs*, in CURRENT CONTROVERSIES ON FAMILY VIOLENCE 306 (Richard J. Gelles & Donileen R. Loseke eds., 1993).

¹⁵⁶ DHHS, *supra* note 152, at 9-10. Similar trends have been noted in other countries. See, e.g., Carol-Ann Hooper, *Child Sexual Abuse and the Regulation of Women: Variations on a Theme*, in REGULATING WOMANHOOD: HISTORICAL ESSAYS ON MARRIAGE, MOTHERHOOD AND SEXUALITY 53, 76 n.1 (Carol Smart ed., 1992) (noting that the number of children in child-protection registers in England and Wales had more than doubled from 1983 to 1987).

Definitional, prevalence, and incidence issues aside, the most controversial aspect of child sexual abuse has been the role of families. Contrary to popular press accounts, "stranger danger"—abuse by strangers—accounts for a relatively small percentage of abusive incidents.¹⁵⁷ Epidemiological studies report that the majority of abused children are abused by either relatives or acquaintances. More controversial, however, is the belief that family members often are aware that the abuse is occurring.¹⁵⁸ Because of such factors as families' involvement in perpetrating abuse and the "seduction process" which offenders use to entice children into a web of secrecy,¹⁵⁹ it is generally believed that sexual abuse is a "predominantly secret, under-reported phenomena" that defies preventative attempts.¹⁶⁰

Attempts to prevent child sexual abuse also continue to be highly controversial. The major focus of prevention has placed primary responsibility on children. This approach has been appropriately criticized.¹⁶¹ In addition to the finding that

¹⁵⁷ Roger J.R. Levesque, *Sex Difference in the Experience of Child Sexual Victimization*, 9 J. OF FAM. VIOLENCE 357, 362 (1991) (incidence study finding that less than 10% of sexually abused children were victimized by strangers); GOMES-SCHWARTZ ET AL., *supra* note 147, at 63 (noting that only 3% of abusers are strangers). *But see* WURTELE & MILLER-PERRIN, *supra* note 147, at 13-14 (reporting that 25% of women and 34% of men reporting childhood abuse were abused by strangers); Hartman & Burgess, *supra* note 154, at 123.

¹⁵⁸ The controversy revolves around popular notions that mothers are the silent accomplices in their children's abuse, despite a lack of solid empirical support. *See, e.g.*, GOMES-SCHWARTZ ET AL., *supra* note 147, at 109-31; *see also id.* at 115-16 (concluding that "the majority of mothers responded to the revelation of sexual abuse in a reasonably appropriate manner"); Anne McGillivray, *Expanding the Narrative of Child Sexual Abuse*, 2 INT'L J. CHILDREN'S RTS. 67, 72-77 (1994) (noting that mothers are simultaneously blamed for the abuse and expected as caregivers to prevent and disclose abuse).

¹⁵⁹ *See* Roland C. Summit, *The Child Sexual Accommodation Syndrome*, 7 CHILD ABUSE & NEGLECT 177 (1983).

¹⁶⁰ Hartman & Burgess, *supra* note 154, at 122. The predominantly silent ecology of sexual abuse is exacerbated by the findings that over one-third of its victims show no symptomatology, that there is no specific syndrome in children who have been abused and that there is no single traumatizing process. *See generally* Kathleen A. Kendall-Tackett et al., *Impact of Sexual Abuse on Children: A Review and Synthesis of Recent Empirical Studies*, 113 PSYCH. L. BULL. 164 (1993) (reviewing the major empirical studies of child sexual abuse).

¹⁶¹ Gary B. Melton, *The Improbability of Prevention of Sexual Abuse, in PREVENTION OF CHILD MALTREATMENT: DEVELOPMENTAL AND ECOLOGICAL PERSPECTIVES*, 168, 168-89 (Diane J. Willis et al. eds., 1992); Reppucci & Haugaard, *supra* note 155, at 313-15 (reviewing evaluation of child sexual education programs and con-

there may be negative side effects associated with participation by children in sexual abuse prevention programs,¹⁶² the central finding is that neither evaluation research nor knowledge about children's development reveals any reason to believe that sexual abuse education programs are, or could be, effective in preventing abuse.¹⁶³ Partly in reaction to these findings, there has been a theoretical move that focuses on the moral responsibility of every adult to protect children.¹⁶⁴ The theory, however, has been difficult to implement: programs continue to focus on childhood education,¹⁶⁵ and the inherent secrecy of sexual abuse has not changed.

The institutional response to child sexual abuse also has been controversial. Well-intentioned but misinformed professionals may do more harm than good.¹⁶⁶ Once abuse has been

cluding that there is no way of determining whether they were successful in causing any changes). Moreover, several researchers have noted that children are not necessarily the appropriate target of intervention, that it is not clear whether greater knowledge will help society prevent abuse, that it is not clear what kinds of skills are needed to prevent abuse, and that prevention programs may have negative effects on children. *See, e.g.,* Melton *supra*, at 177-80; JILL D. BERRICK & NEIL GILBERT, WITH THE BEST OF INTENTIONS: THE CHILD SEXUAL ABUSE PREVENTION MOVEMENT 16-29, 107-22 (1991) (including the following as the negative effects of California's comprehensive pre-school sexual abuse prevention program: creating distrust and fear of strangers, teaching children about rights they cannot comprehend, giving parents a false sense of security, and creating the unrealistic expectation that children can escape from adults' sexual advances when even adults may have difficulties doing so).

¹⁶² Sandy K. Wurtele & Cindy L. Miller-Perrin, *An Evaluation of Side Effects Associated with Participation in a Child Sexual Abuse Prevention Program*, 57 J. SCH. HEALTH 228, 228-331 (1987); *see also* WURTELE & MILLER-PERRIN, *supra* note 147, at 81-82 (noting other findings relating to the negative effects of sexuality-education classes).

¹⁶³ Melton, *supra* note 161 (doubting that prevention of sexual abuse is possible and that, even if it were possible, it could not be achieved without substantial negative side effects); *see also* BERRICK & GILBERT, *supra* note 161, at 93-94 (noting that the effectiveness of prevention efforts is uncertain); N. Dickon Reppucci & Jeffrey J. Haugaard, *Prevention of Child Sexual Abuse: Myth or Reality?* 44 AM. PSYCHOL. 266, 266-75 (1989); Michael S. Wald & S. Cohen, *Preventing Child Abuse: What Will It Take?*, 20 FAM. L.Q. 281, 281-302 (1986).

¹⁶⁴ This was the approach taken by the U.S. ADVISORY BOARD ON CHILD ABUSE AND NEGLECT, CHILD ABUSE AND NEGLECT: CRITICAL FIRST STEPS IN RESPONSE TO A NATIONAL EMERGENCY 42-96 (1990); *see also* WURTELE & MILLER-PERRIN, *supra* note 147, at 54-203 (noting that relying on child-focused prevention programs are only part of the solution and detailing the role of parents, professionals, researchers and policymakers in the prevention of child sexual abuse).

¹⁶⁵ *Cf.* Reppucci & Haugaard, *supra* note 155, at 310-13.

¹⁶⁶ *Id.*

revealed, the system may not be "victim-friendly." Research has revealed several negative effects to being handled through various institutional systems, particularly the criminal justice and social service delivery systems.¹⁶⁷

Research investigating the institutional effects on child sexual abuse victims remains limited and far from unequivocal. Although few child sexual abuse cases actually reach the trial stage, the criminal justice system has been the major institutional response.¹⁶⁸ Ironically, instead of emphasizing the system's effect on children, several commentators have become preoccupied with the impact children are having on the criminal justice system.¹⁶⁹ In particular, commentators have questioned the reliability of the testimony of child sexual abuse victims, and the children's levels of suggestibility. Those who have been concerned with what effects the justice system actually has on children report that results remain far from clear.¹⁷⁰ Recent research reports have been counter-intuitive.

¹⁶⁷ Hartman & Burgess, *supra* note 154, at 111 (reviewing the literature relating to the effects of institutional reactions to abuse). A notable effect is that about 40% of substantiated cases of child abuse and neglect receive no formal state intervention. McCurdy & Daro, *supra* note 151.

¹⁶⁸ A study of criminal sexual abuse case processing in several metropolitan courts revealed that about one-third of identified cases of sexual abuse resulted in no charges and that a much lower proportion of cases were actually tried—9.4% in jurisdictions where cases could be directed for the treatment and 10.8% in jurisdictions with no diversion option. ELLEN GRAY, *UNEQUAL JUSTICE: THE PROSECUTION OF CHILD SEXUAL ABUSE* 95, 98, 100 (1993).

¹⁶⁹ The most controversial areas have been the perceived need for procedural and evidentiary changes to adapt to the need for children's testimony. See generally Gary B. Melton, *Children's Testimony in Cases of Alleged Sexual Abuse*, 8 *ADVANCES DEV. & BEHAV. PEDIATRICS* 179, 184-99 (1987). For a review of the court system and reform efforts for children, see generally NANCY W. PERRY & LAWRENCE S. WRIGHTSMAN, *THE CHILD WITNESS: LEGAL ISSUES AND DILEMMAS* 97-174 (1991); DEBRA WHITCOMB, *WHEN THE VICTIM IS A CHILD* 15-28, 47-145 (1992); Julie A. Lipovsky, *The Impact of Court on Children: Research Findings and Practical Recommendations*, 9 *J. INTERPERSONAL VIOLENCE* 238 (1994). The most contentious aspect of child testimony has been an empirical debate about children's levels of suggestibility. For reviews of this research, see *THE SUGGESTIBILITY OF CHILDREN'S RECOLLECTIONS* (John Doris ed., 1991); Stephan J. Ceci, *Cognitive and Social Factors in Children's Testimony*, in *PSYCHOLOGY AND LITIGATION AND LEGISLATION* 15 (Bruce D. Sales & Gary R. VandenBos eds., 1994); Steven J. Ceci & Maggie Bruck, *Suggestibility of the Child Witness: A Historical Review and Analysis*, 113 *PSYCH. L. BULL.* 403 (1993).

¹⁷⁰ See Desmond K. Runyan, *The Emotional Impact of Societal Intervention into Child Abuse*, in *CHILD VICTIMS, CHILD WITNESSES: UNDERSTANDING AND IMPROVING TESTIMONY* 263 (Gail S. Goodman & Bette L. Bottoms eds., 1993); Gail S. Good-

For example, despite previous thinking, going through the judicial process may actually help some victims.¹⁷¹ Likewise, older victims may have more negative reactions to testifying.¹⁷²

Given the current lack of scientific knowledge, generalizations about the institutional impact on victims may be meaningless, particularly considering the variations in children's experiences.¹⁷³ The shortcomings of empirical research and failures in institutional responses have left child protection in a precarious position: eminent scholars note the growing "social problem fatigue" and the unexpected emergence of a backlash.¹⁷⁴

Although research results have challenged the appropriateness of virtually every response taken against sexual abuse,¹⁷⁵ some generalizations may be rendered: (1) families are not the safe havens they are generally thought to be; (2) abuse tends to be underreported because it occurs within trusted relationships; (3) institutional responses are not always in the child's best interests; and (4) prevention programs should reach beyond individual children and their families.

B. *Family Privacy vs. Individual Rights*

The international community's response to sexual abuse does not have a long history. Child sexual abuse has only recently been recognized as a significant social problem.¹⁷⁶ Fur-

man et al., *Testifying in Criminal Court: Emotional Effects on Child Sexual Assault Victims*, in 57 MONOGRAPHS SOC'Y RES. CHILD DEV. 1 (1992).

¹⁷¹ Runyan, *supra* note 170, at 273-76.

¹⁷² Cf. Goodman et al., *supra* note 170, at 115-16 (reporting that older children express more negative feelings about testifying in court).

¹⁷³ Runyan, *supra* note 170, at 275. Despite variation, it seems that maternal support may be the most critical factor. *Id.* at 272-73.

¹⁷⁴ See generally THE BACKLASH: CHILD PROTECTION UNDER FIRE (John E.B. Myers ed., 1994).

¹⁷⁵ Criticism of institutional and individual responses is endemic in the entire child protection system. See Gary B. Melton & Mary F. Flood, *Research Policy and Child Maltreatment: Developing the Scientific Foundation for Effective Protection of Children*, 18 CHILD ABUSE & NEGLECT 1, 1 (1994) (examining the lack of a "strong scientific foundation for decision-making and program development in the field of child protection"); see also *id.* at 3-26 (detailing the importance and current state of research concerning child maltreatment).

¹⁷⁶ See *supra* note 148 and accompanying text.

thermore, events that occur within families are not usually the subject of international law; indeed, the family unit is afforded a considerable amount of protection from intervention by international law.¹⁷⁷ Lastly, international law has heretofore not been well-suited to address the issue because private rights and actions traditionally have not been within the proper jurisdiction of international law.¹⁷⁸

Despite the hesitant and generally inappropriate response of international law to issues of family violence, recently it has offered explicit protections against child sexual abuse. These protections first appeared with the adoption of the Convention on the Rights of the Child in 1989.¹⁷⁹ The Convention not only mentions sexual abuse in several articles, but also explicitly devotes Article 19 to responding to the protection of children from sexual abuse while in the care of parents, guardians, or others.¹⁸⁰

¹⁷⁷ See UDHR, *supra* note 34, at art. 16, para. 3 ("The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."); *id.* at art. 10, para. 1 ("The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental unit of society . . ."); ICCPR, *supra* note 51, at art. 23(1) ("The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."); *Convention on the Rights of the Child*, *supra* note 2, at arts. 5, 7, 9, 10, 18, 21, 22 (all of which refer to children's right to a relationship with parents and to a family environment). Again, several regional covenants offer special protections to families. See AFRICAN CHARTER, *supra* note 56, at art. 18(1) ("The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral[s]."); *id.* at art. 18(2) ("The State shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community."); American Convention on Human Rights, *supra* note 56, at art. 17 ("The family is the natural and fundamental group unit of society and is entitled to protection by society and the state.").

¹⁷⁸ See *supra* notes 97-98. Traditionally, international law dealt with relationships among states; the current move is to include private actions.

¹⁷⁹ Protections against sexual abuse are found in articles 19, 34, & 35 of the Convention on the Rights of the Child, *supra* note 2. Neither the Declaration of Geneva (the first international document to deal with children's rights) nor the Declaration of the Rights of the Child, mention sexual abuse. For an analysis of these instruments, see Levesque, *supra* note 1, at 209-12.

¹⁸⁰ The text of Article 19 reads as follows:

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has care of the child.

Article 19 takes the approach that the most effective method of protecting children is by supporting their families. In addition, it places a duty on states parties to establish, as appropriate, social programs for prevention, identification, reporting, referral and investigation of abuse allegations. Judicial involvement is to be resorted to "as appropriate."¹⁸¹ The approach is, therefore, neither predominantly punitive nor does it designate responsibility to a singular state agency.¹⁸²

As with any flexible approach to complex societal problems, the Convention has obvious and significant limitations. For example, the Article does not grant children entitlement to legal representation.¹⁸³ In addition, and perhaps more significantly, the Article does not specify when investigations are to be initiated, how the child is to be protected,¹⁸⁴ or the form judicial involvement will take.¹⁸⁵ Given that the Article is the major statement protecting against child sexual abuse, these inadequacies are rather disappointing.

Although the above limitations are significant, some are at least circuitously redressable.¹⁸⁶ Less remediable is the

2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

Convention on the Rights of the Child, *supra* note 2.

¹⁸¹ Convention on the Rights of the Child, *supra* note 2.

¹⁸² Convention on the Rights of the Child, *supra* note 2, at art. 19(2).

¹⁸³ This had not gone unnoticed, for the United States had proposed that it be made available. TRAVAUX PRÉPARATOIRES, *supra* note 131, at 273.

¹⁸⁴ This oversight has been criticized by the delegation of the United States. TRAVAUX PRÉPARATOIRES, *supra* note 131, at 273. The Branch for the Advancement of Women unsuccessfully tried to include the disposition of removal into protective custody. *Id.* at 277.

¹⁸⁵ TRAVAUX PRÉPARATOIRES, *supra* note 131, at 274 (Ukraine criticized the United States for focusing on judicial procedures and punitive measures).

¹⁸⁶ For example, nation states may now be held accountable for consistent patterns of abuse committed by private individuals; see, e.g., Judgment in Velasquez-Rodriguez, 1988 Inter-Am. Ct. Hum. Rts. (Ser. C) No.4, at 154-56, 28 I.L.M. 291, 326 (1989) (state accountability held to extend to responsibility for acts committed by private individuals, amounting to torture and the disappearance of individuals, as the pattern of abuses points to state complicity). Treaty law may be applied where the state refuses to take responsibility for a consistent and reliably attested pattern of institutional child sexual abuse. *Cf. id.* at 144-47 (state responsibility was engaged because there was a consistent pattern of abuse linking the actions

manner in which the Convention prioritizes the protection and support of families. Although in some instances supporting families may be an adequate and reasonable response, it is not clear to what extent a family-focused approach will alleviate, let alone prevent, sexual abuse. Since sexual abuse primarily occurs within families,¹⁸⁷ it is difficult to say what type of family support will prevent abuse from occurring in the first place. Furthermore, it is not obvious how well-equipped or how willing states are to intervene in the internal dynamics of families.¹⁸⁸

Although its response to abuse is often inadequate, the international community has recognized that protection from sexual abuse is a basic human right. Viewing protections from sexual abuse as a children's right issue does have the potential to reform current child protection efforts.¹⁸⁹ Yet, despite this recognition and potential, it remains unclear what the re-

of para-military groups to the state). See generally Dinah Shelton, *Private Violence, Public Wrongs, and Responsibilities of States*, 13 *FORDHAM INT'L L.J.* 1 (1990) (even if the state does not commit the principal abuse, it may still be held responsible if it fails to prosecute or detect the abuse carried out by those acting in their private capacities).

In addition, the right to be protected against arbitrary or unlawful interference with privacy "is required to be guaranteed against all such interferences and attacks whether they emanate from State authorities or from natural or legal persons." ICCPR, as interpreted by U.N. GAOR Hum. Rts. Comm., 32d Sess., at 20, General cmt. 16(1), U.N. Doc HRI/GEN/1 (1992).

Even though Nation States are susceptible to public scrutiny, the Convention on the Rights of the Child lacks an individual petitioning mechanism, which limits its effectiveness. Yet, it is difficult to imagine how giving children a voice in the reporting process would increase its effectiveness. Cf. Philip E. Veerman, *Review of Children's Freedom from Sexual Exploitation*, 2 *INT'L J. CHILDREN'S RTS.*, 117, 118 (1994) ("It is difficult to believe that young girls in Thailand (of whom Anti-Slavery International reported that they are sometimes chained to their beds) or young boys in Sri Lanka or the Philippines who work for pedophile tourists will write to a treaty body at the UN.").

¹⁸⁷ See *supra* note 157 and accompanying text.

¹⁸⁸ See Levesque, *supra* note 2, 284-87 (noting that a major difficulty with the Convention is that it strives to make families more public, and noting general inability and hesitancy on the part of legislatures, courts and society to pierce the family veil).

¹⁸⁹ See, e.g., Roger J.R. Levesque, *Prosecuting Sex Crimes Against Children: Time for "Outrageous" Proposals?*, 19 *L. & PSYCH. REV.* (forthcoming 1995) (manuscript at 49-50, on file with author) (concluding that the current approach to protecting children from sexual maltreatment is somewhat misguided and that taking individual child-victims seriously would mean fundamentally re-envisioning the current legal system which focuses on prosecuting offenders rather than fostering prevention and attending to the support needs of children).

sponse ultimately will be. This question remains even if nation states give considerable social, moral and economic commitment to dealing with sexual abuse. Thus, even when children's rights are taken seriously, there remain several obstacles blocking the full enjoyment of those rights.

CONCLUSION

The plight of sexually maltreated children is perhaps the most stark example of the need to reconsider the place of children in the New World Order. Despite escaping the scrutiny of commentators, it is clear that protection against sexual maltreatment is a right cognizable throughout international instruments. Unfortunately, like all instruments crafted by multilateral bodies, the instruments are necessarily imprecise. As a consequence, national legal systems striving to retain "flexibility" in their international obligations have two options. They may either avoid their international obligations by restrictive interpretation—or, alternatively, they may strengthen their approach by choosing a more progressive application. When the issue is child sexual maltreatment, the former approach seems *de rigueur*.

There is little reason to doubt the conventional wisdom that, by its prescriptive and injunctive character, international law does have the potential to proscribe practices which foster sexual maltreatment. Although international human rights law may provide a powerful normative statement, it remains difficult to enforce in practice. In addition, the issue of child sexual maltreatment is complex and, therefore, demands a complex response.

An examination of the sexual use of children reveals that conceptions of sexual behavior, harm, and rights vary across cultures. No matter how attractive it may be to allow human rights to be defined by local practices, it does not address practices which, from an outsiders' point of view, would violate basic human rights. If consensus exists among nations, it is that the official doctrine underlying the international law of human rights is in principle universal and is based on human dignity. Considering this consensus, the failure of an international response to traditional, cultural practices which involve children sexually appears particularly egregious. Although

international law does not delineate what the moral response should be in terms of respecting cultures, it clearly suggests intervention and Westernization.

The sexual exploitation of children has created a situation to which international law seems aptly positioned to respond. Indeed, there are several international prohibitions against sexual exploitation. Yet, it can hardly be argued that the international community has responded appropriately. As we have seen, even when morally unambiguous situations present themselves—when all agree that the practice should be stopped—nation states remain reluctant to intervene. Not only do they hesitate to interfere with other states, they do not even appear willing to enact responsible laws within their own countries.

The sexual abuse of children exposes the persistent, yet often unacknowledged, uncertainty over what international law can do when there is no consensus about appropriate responses. Even when an intuitively appealing response is made—such as aiming to support families—it still may fail to appropriately address issues of child abuse.

It should no longer be controversial to propose that there exists a developed body of customary and formal international law constituting children's human right to be protected from sexual maltreatment. Although international law provides the global community with the power to intrude and impose internationally recognized human rights standards, it would be unwise to conclude that international law offers a general license for intervention. International law offers the necessary first step. It suggests that domestic conduct in regard to children's basic human rights may be exposed to all members of the international community so that children's rights can be properly scrutinized, appraised, and eventually affirmed. Ultimately, the next step is for nations to take international law seriously and to move beyond engaging in merely cosmetic or symbolic gestures to address truly inhumane practices.