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# DO CHILDREN REQUIRE SPECIAL PROTECTION UNDER INTERNATIONAL HUMAN RIGHTS LAW?

*Fiona Orr*

*Human rights are universal; this is the precedent upon which all human rights discourse is based. Yet over the years, as international human rights law has developed, the rights of certain groups have been awarded particular attention and protection. Children are a particularly interesting group as there is unprecedented and unmatched consensus from almost all states on their need for such special protection. Despite this, children's rights advocates face the challenge of victimising children further by insisting that they need special protection, thereby reinventing the universal subject. A robust Children's Rights regime, decisively marked by the UN Convention on the Rights of the Child and the broadening scope of children's rights, has been growing since the 1990s. On the surface the campaign to raise the standard of living for vulnerable children through children's rights seems irrefutable. This development however must precede with caution, as it raises many issues of conflict, including appointing appropriate representatives for the child, acknowledging the fact that children's rights was born out of a Western concept of childhood, and manipulating the image of the "vulnerable" child. It could therefore have negative effects on the development of the child. Issues such as child marriage, however, highlight that international intervention to implement universal standards of protection for the vulnerable is necessary. If such intervention is not pursued within a human rights framework which respects culture it will risk losing legitimacy.*

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## INTRODUCTION

*"Each time we let in an excluded group, each time we listen to a new way of knowing, we learn more about the limits of our current way of seeing"*  
- Carrie Menkel-Meadow<sup>1</sup>

Human rights are universal. This is the precedent upon which all human rights discourse is based. Yet over the years, as international human rights law has developed, the rights of certain groups have been awarded particular attention and protection. Children are a particularly interesting group whose rights have been specially protected, as every human being is born into this group and yet

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<sup>1</sup> Carrie Menkel-Meadow (1987) in Micahel Freeman *International Journal of Children's Rights* 15 (2007) p6.

most eventually leave it. It is also a group which has found unprecedented and unmatched consensus from almost all states on their need for special protection.

Despite this, children's rights advocates face the challenge of victimising children further by insisting that they need special protection and thereby reinventing the universal subject of human rights as those who are not children. This article will examine the development in human rights theory which led to the UN Convention on the Rights of the Child and the wider children's rights regime. It will go on to consider the unique nature of children's rights and the issues of conflict which arises for children's rights advocates. Finally, with particular attention to the issue of child marriage, it will consider whether intervention by the international community on behalf of children, on the assumption that they are "vulnerable victims," is justifiable.

## THE THEORETICAL STRUGGLE FOR CHILDREN'S RIGHTS

The recognition that children need special protection has been a common concept since the beginning of the 20<sup>th</sup> century. In 1924 the League of Nations adopted the Geneva Declaration of the Rights of the Child (commonly known as the "Declaration of Geneva"), the first document to set out basic principles for the rights of children, primarily with regard to the social welfare of the child.<sup>2</sup> These principles were reinforced and freedom from discrimination was added by the Declaration of the Rights of the Child, which was adopted by the UN General Assembly in 1959.<sup>3</sup> Both Declarations, however, imposed no legal obligation upon States. They were seen by some critics as outdated, as they included vague or idealistic aspirations such as that children should experience "love and understanding" and should not be separated from their mother.<sup>4</sup> They also failed to give first generation rights to children, and thereby did not recognise children as active rights-bearers.<sup>5</sup>

### *Children's Liberation*

In the 1960s and 1970s, following the feminist and civil rights movements, the idea of self-determination for children emerged in the children's liberation movement. The liberationists believed that adults exercised discriminatory and exploitative power over children.<sup>6</sup> Holt and Farson, for example, argued that childhood was a relatively recent western "invention" which purposefully excluded children from the adult world in order to keep them in subordination. They claimed that children should be granted the right to vote, earn and own property.<sup>7</sup> In order to accommodate for the fact that children are not fully mature, Holt argued that their actual exercise of these rights would be a matter of

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<sup>2</sup> Peter Jenkins, 'Advocacy and The 1989 UN Convention on the Rights of the Child' in *Having a Voice* (Venture Press, 1995) 32.

<sup>3</sup> *Ibid.*

<sup>4</sup> Jane Fortin, *Children's Rights and the Developing Law* (Butterworths, 1998) 36.

<sup>5</sup> Antonella Invernizzi and Jane Williams, *The Human Rights of Children: from Visions to Implementation* (Ashgate, 2011) 2.

<sup>6</sup> Fortin (n 4) 6.

<sup>7</sup> *Ibid.* 6.

choice. A young child, therefore, would be unlikely to exercise their right to earn, yet they would not be discriminated against on the basis of age.

The children's liberation movement is controversial and has met strong objections from human rights theorists, as the assumption that human rights are based on autonomy can position children in direct conflict with the interests of their parents. It raises the question of whether it is reasonable to expect parents to promote the rights of children when it could undermine their own authority. Movements which allow the State to intervene and redefine the parent-child relationship have therefore been traditionally met with hostility.<sup>8</sup> Holt regarded this hostility to government intervention as oppression on the part of parents<sup>9</sup> and as Jenkins shows, children's limitations, in terms of emotional and intellectual immaturity and dependency, were regarded particularly in the media as irrefutable arguments for postponing their assumption of adult rights and responsibilities. Franklin, a leading proponent of political rights for children, called this an ideological moral panic.<sup>10</sup>

### ***Choice or Will Theory***

Out of the liberal camp came also the Choice or Will theory. Similar to liberationist theory, advocates of Choice and Will theory assume that individuals are the holders of rights and therefore the exercise of rights is dependent on the individual's choice or will. Where liberationists encourage each individual, including children, to possess rights, Choice or Will theorists, such as Hart, argue that children lack the competency to make choices and therefore cannot be rights-holders.<sup>11</sup>

Even considering the development made by children's rights theorists and practitioners, there is no theoretical consensus on if and why children need special protection under human rights law. In spite of that, the idea that a human rights approach can protect the minority of children who need protection from their parents or their government seems irrefutable. As Eekalaar notes, if nothing else, children's rights serve as a useful political tool to ensure the realization of certain goals for children.<sup>12</sup> This assumption of the need for more progressive protection is the starting point which led to the drafting of the UN Convention on the Rights of the Child (UNCRC).

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<sup>8</sup> Jenkins (n 2) 35.

<sup>9</sup> Fortin (n 4) 6.

<sup>10</sup> Bob Franklin, *Children's Rights: Comparative Policy and Practice* (Routledge, 1995) 4.

<sup>11</sup> Jane Fortin, *Children's Rights and the Developing Law* (Cambridge University Press, 2009)

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<sup>12</sup> Ibid 17.

## FORMING INTERNATIONAL CHILDREN'S RIGHTS LAW

### *The decade of "We the Children"*

In his decade review in 2001, the General Secretary of the United Nations, Kofi Annan, famously addressed the world as "We the Children".<sup>13</sup> The 1990s had been the decade to finally consolidate children's rights into a binding document. The Convention on the Rights of the Child, however, had not come about simply or quickly.

In 1978, in light of the clear need for a comprehensive consensus on children's rights, Poland tabled a proposal to formulate a convention, effectively the same as the 1959 Declaration, but which would be legally binding. Unfortunately the proposal gained little support and instead an open-ended Working Group was established by the Commission on Human Rights which worked for 9 years to draft a document. Partly due to Cold War politics, there were rarely more than 30 states represented in the early discussions, and unsurprisingly, industrialised countries were heavily overrepresented. This resulted in a fear that the document would be oriented towards western societies and around western ideals.<sup>14</sup>

Lack of support and contributions from International Organisations were also partly to blame for the lengthy process. As Pupavac notes, it is often forgotten that UNICEF, the key UN body responsible for children's advocacy, was in fact initially hostile to the drafting of a Convention on the Right of the Child, on the grounds that human rights agreements should not be legally binding, but rather aspirational.<sup>15</sup> By the late 80s however, the Cold War had thawed and there was a sudden surge from NGOs and other countries, mainly Islamic states.<sup>16</sup> The UNCRC was adopted on the 20th November 1989 and entered into force on the 2nd September 1990. A record 191 countries ratified the Convention by 2003, Somalia, South Sudan and the USA being the only countries yet to do so.

### *Creating New Standards*

The UNCRC is monumental because, not only did it create new standards in areas such as adoption (Article 21), access to health care (Article 24) and torture and capital punishment (Article 37), but for the first time it granted children all traditionally defined civil, political, social, economic and cultural rights.<sup>17</sup> It therefore diverges radically from previous documents which primarily addressed children's need for protection and care, by embracing empowerment rights. As Jane Fortin notes, in a mix of idealism and practical realism, it recognises the importance of the family while preparing a child to live as an individual in society.<sup>18</sup>

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<sup>13</sup> Kofi Annan, 'We the Children: Meeting the Promises of the World Summit for Children' (UNICEF, 2001).

<sup>14</sup> Henry J Steiner and Philip Alston, *International Human Rights in Context: Law Politics, Morals* (Oxford University Press, 2002) 513.

<sup>15</sup> Vanessa Pupavac, 'Children's Human Rights Advocacy' in M. Goodhart (eds.) (Oxford University Press, 2009) 220.

<sup>16</sup> Steiner and Alston (n 14) 513.

<sup>17</sup> Ibid 516.

<sup>18</sup> Jane Fortin, *Children's Rights and the Developing Law* (LexisNexis, UK, 2003) 39.

### **Protective Rights**

In the preamble, the UNCRC recognises the importance of the family as “the fundamental group of society” and childhood as a time for “special care and assistance”, while simultaneously recognising the child as an individual with equal and inherent dignity.<sup>19</sup> As expected, a long list of protective rights, such as protection from abuse and exploitation (Article 19) and armed conflict (Article 38) is provided. This reflects the consistent underlying assumption that children do in fact need special protection as they are particularly vulnerable.

### **Empowerment Rights**

The major leap in setting new standards however is taken by introducing the autonomous participation of children. Article 8, for example, gives children the right to an independent identity, requiring States “to respect the right of the child to preserve his or her identity, including nationality, name and family relations.” This Article was drafted in light of the forced disappearances of children in Argentina.<sup>20</sup> Similarly, Article 12 grants children the right to form and express their views freely in all matters concerning themselves, and Article 42 states that information of their rights must be provided to children.

### **The Guiding Principles**

Although it is stated that children's rights, like human rights, are interrelated, 4 principles are given precedence; non-discrimination (Article 2), the best interests of the child (Article 3), the right to life (Article 6) and respect for the child's views (Article 12). These principles have become both the basis for modern children's rights and also the major points of tension. Article 12 is particularly contentious because, by providing a child the right to form his or her own view, the right to information, education, freedom of religion and privacy must also be given, which could conflict with parental rights.<sup>21</sup> The perception that Article 12 would undermine parental authority was the primary reason the USA has not ratified the UNCRC.<sup>22</sup>

### ***An imperfect Convention***

Although seemingly indisputable, the UNCRC has its flaws and opponents. First, the UNCRC is fraught with conflicting provisions. The radically new vision of children as individual rights-holders, not dependent on representatives from the adult world, arguably places children's rights and parents' rights in conflict with each other. Article 5 attempts to deal with this challenge by recognising the parental role and emphasising that both parents, the extended family and the community have responsibilities and duties to raise the child in accordance with their customs. The UNCRC itself contains no practical or specific advice on how to reconcile such tensions, and is subject to conflictual

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<sup>19</sup> UNCRC Preamble 1989.

<sup>20</sup> Steiner and Alston (n 14) 516.

<sup>21</sup> Fortin (n 18) 41.

<sup>22</sup> Susan Kilbourne, ‘The wayward Americans-why the USA has not ratified the United Nations Convention on the Rights of the Child’, *Child and Family Law Quarterly*, 10, (1998)

views particularly from Islamic states and the USA.<sup>23</sup> In order to accommodate for cultural, political and legislative differences many states signed and ratified the UNCRC with reservations. Syria, for example, issued reservations regarding articles which are not in conformity with Shariah principles.<sup>24</sup>

Secondly, like any international agreement, its effectiveness depends entirely on a State's willingness to sign and ratify it. Despite almost universal ratification, enforcement of such an international human rights treaty is precarious. The UNCRC has no court or formal method of enforcement, and instead operates on a basis of monitoring reports submitted by governments to the Committee on the Rights of the Child in Geneva. The requirement on States therefore is merely to undertake "all appropriate, legislative, administrative and other measures" to ensure the implication of the UNCRC. In some states therefore the UNCRC holds persuasive influence only. This raises two problems, firstly, self-reporting can be an unreliable method of gathering information, as governments tend to exaggerate their progress, and secondly, acceptance of recommendations from the Committee can often depend on the media. In the UK for example, media sentiments have been hostile to the UNCRC, with tabloids producing headlines such as "how dare the UN lecture us?"<sup>25</sup>

### ***Growing reach for Children's Rights***

Despite its difficult inception, the UNCRC has been remarkably successful for children's rights. It is regarded as the most comprehensive list of human rights granted to a specific group and, as mentioned, has practically worldwide support which is becoming more wide-reaching. Other international and regional organisations have joined the UN Human Rights Council in putting children's rights on their agendas, leading to documents such as the ILO Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (1999) and the OAU African Charter on the Rights and Welfare of the Child (1990). Even the Security Council has brought children's rights into their agenda, by invoking the UNCRC as part of their international security strategy.<sup>26</sup> In Europe, the mainstreaming of children's rights has been seen for example in the European Charter of Fundamental Rights of the European Union (2000), which echoes the UNCRC in many respects.

### ***Children's Rights in the Courts***

The real indicator as to how the UNCRC affects and improves the lives of children, however, is in the influence it has had on legislatures and courts. As Van Buren notes, the courts are "one of the principal instruments for transforming social values and influencing traditional conduct towards children."<sup>27</sup> Although the UNCRC itself has no court, it has informed and guided courts across the world, most notable the European Court of Human Rights

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<sup>23</sup> Fortin (n 18) 43.

<sup>24</sup> Steiner and Alston (n 14) 521.

<sup>25</sup> Fortin (n 18) 44.

<sup>26</sup> Vanessa Pupavac, 'Children's Human Rights Advocacy' in M. Goodhart (ed.), *Human Rights: Politics and Practice* (Oxford University Press, 2009) 221.

<sup>27</sup> Geraldine Van Bueren, *Child Rights in Europe: Convergence and Divergence in Judicial Protection* (Council of Europe, 2007) 13.



(ECtHR). The ECtHR has stated that “the human rights of children and the standards to which all governments must aspire in realising these rights for all children are set out in the Convention on the Rights of the Child”.<sup>28</sup>

Individuals can, at any age, bring a complaint to the ECtHR, meaning that children are included. The reality is however, that applications will be brought by adults on behalf of children, oftentimes by parents on behalf of their own children. The ECtHR has in the past been cautious in granting children their independent rights where these might conflict with parental rights, as seen in *Nielsen v Denmark*.<sup>29</sup> However recent years have seen the ECtHR consider it more necessary to protect children from abusive parents, and it has adopted a more flexible approach. When assessing whether to place a child in care, for example, the ECtHR found in the case of *Johansen v Norway*<sup>30</sup> that the best interest of the child may override the interests of the parent and a “balancing act” must ensue. Although the ECtHR allows for a margin of appreciation, state intervention must be proportionate to its legitimate aim.<sup>31</sup>

The ECtHR is directed by principles laid down by the European Convention on Human Rights (ECHR). Although the ECHR is primarily aimed towards safeguarding the civil and political rights of adults, by considering the application of principles set out in the UNCRC, the ECtHR has responded dynamically to contemporary demands, reinforcing the fact that the ECHR is “a living instrument”. Its growing flexibility to particularly protect children's rights is further seen in its strong stance against corporal punishment, its insistence that state care must be a temporary measure only, its willingness to vigorously protect the civil rights of young offenders such as the Bulger killers, and its interpretation of the right to private and family life.<sup>32</sup>

## THE UNIQUE NATURE OF CHILDREN

In considering whether “children” as a group are vulnerable victims, it is worth examining the unique nature of the group. Much of the discussion regarding whether children are entitled to individual rights equal to those of adults has been focused on attempting to qualify children as a group, similar to other vulnerable groups. Women, indigenous people and LGBT advocates have similarly fought for special protection, on the assumption that a human rights approach is the best approach to compensate “vulnerable victims”. Freeman, for example, argues that the children's rights agenda is irrefutable because to accord rights is to respect dignity, while to deny them is to place doubt on humanity.<sup>33</sup> As Hannah Arendt said, what the excluded most lack is the right to possess

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<sup>28</sup> *Sahin v Germany* [2003] 2 FLR 671, [39].

<sup>29</sup> *Nielsen v Denmark* (1989) 11 EHRR 175.

<sup>30</sup> *Johansen v Norway* (1996) 23 EHRR 33.

<sup>31</sup> Fortin (n 18) 60.

<sup>32</sup> *Ibid.*

<sup>33</sup> Michael Freeman *International Journal of Children's Rights* 15 (2007) 7.

rights.<sup>34</sup> Expanding the Children's Rights agenda into the 21st century seems therefore inevitable as it affirms Kant's basic principle that individuals are an end in themselves, not a means to the ends of others.<sup>35</sup> There are however several characteristics of children's rights which make them fundamentally different to those of other groups. These must be considered.

Firstly, children are born into a biological state of dependence on adults. This means that children inevitably require a representative from the adult world, usually their parent, to assert their will or to act on their behalf. This has been referred to as the "capacity gap".<sup>36</sup> Some, such as Freeman, argue that, in seeking to protect children, society has underestimated the capability of children to show preference and understand a situation,<sup>37</sup> while others, such as Pupavac, consider the capacity gap to be "the fallacy of children's rights", as children are to be empowered and yet they lack the capability to exercise their empowerment. Nevertheless, the nature of dependence of children on adults is reflected in the principle of the best interest of the child, which recognises that representatives must be kept accountable to act in the interest of the child because children themselves cannot assert their own interests. Pupavac argues that children's empowerment rights should therefore not be thought of as civil liberties, because the rights holder and the moral agent are not the same person.<sup>38</sup>

Secondly, children represent a more complex group than any other group because it is subdivided. Infants are not the same as adolescents, and experience different degrees and forms of vulnerability. In order to contain "children" as a group, age limits must be made, usually realised in the form of the minimum age for a legal action such as voting or getting married. Van Bueren points out that although age limits are unavoidable they are inevitably arbitrary because they cannot take into account the varying development of individual children.<sup>39</sup> There could therefore be a 16 year old rational and competent "child" who cannot vote, while his 40 year old irrational neighbour may vote. Despite this, most children's rights documents, including the UNCRC (Article 1), recognise children to be all individuals under the age of 18. Some age limits however can regard individuals much younger than 18 with similar responsibilities and entitlements as fully mature adults. The age of criminal responsibility in the UK for example, is notoriously low, at age 10. The unique nature of children's rights raises several issues of conflict, making the question of considering children as "vulnerable victims" in need of special protection more complex.

### ***Who determines best interests?***

Firstly, it must be considered from the outset whether granting children empowerment rights is at all in their best interests. Rights include the right to do wrong. Granting children greater autonomy and assuming their greater rationality therefore may in fact expose them to greater danger. JS Mill asks, if a

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<sup>34</sup> Hannah Arendt in Michael Freeman *International Journal of Children's Rights* 15 (2007) p7.

<sup>35</sup> Freeman (n 33) 7.

<sup>36</sup> Pupavac (n 26) 222.

<sup>37</sup> Freeman (n 33) 12.

<sup>38</sup> Pupavac (n 26) 222.

<sup>39</sup> Van Bueren (n 27) 57.

man is walking across an unsafe bridge should you pull him back or allow him walk? Freeman illustrates this by considering a situation of a 13 year old Jehovah's Witness refusing a blood transfusion or a 16 year old anorexic patient refusing treatment.<sup>40</sup> The child, rather than the child's rights, should surely be the object of protection.

However, since there is no infallible representative of the child, who determines their best interests? It has long been assumed that adults, and in particular parents, act out of love and altruism for children. This has, however, since been re-conceptualised in response to mass violations against children both inside and outside the home. Van Bueren therefore argues that the Convention does not empower children, but rather empowers officials to act in a role previously assigned solely to parents.<sup>41</sup>

The question of representation also raises the issue of the rationality and autonomy of the child itself. Children's rights essentially promote the child's capacity for full autonomy, however, the capacity of a child is an evolving phenomenon and it is therefore difficult to accept the child as an "agent". Debates over freedom of religion, for example, have resulted in one view claiming that children are not agents and that conflicts involving children and religion must be seen through the lens of other actors, while another view, which emphasises autonomy, claims that children are the most important agents in their own religious convictions.<sup>42</sup> The UNCRC has accommodated for the evolving capacity, by insisting in Article 5 that State Parties "accept the responsibilities, the rights and duties of parents... to provide in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise of rights recognised in the present Convention."

### ***Who wrote the childhood norms?***

One of the most convincing arguments against the children's rights agenda is the constructivist argument that it is a Western concept, born out of Western history and relevant only to Western children. Constructivists argue that children's rights emerged after the industrialisation of Europe and North America when modernization brought children out of the adult workforce, relieved them of adult responsibilities and determined childhood as a time for education and play.<sup>43</sup> Due to their specific, regional origin, rights are therefore only relevant to the West. Societies which do not have shared experiences, cannot adopt specific norms. Donnelly calls this "the genetic fallacy."<sup>44</sup> Indeed, this was seen in the development of the African Charter on the Rights and Welfare of the Child (ACRWC), which was adopted by the Organisation of African Unity (OAU) Assembly on 11 July 1990, just a few months after the adoption of the UNCRC by the UN General Assembly. Viljoen argues that the OAU adopted their subsequent children's rights agenda as a reaction to the fact that African

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<sup>40</sup> Freeman (n 33) 14..

<sup>41</sup> Van Bueren (n 27).

<sup>42</sup> Silvie Langlaude, *The Right of the Child to Religious Freedom in International Law* (Leiden, Boston, 2007) 246.

<sup>43</sup> Pupavac (n 26) 224.

<sup>44</sup> Jack Donnelly in Vanessa Pupavac, (n26) 223.

involvement in the drafting of the UNCRC was limited (by 1989 just nine African States had participated in the working group), and to address concerns particularly relevance to Africa, notably child soldiers, child marriages and child refugees.<sup>45</sup> For example, the UNCRC allows for adolescents under the age of 18 to be recruited and used in direct hostilities (Art 38), while the ACRWC prohibits the involvement of all children in hostilities (Article 22). The ACRWC also explicitly prohibits child marriage and obliges states to take effective action, including legislation, to specify the minimum age of marriage to be 18 and to make registration of all marriages compulsory (Article 21). The UNCRC has no mention of child marriage.

### ***The end of the Universalist models of development***

Due to the effect that economic development had on the welfare of children in the West, it became accepted that material improvement and social progress were intrinsically linked. Indeed up until recently, NGO responses to child poverty in the developing world emphasised the material improvement of the country as a whole.<sup>46</sup> In other words, in order to help poor children, the general standard of living for the whole population must be raised. This approach was also endorsed across many actors, including UNICEF. However, this economic development model has not had the same effect in developing countries as it had in the West. Practically speaking, poorer countries were not able to secure capital investment unless they were strategically placed, and Marxists argued that this form of modernisation simply advanced the agenda of the West, rather than “lifting all boats”. Anthropologists such as Margaret Mead warned against the destabilising effects of modernity on traditional societies<sup>47</sup> and indeed, this was realised from the 1960s in the rapid urbanisation, the development of slums and shanty towns, and the alarming number of poor street children in urban areas of the global South. The poverty had simply centralized to the cities.

The belief in a universal model for development therefore subsided and other cultural relativism models for development, such as the sustainable development model, took its place. This raises the question as to whether children rights, or human rights in general, are universally applicable.

### ***The chaotic mix of universal children’s rights and relativist models of development***

Pupavac points out that, ironically, at a time when universal economic development was abandoned, universal human rights were renewed.<sup>48</sup> The effect has been chaotic, as global children rights advocates promote universal childhood norms, while countries adopt relativist development models. She is highly critical of this fundamental paradox, pointing out that whatever romantic images of family farming sustainable development conjures up, without modern machinery, child labour is a necessity. To expect individuals in a traditional society to adopt radically different family relations is to undertake a huge social

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<sup>45</sup> Frans Viljoen ‘Human Rights in Africa: Normative, institutional and functional complementarity and distinctiveness’ *South African Journal of International Affairs* (2011) 195.

<sup>46</sup> Pupavac (n 26) 225.

<sup>47</sup> Margaret Mead in Vanessa Pupavac, (n26)226.

<sup>48</sup> Pupavac (n 26) 229.

experiment.<sup>49</sup> Children's rights advocates have not sufficiently considered these contradictions. Being focused on the needs of individuals, children's rights can therefore destroy family ties and unwittingly have negative effects on development. Pupavac considers the children's rights regime therefore to have a distinct authoritarian and anti-humanist character.<sup>50</sup>

### ***Preserving culture in a universal regime***

Despite this seemingly hopeless paradox, children's rights advocates do provide for cultural differences, recognising culture and traditions as intrinsic to a child's identity and formally denying any hierarchy of cultures. The UNCRC, for example, recognises the child's right to culture in Articles 8, 29, 30 and 31. The African Charter on the Rights and Welfare of the Child has similar provisions.<sup>51</sup> Culture, however, has its limitations within children's rights. Certain cultural practices such as female genital mutilation and child marriage are regarded as unacceptable. Since cultural norms are regarded as learnt, they can also be reformed.<sup>52</sup> Cultural self-determination is therefore formally supported, but external intervention is legitimised against practices which are considered harmful and arbitrary to identity.

### ***A Neo-Imperialist Agenda and the Infantilisation of the South***

The children's rights regime, being a normative concept, claims moral legitimacy. As it has grown out of a society which experiences childhood to be an extended period of education and play which requires protection to keep it that way, some critics argue that the UNCRC and the children's rights regime has in fact stripped the developing world of their moral legitimacy. The developing world is the site for more violations of the provisions of the UNCRC, particularly systematic violations such as the use of child soldiers or child labour. Childhoods which deviate from the model enforced by the UNCRC render whole societies as insufficiently protecting their children and therefore unfit to represent their children's best interests. Pupavac argues that this effectively labels the South as a failure and positions the North as the provider and saviour, and therefore any form of intervention takes on a neo-imperialist character.

### ***The vulnerable image***

Lastly, the media have played a huge part in portraying children as a homogenous vulnerable group. As discussed before, children make up a complex group which can be subdivided according to age and competency, but also regionally with varying experiences. The image portrayed of children by the media is often sentimentalized in order to trigger a response. As Cantwell notes, the emotionally charged label "child soldier" can refer to individuals who are strictly speaking neither children nor soldiers.<sup>53</sup> Both Doek and van Bueren note that there is no international enforcement mechanism to monitor the extent of

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<sup>49</sup> Ibid 232.

<sup>50</sup> Ibid 235.

<sup>51</sup> Articles 11, 12 and 31, African Charter on the Rights and Welfare of the Child.

<sup>52</sup> Ibid 231.

<sup>53</sup> Nigel Cantwell, 'Are Children's Rights still Human?' in Invernizzi and Williams (eds) *The Human Rights of Children: from Visions to Implementation* (Ashgate, 2011) 46.

vulnerability portrayed, and therefore the information cannot be taken as reliable.<sup>54</sup> Invernizzi and Williams argue that the image of the vulnerable child is actually an image of a disempowered child.<sup>55</sup>

## THE LEGITIMACY OF INTERVENTION

Considering the conflict which arises within the global children's rights debate, intervention must be approached with care. Is it legitimate for the international community to implement policies which label children as a vulnerable group in need of special protection and thereby, in many cases, change traditional norms? Freeman argues that the children's rights agenda is rooted in "liberal paternalism" which is legitimate because children are, by definition, vulnerable. They have fewer resources, they are usually blameless and they did not choose to come into the world.<sup>56</sup> Pupavac, on the other hand, considers intervention as a fundamental intrusion into the domestic affairs of states which effectively destroys their sovereignty.<sup>57</sup>

### *Child Brides*

A contemporary example of international intervention on the part of children has been the global push to eradicate the practice of child marriage. This came to the fore in recent years when stories such as that of the Yemeni brides emerged on the mass media through individuals such as Nujood Ali, who published her book "I am Nujood, aged 10 and divorced", in 2010.<sup>58</sup> The practice is still prevalent in over 100 countries,<sup>59</sup> and is most common in South Asia and Sub-Saharan Africa.<sup>60</sup> According to Anti-Slavery International, 50% of African girls are married before the age of 18.<sup>61</sup> The legal age for marriage varies across the world from 12 to 21, and in some countries, such as Ghana, where customary law prevails over legislative law, there is no minimum age requirement. This causes children to be placed in very vulnerable situations, as the vast majority of child marriages are forced, and therefore involve an array of human rights abuses. The freedom to choose one's spouse and consent to marriage is a fundamental right according to Article 16(2) of the Universal Declaration of Human Rights, and although this is not enforced by the UNCRC, it is provided in the International Covenant on Civil and Political Rights ICCPR (Article 23). A child forced into marriage may suffer abuses such as repeated rape and sexual violence, forced child bearing, withdrawal from education, isolation, depression, and financial and social dependence. Many human rights advocates point out

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<sup>54</sup> Jaap E. Doek and Geraldine Van Bueren in Invernizzi and Williams (eds) *The Human Rights of Children: from Visions to Implementation* (Ashgate, 2011) 8-9.

<sup>55</sup> Antonella Invernizzi and Jane Williams, *The Human Rights of Children: from Visions to Implementation* (Ashgate, 2011).

<sup>56</sup> Michael Freeman *International Journal of Children's Rights* 15 (2007) 16.

<sup>57</sup> Pupavac (n 26).

<sup>58</sup> Ali Nujood, *I am Nujood, Aged 10 and Divorced* (Broadway Books, 2010).

<sup>59</sup> UN Population Fund, 'Marrying too young: End Child Marriage' (UNPFA, 2012) 10.

<sup>60</sup> UNICEF 'Child Protection from Violence, Exploitation and Abuse' (2012)

<sup>61</sup> Jaya Sagade, *Child Marriage in India: Socio-legal and Human Rights Dimensions* (Oxford University Press, 2005) xiv.

that girls are particularly vulnerable and therefore there is also an element of discrimination on the grounds of sex. The UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) therefore includes child marriage, stating that “the betrothal and the marriage of a child shall have no legal effect” (Article 16). Often child brides live in an intense state of fear of their husbands and extended families, for if they attempt to escape or end the marriage they may face violence or even death, a phenomenon referred to as “honour killings”.<sup>62</sup> For this reason, Sagade describes the practice as a form of slavery which deprives children of their childhood.<sup>63</sup>

The practice is still defended and justified in the name of culture, religion and morality.<sup>64</sup> Parents who have been involved in cases of child marriages in the UK for example, have cited as key motives the desire to control unwanted sexual practices (such as homosexuality or promiscuity), the desire to protect and preserve family honour and cultural ties, religion, and the desire to ensure financial or social security.<sup>65</sup> Using religion as a grounds for justifying child marriage has however been discredited, as all major religions condemn the practice, emphasising the importance of mutual consent in marriage.

The UNCRC does not specifically prohibit child marriage, however, the general prohibition of sexual violence makes the practice of child marriage incompatible with the Convention. Sagade argues that child marriage is a contradiction, because, understanding marriage to mean a formalised relationship in which sexual relations are legitimised, a child by nature cannot negotiate or agree to such an agreement with the full understanding of its consequences.<sup>66</sup> It can therefore be seen as a form of child abuse.

### ***The campaign for the Universal Elimination of Physical Punishment in Children***

The fight to universally prohibit the practice of child marriage may be compared to the movement in the late 90s to eliminate the practice of the physical punishment of children. In the African Charter on the Rights and Welfare of the Child, the physical punishment of children is provided for within the scope of parental responsibilities, where it states that parents must “ensure domestic discipline is administered with humanity and in a manner consistent with the inherent dignity of the child.”<sup>67</sup> The campaign for its universal prohibition gathered support on a global scale as various groups came together to pressure the international community to end all corporal punishment of children. They even implemented a “countdown to universal prohibition” in 2001. A similar wave is occurring against the practice of child marriage. In countries such as India, where it is more widespread, national state bodies such as the National

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<sup>62</sup> Ibid.

<sup>63</sup> Ibid xxv.

<sup>64</sup> Ibid xxvi

<sup>65</sup> NI Dept. of Finance and Personnel, ‘The Right to Choose: Statutory Guidance for dealing with Forced Marriage’ (Dept. of Finance and Personnel, 2008?).

<sup>66</sup> Sagade (n 61) xxvi.

<sup>67</sup> Article 20(1)c, African Charter on People and Human Rights, (adopted 27 June 1981, entered into force 21 October 1986).

Commission for Human Rights have finally started to give it attention, along with NGOs.<sup>68</sup> In countries where child marriage is more covert, tough legislation protecting vulnerable women and children has come into force, such as the Forced Marriage (Civil Protection) Act 2007 in the UK, which regards forced marriage as a human rights abuse and child marriage as a form of child abuse, and provides for a protection order.<sup>69</sup>

As in the case of corporal punishment, a human rights approach can legitimately challenge what is reasonably thought of as a cultural practice which causes huge oppression and abuse. As Sagade argues, by tackling this issue within the framework of children's rights, the issue is brought out of the family sphere and into the public sphere, forcing society as a whole to question its legitimacy within their culture.<sup>70</sup> This is the legitimate protection the children's rights regime can provide children in the vulnerable position forced marriage.

## CONCLUSION

On the surface the campaign to raise the standard of living for vulnerable children through children's rights seems irrefutable. Children are, after all, a particularly vulnerable group due to their underdeveloped capacity to exercise their rights in the same manner as mature adults. Although the capacity gap varies in severity from infants to adolescents, essentially it makes children dependent on representatives from the adult world and vulnerable when their rights come into conflict with the rights of parents. A progressive century of children's rights advocacy finally gave rise to the UN Convention of Children's Rights which has secured comprehensive protective and empowerment rights for children across the world. The body of legislation which has emerged in the past two decades, notably by the ECtHR, has reflected the changing perspective on children's rights and the tendency to give more weight to the child's autonomy and to view children's rights as universally applicable. Despite its success, this development must precede with caution, as it raises many issues of conflict, including appointing appropriate representatives for the child, acknowledging the fact that children's rights were born out of a Western concept of childhood, and manipulating the image of the vulnerability of a child. The issue of child marriage highlights that intervention to implement universal standards of protection for vulnerable children is necessary yet must be pursued within a human rights framework which respects culture, or it will risk losing legitimacy. It is therefore fair to say that children are vulnerable victims who need special protection insofar as it does not continue to arbitrarily enforce western norms.

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<sup>68</sup> Sagade (n 61) xxv.

<sup>69</sup> HM Government Foreign and Commonwealth Office, 'The Right to Choose: Multi-agency Statutory Guidance for dealing with Forced Marriage' (Foreign and Commonwealth Office, 2008) 8.

<sup>70</sup> Sagade (n 61) xxxv.



*Abbreviations*

ACRWC African Charter on the Rights and Welfare of the Child  
CEDAW United Nations Convention on the Elimination of All Forms of  
Discrimination Against Women  
ECHR European Convention on Human Rights  
ECtHR European Court of Human Rights  
ICCPR International Covenant on Civil and Political Rights  
ILO International Labour Organisation  
LGBT Lesbian, Gay, Bisexual, Transgender  
OAU Organisation of African Unity  
UNCRC United Nations Convention on the Rights of the Child