

**CAN THERE BE ANY UNIVERSAL CHILDREN’S RIGHTS? SOME  
CONSIDERATIONS CONCERNING RELATIVITY AND ENFORCEMENT**

**Kristina A. Bentley**

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## 1. INTRODUCTION

This paper is intended for the purposes of discussion to raise questions, rather than present answers to the problem of the universality of children's rights. The paper considers the ideal definition of childhood implicit in the UN Convention on the Rights of the Child (CRC) and other domestic and international law documents, and questions whether or not this definition can have any universal purchase in light of vastly different conceptions of childhood both in South Africa and across the world. The paper seeks to make the distinction between fundamental rights that children have as human beings (non-derogable rights), and rights that they may be regarded as having in terms of their status as children by virtue of their age (derogable rights). It is the latter rights that are regarded as being most problematic in some universal sense. The paper then goes on to illustrate this by drawing on examples that pose challenges to the received conception of childhood underlying the CRC, and raises the question of whether the notion of children's rights should be rethought from a perspective of autonomy and obligation.

## 2. POINTS OF CLARIFICATION: WHAT THIS PAPER IS NOT ABOUT

Some initial clarification of the issue being addressed here is necessary to avoid confusion, as the topic of children's rights is both emotive and contentious. Indeed "[t]o question children's rights has been described as a modern-day heresy"<sup>1</sup> and so one must endeavour to be absolutely clear in navigating this tricky terrain about precisely what is being debated. There are two critical positions on universal children's rights that are rejected at the outset.

This paper is not an attempt to cast doubt on the concept of children as having the capacity to be right-holders in any sense. My position is based on an interest rather than a choice conception of rights. A version of the former of these can quite comfortably accommodate the notion of children as holders of rights of various kinds. Choice theory however more or less precludes the possibility of children being competent to hold rights, as it regards rights in a structural sense as being constituted by the power to either waive or enforce the duties of others. As a result, at least in the case of infants and the very young, but legally also those under 18, the inability to exercise this power effectively rules out children as being competent to be the holders of rights. Interest theory however considers rights to be generated by the fundamental interests of their holders, which then justifies holding others to be under a duty to honour those rights. Interest theory is therefore a more

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<sup>1</sup> Pupavac, 2000: 517

general (in the sense of universal) conception of rights, and so is better suited to accommodating natural or human rights, and indeed children's rights.<sup>2</sup>

This paper is also not an attempt to argue from the extreme multicultural perspective of Kukathas and others. Briefly that position holds that concepts of human well-being vary to such a great extent throughout the world that no meaningful concept of the right (or wrong!) treatment of children could possibly be universally agreed upon, and nor could such rights permissibly be enforced without recourse to liberal paternalism.<sup>3</sup> I am of the view that there are bedrock considerations of human well-being and "right" treatment that extend across boundaries of country and culture, and it is these that properly form the basis for some universal rights. However it is acknowledged that this bedrock underlies strata of vastly different conceptions of how these fundamental rights are to be attained and indeed what they can be taken to require in different contexts. This paper makes no attempt to address the genuinely pressing question of just how "thin" conceptions of universalism should be as an abstract question about multiculturalism. While it is recognised that this is a closely related issue, the focus of this paper is identifying what grounds children's rights in some universal sense.

One further point of clarification may be in order. It is beyond the scope of this paper to address the question of whether there can be any universal natural or human rights at all, and if so what would be included under that heading. This is an issue upon which an enormous amount of polemical energy has been and continues to be spent. This paper regards it as established that some minimal conception or standard of human rights is so widely agreed upon as to make their existence axiomatic.<sup>4</sup> While not dismissing the debates surrounding the existence of *any* human rights, for the purposes of this paper it is assumed that these challenges are ones that can be satisfactorily addressed, both philosophically and empirically.

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<sup>2</sup> The details of the centuries-old debate between choice and interest theory cannot be addressed in the context of this paper, but for a detailed account of the many dimensions of what is at issue between them see Kramer, M.H., Simmonds, N.E., and Steiner, H. 1998. A Debate Over Rights. Oxford: Clarendon Press

<sup>3</sup> See Barry, 2001: 142

<sup>4</sup> Peter Jones remarks in this regard that "[i]t is a mark of the ubiquity of rights thinking that a body such as the United Nations, whose member states espoused conflicting ideologies and possessed widely different cultures, should nevertheless have been able to promulgate such a declaration [as the Universal Declaration of Human Rights]" and "it is hard to think of any idea which has achieved a similar stature amongst the international community ... Few states are willing to flatly reject the idea of human rights and few governments are willing to present themselves openly to the world as violators of human rights." Jones, 1994: 1-2.

### 3. WHAT ARE CHILDREN'S RIGHTS?

The United Nations Convention on the Rights of the Child (CRC) was adopted by the UN in 1989, and came into force in 1990. To date it has 191 state parties, with only the United States and Somalia remaining outside of the convention.<sup>5</sup> The CRC is regarded as “the most comprehensive single treaty in the human rights field”<sup>6</sup> owing to both its scope and wide acceptance. The provisions of the CRC apply to all human beings under the age of 18, unless the child lives in a jurisdiction in which majority is attained earlier, in which case the state in question bears the burden of justifying specific lower age limits.

However, despite the almost universal signing of this convention, as well as its wide ratification, children remain among the most marginalized and abused human beings on earth. Children are also the most vulnerable to the effects of poverty and disease, not least of all in the context of HIV/AIDS. The UN Population Division/UNICEF estimates that deaths of children under the age of 5 in Sub-Saharan Africa will exceed the combined total of that in the rest of the world by 2010, and of those deaths, more than 50% will be due to Aids.<sup>7</sup> These figures are just one example of how the plight of children in reality fails to mirror the theoretical commitment to honouring their rights contained in the CRC.

The problems with the enforcement of this convention are therefore enormous, not least of all because while it may be possible to reach broad agreement on general standards of right treatment for children around the world, in practice this translates into vastly different understandings of what such treatment can be taken to imply. Furthermore there are many examples that challenge this universal conception of children, not least of all because children factually do behave in autonomous and adult ways that challenge the notion of them as passive *loci* of duties, rather than autonomous holders of rights.

Vanessa Pupavac argues that the supposed universal standards established by the CRC are based on Western standards and concepts of childhood. These reflect “Western social policies which emphasise the role of individual causations and professional interventions and de-emphasise the influence of the wider social, economic, political and cultural circumstances.”<sup>8</sup> While it is certainly

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<sup>5</sup> For an account of the grounds for opposing the US's ratification, see Kilbourne, S. in Steiner and Alston, 2000: 519. Also see Steiner and Alston, 2000: 520-523 on reservations to the CRC by Germany, Guatemala, Malaysia, United Kingdom, Syria and Singapore as well as Norway's objection to Singapore's reservations.

<sup>6</sup> Steiner and Alston, 2000: 511

<sup>7</sup> Brittain, 2002

<sup>8</sup> Pupavac, 2000: 517

the case that the CRC reflects this bias, it is also important to note that many of the rights included in the convention are in fact not specifically *children's* rights, but rather fall under the broader aegis of human rights. The reason these rights are included and restated in the CRC is of course because children are more vulnerable to their abuse. So while these rights do not entail anything special about their holders at the level of their *specification*, they have special implications for children at the level of their *enforcement*. In other words, while these rights are rights that all human beings are normatively deemed to be the subjects of, they have special “bells and whistles” attached to them in the case of children, because their actual enforcement is more onerous.

For example, the rights generated by fundamental interests in personal safety, such as the rights not to be murdered, raped, assaulted or harmed in any other way, or to have one's body interfered with without consent, are not rights that we think children should have honoured because they are children, but because these rights are a component of their human rights.<sup>9</sup> Certainly this becomes an area of additional consideration in the case of children because not only are children less able, or even unable, to defend themselves against such invasions, but the damage that is done to a child, physical and mental, as a result, is probably more severe and permanent.

So too the various economic rights<sup>10</sup> that are widely (although not uncontentionally) regarded as forming part of the basic human rights category, have special relevance in discourse on children's rights at the level of their *enforcement*, but not their *specification*. This is because a right to adequate nutrition or access to clean drinking water is not generated by the condition of being a child, but by the status of that child as a *human* child. And as with the former type of rights referred to above, it is certainly the case that the duties with regard to children in this regard are more pressing and onerous, because children suffer more serious and permanent damage as a result of their lack.

I would like to however exclude these rights from consideration in this paper. This exclusion is not because I think these rights are unimportant or in question, but simply because they are not *children's* rights properly speaking, as I have indicated above. Furthermore, to include children's human rights for consideration in this paper would be to stray into the territory of having to argue for the specification of human rights *per se*, and this is too large and important an area of debate for human rights discourse to be dealt with here. So I refer back to my earlier point of clarification that

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<sup>9</sup> Enshrined in Article 19 of the CRC

<sup>10</sup> Articles 24 and 27 of the CRC

I am assuming that there is at least sufficiently wide agreement on these rights for them to be taken as given for the purposes of this discussion.

I would like to therefore put forward for consideration only those rights which children are deemed to have *qua children* rather than as human beings, or refugees, or any other rights-generating category. It is these rights, children's rights properly-so-called, that I would like to consider in terms of their universal purchase, as it is precisely these rights that I think prove most problematic for a universal conception of childhood which sets some kind of standard of right treatment of children across all countries and cultures. Most of these rights are what are known as derogable rights, as they are constituted by limitations that are placed on children in terms of the exercise of their liberty, as the practice in question is one that is regarded as inappropriate for children to be engaging in by virtue of their youth. The human rights I have referred to above are of course non-derogable (or inalienable) as they cannot be limited in this way.<sup>11</sup>

What follows are examples from the CRC of what could be regarded as rights of this sort. Indeed there may be others that fall into this category, but it is these that seem to me to stand out as being the most obvious examples of derogable children's rights, and therefore candidates for consideration in terms of both their relativity, and contingently their universal enforceability.

### **3.1 Child labour**

Article 32 of the CRC establishes the right of children "to be protected from economic exploitation and 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." States that are party to the convention bear the duty ("legislative, administrative, social and educational") of implementing the provision. In particular, they are charged with providing a minimum age(s) for admission to employment, regulation of hours and conditions, and for imposing sanctions for breach of these.

The extent of the problem of child labour cannot be exaggerated. According to ILO estimates, 250 million children between the ages of 5 and 14 work in developing countries, and of those, 120

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<sup>11</sup> This is not to suggest of course that they cannot be limited at all. No right is absolute in the sense that it cannot be limited under certain circumstances where other rights considerations are brought to bear. However, non-derogable rights cannot be limited on the basis of something discriminatory like race, gender, religion, or indeed age, because what grounds those rights is the agent's humanity, rather than any other consideration.

million work full-time. A Human Rights Watch (HRW) report on the subject of child labour notes that “[i]n some cases , a child’s labour can be helpful to him or her and to the family; working and earning can be a positive experience in a child’s growing up. This largely depends on the age of the child, the conditions in which the child works, and whether work prevents the child from going to school.” The concern is not therefore that children do not work at all, but rather that they are not forced to work, and more importantly not forced to work under circumstances detrimental to their health and well-being, and that disrupt their education. According to the same HRW report, “[c]hildren who work long hours, often in dangerous and unhealthy conditions, are exposed to lasting physical and psychological harm.” However, the report also notes that many of the abuses of children in the work place are violations of their *human* rights, rather than their specific derogable rights as children.<sup>12</sup>

What is particularly interesting is that the CRC gives no hint as to *what* the minimum age(s), working conditions, or appropriate penalty for the breach should be. So Pakistan, for example, which has an enormous number of child labourers many of whom are under the age of 10, and some even as young as 5, could quite well claim to be in compliance with the CRC, as long as these age limits and conditions were regulated by law. Pakistan is of course notorious in this regard,<sup>13</sup> and is a repeat offender in failing to enforce their own domestic as well as their international legal obligations *vis-à-vis* child labourers. Nevertheless, the problem is the hugely relative nature of this, and other provisions of the CRC, and it is this inability to lay down any standards at all that I would argue undermines the relevance of their inclusion in the CRC as universal children’s rights.

### 3.2 Child soldiers

Another area of acute concern for advocates of children’s rights are children who are recruited into (or volunteer for) armed conflict. Article 38 of the CRC deals with children affected by armed conflict as well as those who are recruited into active combat. The convention stipulates 15 as the lower age limit for conscription, and in the case of children between 15 and 18, there is an obligation to recruit older conscripts first. This article is particularly poignant in light of the fact that many children, particularly in parts of Africa, are recruited and trained by guerrilla armies in particular, and in many instances are ordered or encouraged to perform horrific and brutal acts. The

<sup>12</sup> Human Rights Watch Report: Child Labour, Human Rights Watch 2001: <http://www.hrw.org/children/labor.htm>

<sup>13</sup> See Contemporary forms of Slavery in Pakistan which refers in particular to children (but also adults) who are forced into “bonded” labour for little or no remuneration under dangerous conditions at brick kilns, carpet looms and in agriculture, sometimes for up to 14 hours per day. Human Rights Watch Report: July 1995

fact that they are children is deemed to entail absolution from responsibility. The participation by children in armed conflict has the consequence of blighting the possibility of their returning to normal civilian life, which is what makes this particular “children’s right” all the more urgent.

However, this also looks like an impossible right to universalise. Some argue that 15 is too low a limit to set, given that armed combat almost certainly implies killing, and in many countries the limit is set at 18 or higher.<sup>14</sup> Yet the presence of children in many armies (official and otherwise) would seem to indicate that children are perfectly *capable* of acting as soldiers, and discharging their duties as competently as their adult counterparts. Whether or not this is desirable is a matter of context and impossible to set as a global standard.

A more recent development in international law with regard to this particular children’s right is the coming into force of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict. This was adopted by the General Assembly on 25 May 2000, and came into force in February this year. This convention raises the minimum age for compulsory recruitment to 18, and requires the age for voluntary recruitment to be set above the current minimum of 15 (so 16 is now the minimum age for a soldier). Among other things, the protocol requires countries that agree to take voluntary recruits under 18 to do so with the consent of the child’s parents, and on condition that their age is proven. States parties are also responsible for demobilising existing child soldiers, and to provide for their rehabilitation.

This seems promising until one considers the countries that have not only signed, but actually ratified the Protocol. As of 29 July 2002, there were 109 signatories, and 35 state parties who had ratified the Protocol. Those who have ratified it include Sierra Leone, the DRC and Rwanda. Article 4 of the Protocol states that non-governmental armed groups (that is rebel forces) should not employ those under the age of 18 in combat, and states parties are responsible for taking “all feasible measures to prevent such recruitment, including the adoption of legal measures necessary to prohibit and criminalize such practices.” However when one considers the nature of international law, it seems pointless to impose such an obligation on those who are not (and indeed cannot be) party to such an agreement. The issue of children in combat is reconsidered in section 4 but this looks like a hollow victory for children’s rights. Furthermore it disguises the real problem of children in situations of conflict which is that their fundamental human rights are being violated. A concerted application of the *jus in bello* of the Geneva and Hague Conventions (which are so widely

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<sup>14</sup> Kolosov in Symonides, 2000: 261



accepted as to be part of Customary International Law)<sup>15</sup> would contribute to ensuring that children are not even in a position to be recruited into or volunteer for armed service, official or otherwise.

Notice also that both the limitations on children's labour and their recruitment into armed forces are restrictions on practices that an adult would be regarded as competent to choose to engage in. Labour and combat *per se* are not regarded as undesirable or illegal practices, but rather it is undesirable that children perform them. So this restriction on children's autonomy is intended to protect them from being forced to perform certain actions that they will later (when they are 18) be regarded as competent to choose for themselves. The problem is that it is by no means clear that this autonomous ability is one which is general, but rather that different children in different circumstances may attain this at different times, or never at all. Furthermore, it seems like an arbitrary distinction to make when in many cases, even after the age of 18 there is effectively no liberty to choose whether or not to engage in a certain type of labour, or combat, as "adults" may be just as vulnerable to coercion. While it is almost certainly the case that some sort of normative restriction on the employment of children in these ways should be in place, what I think is genuinely open to debate is just what that should be.

### 3.3 Drugs and Prostitution

Article 33 of the CRC deals with the normative protection of children from exposure to narcotics, but most importantly their protection from being recruited into producing and trafficking drugs. Article 34 obliges states parties to protect children from sexual exploitation and abuse, and in particular the use of children in prostitution and pornography. Again notice the nature of what is being protected here. Both of these activities which children are regarded as requiring protection from, are activities which, while they are regarded as either illegal or undesirable, are ones adults are nevertheless at liberty<sup>16</sup> to engage in, and if they do, will be held to be fully responsible for having done so. So this is a children's right in the sense that I outline above in that what generates the normative protection is the fact of being a child.

What is relative about these rights is the extent to which children really are responsible for engaging in these types of activities. In some countries the lower age limit for consent to marriage and sexual

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<sup>15</sup> See Dugard, 1994: 332-333

<sup>16</sup> I use liberty here in the purely libertarian sense to mean that there is no external impediment to choosing to engage in either of these.

activity is 16 or even younger,<sup>17</sup> so it looks like a logical contradiction that a person could be regarded as competent to be married (and the disposal of their body that this entails) but not to engage in prostitution or pornography. So too with drug trafficking, in instances where the age for full criminal liability is below 18, in what sense can children be regarded as entitled to protection from engaging in this practice and bearing the consequences of doing so? I do not mean to suggest that there can be no obligation to protect children from sexual and criminal exploitation. Rather that it is a specious fantasy to pretend that by setting the limit for this at 18 without any qualification or consideration of the relative circumstances in which children really do find themselves, does no service to the cause or belief in universal children's rights.

### **3.4 Crime and punishment**

Article 37 of the CRC restates the standard human right restriction with regard to torture, and cruel, inhuman or degrading treatment or punishment. In addition it adds a further qualification with regard to children that their imprisonment should not be for life without possibility of release, and nor should states parties impose capital punishment on children. Article 40 deals with children who are accused of or convicted of having broken the law. Again the CRC does not make any specific stipulations here, but somehow the setting of a minimum age for criminal liability is seen to be conducive to this right. Interestingly the CRC is silent on the matter of setting a minimum age for imprisonment of children.

Again this is not only very vague, but very difficult to universalise, in light of the seriousness of many juvenile crimes, as well as deeply plural understandings of responsibility for one's actions in different societies and contexts. The intractable disagreement over the issue of corporal punishment, for example, and the appropriateness of its being administered to juvenile offenders, is an example of just how relative the understanding of this right is likely to be in practice.

The following section seeks to identify some examples which challenge the perception of childhood underlying the CRC, and which are intended to highlight just why it is so difficult to lay down universal standards of right treatment of children across the board in all instances.

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<sup>17</sup> Particularly for females this is highly contentious: The Gambia has no lower age limit for marriage, and in Kenya it is 9. For countries that set this limit at 12, 13 and 14 as well as details of Asian countries which have raised this limit to above 20, see Tomasevski in Symonides, 2000: 249

#### 4. A UNIVERSAL UNDERSTANDING OF CHILDHOOD? SOME CHALLENGING EXAMPLES

##### 4.1 Children who commit violent crimes: The Bulger Killers

In February 1993, 10-year-olds Robert Thompson and Jon Venables abducted and brutally murdered 2-year-old James Bulger in England. Their case was to test the legal presumptions in their favour based on their age, and resulted in a clamour to try them as adults. The “unparalleled evil and barbarity”<sup>18</sup> of the crime was to directly contribute to the decision to try them in an adult court in spite of their youth - they were both 11 when their case came before the court. This was to set a dangerous precedent and created confusion about the age of criminal liability in Britain, and while by 1999 the European Court of Human Rights had ruled that the boys did not receive a fair trial and a further judgement from the House of Lords ordered that their parole begin in October 2001,<sup>19</sup> the case nevertheless raises some troubling questions about the age at which full criminal liability should begin.<sup>20</sup>

The difficulty lies in determining at what age a person is to be regarded as having the *mens rea* or mental ability to comprehend, and therefore intend, the consequences of their actions (or negligently not anticipate them as the case might be). It strikes me as very odd that the seriousness of the crime in the example above *contributed* to holding the children fully responsible rather than the reverse. It seems to me that criminal liability, hinging as it does on the ability to comprehend the seriousness of the consequences of one’s actions, should be in *inverse* proportion to the seriousness of the crime, rather than direct proportion as seems to be the presumption. I can well see how we might expect a 10 or 11-year-old to take responsibility for stealing or mischievous damage to property, as the consequences are fairly obvious, direct and easily comprehensible. I cannot see how a 10-year-old could possibly comprehend all the consequences (for their own future, as well as for others such as the family of the victim) entailed by killing another person.

Furthermore, what is so troubling about cases such as this one is that they involve children behaving in a manner that completely undermines the notion of childhood implicit in the CRC and legislation aimed at protecting children. Similar considerations arise in the case of children who are convicted

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<sup>18</sup> The phrase used by the 1993 trial judge Mr Justice Morland to describe the murder, and widely reported in the media at the time.

<sup>19</sup> The boys were originally sentenced to a minimum of 8 years, but the then (Conservative) Home Secretary Michael Howard, in response to the public outrage generated by the case, raised this to 15 years in 1994. This was overturned by the ECHR in 1999 as *ultra vires* as it was held that only courts have the competence to set tariffs.

<sup>20</sup> See Bristow, 2001

of crimes and incarcerated as a result, as not only the degree of liability of children is difficult to determine, but indeed what penalties are appropriate and under what conditions they are to be imprisoned. Kolosov makes the point that

[t]he problem of juvenile criminality is acute. Most often adults corrupt children and involve them in criminal activities. Sometimes the poor living conditions of families encourage juvenile criminal behaviour, which is why juvenile offenders should be primarily treated as victims in criminal cases. Nonetheless, states are facing the need to combat crimes committed by children.<sup>21</sup>

This is an acute problem in South Africa<sup>22</sup> where not only is juvenile crime on the increase, but reflecting this, nearly 4 000 children (according to the CRC definition of those under the age of 18) are among the country's prison population of either sentenced or awaiting trial prisoners. Of these, according to Department of Correctional Services statistics, eight children between the ages of 7 and 13 are serving sentences ranging from 6 months to 24 years.<sup>23</sup>

The problem this poses for a universal conception of children's rights is two-fold. Firstly, the ideal of childhood that the CRC assumes is undermined by the fact that children are not merely passive recipients of duties, but can, and sometimes do, behave in violent, brutal ways inimical to that conception. The temptation, when children behave in this "unchildlike" way, is to no longer treat them as children, but it is precisely children in such "difficult circumstances" for whom the rights enshrined in the CRC are most pressing, and who these rights are primarily intended to protect.

Secondly, a concept of children's rights would almost certainly entail some minimum standards of treatment and appropriate penalties for children convicted of crimes, as well as consideration of the type of facilities in which they are to be held. However, whether or not such a standard can be either set or met universally is exceedingly doubtful. South Africa for example has only 13 separate facilities altogether for youth offenders. The result is that the rest have to be imprisoned in adult facilities, although they are separated from the adult prison population. It is no coincidence that

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<sup>21</sup> Kolosov in Symonides, 2000: 268-9

<sup>22</sup> Under the common law of South Africa, for criminal purposes, children up to the age of 6 are irrebuttably presumed to be *doli incapax* – incapable of causing deliberate criminal harm. Between the ages of 7 and 13 this is a rebuttable presumption, and from 14 upwards one bears full criminal liability for one's actions, although age is a factor to be taken into account for sentencing purposes up to the age of 18 (Hosten et al, 1983: 716). I acknowledge the assistance of Prof Le Roux of the Faculty of Law at the University of Pretoria for clarifying this point, as well as for pointing out that the South African Law Commission has been asked to consider raising the minimum age for criminal liability to 10.

<sup>23</sup> Of the 8, 3 were jailed for "aggressive crimes" (murder, attempted murder, and assault). One is serving 12-24 years, and two others 10-15 years. Two are serving 6 month sentences and one 3-5 years for "economic crimes" (theft). One has been jailed for 10-15 years for sexual crimes (rape) and two others jailed for "other crimes" (unspecified) are serving sentences of 6 months and 5-7 years. See Merten, 2002.

countries with the highest numbers of youth offenders are most often those that lack adequate resources and facilities<sup>24</sup> to deal with those offenders.

#### 4.2 Children engaged in combat: Liberia, DRC and Sierra Leone

Another example of children engaged in an activity that challenges the received ideal notion of childhood are those who are engaged in combat. I do not mean to suggest that I think that children *ought* to be engaging in combat, but rather that when they do, they display the ability to behave in a manner that quite shockingly challenges the perception of them as vulnerable agents that require protection. Furthermore, the contexts in which children are conscripted, or even engage willingly in armed combat, are ones that cannot be covered by the artificially thin mantle of the CRC.

As is noted above, the CRC sets 15 as the minimum age for conscription, and furthermore that when those between 15 and 18 are candidates for conscription, that the older conscripts are employed first. Also noted above is the recent optional protocol which raises this minimum to 16 for voluntary recruits, and 18 for conscripts. However, this again regards children as only capable of being the recipients of duties rather than the instigators of their rights. How are we to universalise the standard for children who place *themselves* in combat positions? Can we really say that a person of 15 who is living in life-threatening conditions is incompetent to make this decision? In Liberia, children as young as 12 are respected and ranking members of the anti-government rebel movement Liberians United for Reconciliation and Democracy (LURD) and in cases such as this the line between passive childhood, and active “adult” participation, becomes extremely blurred.

Again, I do not suggest that this is a good or desirable state of affairs. What I am questioning is how to universalise the lower limit of 16 on children in armed combat, when so many children in reality find themselves in a position where the choice is to either fight or fall victim themselves. In what sense can there be a universal standard laid down protecting them from conscription under those circumstances, and who is responsible for honouring the resulting duties? Other tragically familiar examples of children who are recruited into the armed forces and encouraged to perform horrific acts of violence are Sierra Leone and the DRC where children as young as 8 are reported to have been conscripted.<sup>25</sup>

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<sup>24</sup> I have in mind here the inextricable link between poverty and juvenile crime, as well as the fact that where poverty is widespread, the state may be least well equipped to deal with juvenile offenders.

<sup>25</sup> This in spite of the ratification of the optional protocol in this regard by both of those countries.

Also consider circumstances in which children are seen to have a duty to fight, and the related problem of who is to count as a combatant. Do Palestinian children who throw stones at Israeli tanks fit this definition? Is the abuse of these children constituted by the fact that they are encouraged to attack those seen as their oppressors with any means at their disposal, or that they are in this situation in the first place?

It seems to me that a more robust programme of care for children universally, aimed at meeting their basic human rights, would do better at ensuring that they are not forced into combat, rather than ill-conceived principles reflecting the ideals of those for whom the circumstances in which child soldiers find themselves is a chimera. Children get embroiled in combat because they live in war-zones. A serious effort to honour their human rights in this regard employing the well-established *jus in bello* would be aimed at keeping them out of the circumstances under which they could be conscripted in the first place. It is basic humanitarian law that needs to be honoured in the first instance, and any standards relating to age restrictions on combat should follow.

### **4.3 Children as economic agents: HIV/AIDS and dependency**

HIV/AIDS compounded by a worsening famine in Southern Africa has resulted in increasing numbers of children finding themselves in the position of having to care for younger siblings, or even ill adults, and effectively taking on the role of heads of households.<sup>26</sup> Again while this is not a desirable situation, and it has wide implications not least of which is the interruption of education, it is one that challenges the ideal of childhood implicit in the provisions of the CRC.

Children in this position are, again, not passive recipients, and nor are they, tragically, protected members of family units. Rather they are placed in the adult position of having to be independent economic agents with responsibility for dependents. This is another example that I think begs for a redefinition of the universal concept of childhood, as well as more serious consideration as to what the *human rights* of children in this situation are. If the cause of this situation is, as is supposed, hunger, poverty and illness, then this is not a matter of special consideration for children, but rather is created by a general situation that is a humanitarian crisis, and it is this that needs to be addressed. A more useful approach to the rights of children in this situation might be one that takes their agency and potential autonomy into account, rather than their age being a disempowering element in such cases.

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<sup>26</sup> See Stucky, 2002

#### 4.4 Marriage and Childbearing: children with children

Another area which, as I have indicated above, is extremely challenging in light of a universal conception of childhood is determining at what age a person is able to marry, and by extension, at what age it is appropriate for them to have children of their own. The difficulty with setting a universal benchmark in this regard is that the custom of marriage itself is not a universally understood one, and so the significance of getting married is not limited to the Western understanding of one man and one woman consenting to be partnered in various ways. In many instances marriage is, at least partly, a financial transaction, and so the age of the parties may in this sense be irrelevant. In other cultures, marriage is seen as a union of families rather than just two individuals, and again age may not be a crucial factor in determining the appropriateness of this union. Furthermore, both in South Africa and in cultures in other parts of the world, polygynous<sup>27</sup> unions are accepted, and given the communal nature of these types of marriages, the age of parties can sometimes be irrelevant to their participation within that family structure.

Now again I do not want to argue that there should not be standards of care for children invoked here. Forced marriage (which is to be distinguished from arranged marriage) of an unwilling person is a violation of their human rights whatever their age. In addition it cannot be the case that marriages entailing sexual contact (as Western marriages standardly do) would be acceptable for children or infants. However what is impossible to determine is a universal standard or age at which marriage (in any form) can be consented to, and what that marriage should be taken to entail.

Furthermore, the issue of a universal appropriate marriageable age (for males and females) is not to be confused with violations of (usually) women's bodies and autonomy and co-extensively their fundamental human rights, which is often disguised behind a veil of cultural relativism in this regard. In no sense should the genuinely relative concepts of marriage, and what those entail in different cultures, be confused with practices that violently abuse the bodies of women and mutilate them permanently for the sake of misogyny disguised as culture.<sup>28</sup>

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<sup>27</sup> I wish to distinguish here polygamy as it relates to a marriage involving more than one woman. I am not aware of a sufficient number of polyandrous cultures in the world to make that practice significant to this discussion.

<sup>28</sup> It is beyond the scope of this paper to deal with the subject of female genital mutilation in any detail, but for an egalitarian liberal challenge to the multicultural toleration of the practice, see Barry, 2001: 131-146

## 5. ALTERNATIVE CONCEPTS OF CHILDHOOD

I wish now to turn to the question of what childhood is understood to mean and the concept of this that the CRC seems to assume. I will then present some alternatives to this notion. None of the alternatives I present are intended to fill the requirement of a universal conception of childhood. Rather what I wish to highlight is just how relative this concept is, and in light of that relativity, what may be said (or not said!) about the universalisation of children's rights.

As was noted above, the CRC enshrines a largely ideal Western conception of childhood, which is “[a] model of childhood based on the idea that children should be protected from the adult world. The Western conception of childhood as a time of play and training for adulthood has become the universal standard to be enforced under the Convention to the age of eighteen.”<sup>29</sup> This conception of childhood is one which views children largely as passive objects of duties, and does not assign to them any significant levels of autonomy nor does it require of them responsibility for the types of decisions mentioned in the examples in the section above.

Now this is an artificial definition for a number of reasons. Firstly, children do, as we know, have the capacity to act to varying degrees in an adult fashion, so to assume that it is a good thing that they do not under all circumstances is questionable. Secondly, it is far from the case that this is a universal experience for children, even in the developed world. Thirdly, and most significantly I think, it is far from the case that this is an experience or concept of childhood that it is universalisable in a normative sense.

As Pupavac remarks, this “protective view of childhood” arises in a specific context and out of circumstances that are not part of the experiences of countries outside of the developed world. Furthermore, “the institutionalising and globalising of Western models of childhood under the Convention means that the experience of childhood in developing countries is outlawed” and “[t]hus Southern societies through the failure to comply with Western childhoods become permanent objects of outside intervention. In other words, the discourse on children's rights infantilises the South.”<sup>30</sup>

Very often this “failure to comply” with the idealised conception of childhood of the CRC is linked to the fact that material conditions in a given situation do not allow for children to experience

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<sup>29</sup> Pupavac, 2000: 517

<sup>30</sup> Pupavac, 2000: 518



childhood in the protracted and protected way which the convention seems to assume is the norm. Bennet, in considering the status of children in traditional African society, sums this up thus:

It would be true to say that every society withholds some, if not all, legal capacities from the young until they have matured sufficiently to behave in a responsible manner. But childhood and adulthood are flexible concepts, decided according to cultural stereotypes of ageing and the constraints of social and economic circumstances. A long period of childhood is a luxury that cannot be afforded in subsistence societies where the life span is short and survival is a struggle.<sup>31</sup>

However this is not a *normative* point about childhood. One could quite feasibly concede this and consistently argue that all children *ought* to enjoy the idealised concept of childhood of the CRC, and indeed it is precisely this that the provisions of the Convention are intended to achieve. However, I think that this is misconceived. There are relative concepts of what childhood *ought* to entail that differ quite significantly from the passive objects of duties definition outlined above, and it is some of these which I would like to raise as potentially challenging for a universal conception of children's rights.

One alternative is to regard children as the objects of power or "possessions" of a particular group or their parents. While this conception is problematic for a number of reasons, some of which I will return to in the following section, it is important to include it for consideration, as many traditional or religious-based cultures regard children primarily in this way. For example, the Amish maintain the right (a power in the Hohfeldian sense) to control the content and limit of their children's education and influences from the outside world. Children are seen in this light as the bearers of duties<sup>32</sup> of obedience and respect. So "many of the convictions to which people find themselves drawn in thinking about the authority of parents over children reflect the archaic idea that the child is the chattel of the parent (which once went hand-in hand with the patriarchal idea that the wife is the chattel of the husband)."<sup>33</sup> Therefore insofar as patriarchy, and patriarchal power, are seen as inextricable features of certain cultures, so too this particular view of childhood is not one which can be easily dismissed in spite of the egalitarian liberal misgivings which it might generate.

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<sup>31</sup> Bennet, 1991: 339

<sup>32</sup> I owe an acknowledgement to Mandla Seleokane for drawing to my attention Article 29 of the African "Banjul" Charter on Human and Peoples' Rights which states, *inter alia*, that "The individual shall also have the duty ... to respect his parents at all times" which reflects this particular conception of children as the bearers of duties themselves, rather than as the passive subjects of rights.

<sup>33</sup> Arneson and Shapiro cited in Barry, 2001: 202. See also Barry, 2001:201, 208-209 on the concept of parental or communal "ownership" of children.

A related concept<sup>34</sup> is the libertarian view which regards children as part of families, and so covered by a mantle of privacy which precludes the interference of the state and others in how that family (or father as is usually the case) treats those children. This can have bizarre implications such as parents claiming the right to have vital medical treatment withheld from their children<sup>35</sup> or to dictate the curricula of state schools to reflect their own particular beliefs. However, again this particular view of childhood cannot be altogether discounted as an element of this idea of the family and rights of privacy within the home are indispensable to the laws and conduct of a liberal state. The difficulty lies in determining where the line is to be drawn between state or communal responsibility for children, and parental authority over their own children.

A fourth alternative is to regard children in what I have labelled the “republican” sense which is to regard them as future citizens who are first and foremost members of their society and so must be groomed to be fit to participate in that society. This would of course entail a degree of state or communal responsibility for their upbringing and education, which could imply a decrease in parental authority. Furthermore, depending on what the values and norms of that society are, children in this sense could be seen as the holders of rights in terms of standards of treatment regarded as appropriate to them, but not necessarily so. An example of this is France, where children have inculcated in them deeply nationalistic sentiments from a very early age, and where the state has extensive power over the content of their education. However this is seen to contribute to, rather than detract from, the ultimate liberty which children will be able to exercise on becoming adults.

I would like to propose an additional concept of childhood which may in some sense capture the positive aspects of the concept of childhood assumed by the CRC, but which would not encounter the perceived problem of the of the passivity of children that it implies. I suggest that children could be seen as a vulnerable group. Children are not a minority in the world, and in some countries they constitute quite substantial majorities. However it is true that their youth is for many reasons disempowering, and so perhaps children could be regarded in the same way that other vulnerable groups are. I have in mind here the special rights attached to refugees, and to some degree to women (who are also not in a minority, but widely discriminated against nevertheless). The difference is that children on this account would be regarded as having a higher degree of competence to order their affairs, and autonomy over the exercise of their derogable rights. This

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<sup>34</sup> Both the traditional and the libertarian view that regard children as bearers of duties of respect and the family or community as having power over them have ancient roots. The Roman *paterfamilias* had absolute power over his children (and wife) to the extent of having the power of life and death over them.

<sup>35</sup> See Barry, 2001: 124

would entail duties towards children, but rather than these being towards them as passive recipients, the duties would be towards them as active participants in securing their own well-being.

What follows are some examples of areas in which I think children are often capable of acting autonomously and in their own best interests. In these instances, the passive “derogatory” nature of the conception of childhood and children’s rights enshrined the CRC, far from protecting children, conversely disempowers them.

## **6. AGE RELATED RIGHTS AND QUESTIONS ABOUT AUTONOMY**

### **6.1 Political participation**

In many jurisdictions the franchise is limited to those over the age of 18. Some countries have further age restrictions on election to various offices and to the legislature, but generally, the competence to participate in political life is seen to begin at 18. There are of course perfectly sensible reasons to do with practicality, education and responsibility why this limit should be in place, and it is not generally or necessarily a derogation of liberal principles.

However I would like to raise the following point of enquiry. It is my understanding of the rationale for democratic political participation that those who are to be governed have a stake in who governs them and according to what policies. Presumably as one also is liable to contribute to state revenue (usually through various forms of taxation) one should have some say in how that public revenue is spent - those who pay the piper, should get to call the tune.

This is what I find rather puzzling. There is nothing entailed in either the definition or practice of democracy that requires the electorate to make good choices about who should govern them and what their policies should be. It is enough that they do the choosing. In fact, even in well-established democracies electorates can sometimes be seen to behave in collectively irresponsible ways. Recent examples of electoral blunders in France, and arguably Italy and the United States will attest to this. So why then do we exclude those under the age of 18 from political participation? If there is nothing entailed in democracy that implies that the electorate must meet some standard of competency to vote, then why exclude the very people who are to be on the receiving end of (and expected to pay for) policies that are being decided now?

I do not want to suggest that everyone should have a vote from birth, or that children should be treated as political actors, but rather that the political views of adolescents at least should be taken into consideration as future members of the electorate. There are a number of mechanisms that could be put in place to facilitate this, and could make some contribution to generating better policies which make the needs of children and their human rights a priority.

## **6.2 Property administration**

Another area in which children's rights are derogated until majority is in the case of property administration. This is perfectly right and sensible when you consider that children are doubtless not competent to bind themselves contractually, or to grasp the intricacies of managing certain affairs, and nor should they be troubled by such things as their time and energy ought to be otherwise expended, on education in particular.

However, as is indicated by the examples in section 4 above, children are frequently placed in circumstances beyond their control as a result of poverty or the death of parents which requires them to take responsibility for themselves and others at a far earlier age than is usually considered appropriate. In these instances, it seems to me that an interest in children's well-being would be far better served by considering ways in which they could be assisted in their material agency and exercising those powers, as well as gaining access to the necessary resources, rather than disabling them from doing so.

## **6.3 Self-ownership**

One of the aspects of parental control over their children is that parents are regarded as being best placed to make decisions for their children about their physical well-being. So parents are usually regarded as being competent to decide and administer things like choices about their children's food, clothing, shelter, and to a large degree their medical treatment. The underlying assumption is that while all people are deemed to physically own themselves (a classical liberal assumption giving rise to a whole range of human rights), children are not fit or competent to determine what is in their best interests, and so parents exercise these rights of ownership on their behalf until they can.

Now this seems to me to be questionable. Firstly it is widely accepted that the state is competent to intervene when parents exercise this power in way destructive to the health or well-being of their children, such as cases in which they refuse life-saving medical treatment on their children's behalf, usually on the basis of their religious beliefs.<sup>36</sup> However it is unclear to me why children are uniformly regarded as being incompetent to make these sorts of decisions for themselves, or at least have a say in these decisions, until they are 18. If a 17 year-old Jehovah's Witness for example, were to wish to refuse a blood transfusion, ought the state to force them to have it? Another example in which it is unclear why children are regarded as incompetent across the board until they are 18 is with regard to organ and tissue donations. Again it is the power of parents in the first instance, and the state in the second, to administer this. What if a child did not wish to be an organ donor for some reason? Should this wish be discounted?

Again I do not mean to suggest that we completely discard the derogation of these sorts of rights with regard to children, but rather that we rethink the nature of the rights from the perspective of enabling children rather than disabling them.

#### **6.4 Freedom of association**

Another example where it seems that children are capable of a far greater degree of autonomy than the presumption of them as recipients of protective duties implies, is in making choices about association. I mean this in the broader sense to include community, education, religion as well as the standard family and friends definition. Furthermore, it is often decisions about association over which children have no control (such as who is to care for them when their parents are unable to do so) that place children in situations that expose them to abuse and maltreatment. Is there room to argue here for a more inclusive and participatory treatment of children with regard to their freedom of association?

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<sup>36</sup> Other examples are when parents injure their children, deny their children education, or force them to marry unwillingly. See Barry, 2001: 201

## CONCLUSION(S)

Quite unsatisfactorily and regrettably I do not have a concrete conclusion to this paper. As I indicated at the start, the purpose of this paper is to raise the question of the universality of children's rights rather than to address it. I would like to make however the following points by way of suggestion as to how this discussion could be taken further.

Firstly, it seems to me that the greatest challenge to the universal right treatment of children is not at the level of their special children's rights, but rather is generated by insufficient care and attention being paid to their human rights. If children's basic well-being was the aim, in the sense that if adequate measures were taken to counter their physical abuse, provide for their basic physical needs, and assist them in situations where they are forced to fend for themselves, then at least some of the derogable children's rights referred to above would become redundant. And *that* would truly amount to a universal practice of children's rights, rather than vague but widespread agreement about potential wrongs.

Secondly, I want to suggest that the concept of childhood assumed by the CRC – that of children as passive recipients of duties of protection – is one which needs to be rethought. It is this artificial concept which renders the CRC an empty vessel, and which also serves to disguise the ill-treatment of children across the world behind a veil of relativity, as, if the concept of childhood itself is one which is of such limited relevance, then so too are the rights which it generates. Perhaps the injection of some notion of children's potential autonomy could contribute to a more substantive understanding of how children ought to be treated in order that childhood be, if not the ideal halcyon fantasy assumed by the CRC, at least not a period of abuse, vulnerability and impotence.

**SOURCES**

Barry, B. 2001. Culture and Equality: An Egalitarian Critique of Multiculturalism. Cambridge: Polity Press

Bennett, T.W. 1991. A Sourcebook of African Customary Law for Southern Africa. Kenwyn: Juta

Bristow, J. Bulger Killers: Childhood on Trial. Spiked Liberties, 21 June 2001

Brittain, V. Aids turns back the clock for world's children. The Guardian, Saturday May 4 2002: 23

Cantwell, N. 2000. "The Origins, Development and Significance of the United Nations Convention on the Rights of the Child" in H.J. Steiner and P. Alston (eds). International Human Rights in Context (2<sup>nd</sup> ed). Oxford: Oxford University Press

Dugard, J. 1994. International Law: A South African Perspective. Kenwyn: Juta

Hosten, W.J., Edwards, A.B., Nathan, C. and Bosman, F. 1983. Introduction to South African Law and Legal Theory. Durban-Pretoria: Butterworth

Jones, P. 1994. Rights. London: Macmillan

Kolosov, Y. 2000. "The Rights of the Child" in J. Symonides (ed). Human Rights: Concept and Standards. Aldershot: UNESCO/Ashgate

Mamdani, M (ed). 2000. Beyond Rights Talk and Culture Talk: Comparative Essays on the Politics of Rights and Culture. Cape Town: David Philip Publishers

Merten, M. Children Behind Bars. Mail and Guardian, September 13-19 2002: 9

Pupavac, V. 2000. "The Infantilization of the South and the UN Convention on the Rights of the Child" in H.J. Steiner and P. Alston (eds). International Human Rights in Context (2<sup>nd</sup> ed). Oxford: Oxford University Press

Stucky, C. Children With a Hunger to Survive. The Sunday Independent, September 22 2002:13

Tomasevski, K. 2000. "Women's Rights" in J. Symonides (ed). Human Rights: Concept and Standards. Aldershot: UNESCO/Ashgate

Contemporary Forms of Slavery in Pakistan, Human Rights Watch Report: July 1995

Human Rights Watch World Report 2002: Asia: Pakistan

<http://hrw.org/wr2k2/asia9.html>

Human Rights Watch Report: Child Labour

<http://www.hrw.org/children/labor.htm>

Universal Declaration of Human Rights, 1948

African ("Banjul") Charter on Human and People's Rights, 1985

United Nations General Assembly Resolution 44/25: Convention on the Rights of the Child  
20 November 1989

The Constitution of the Republic of South Africa, Act 108 (1996)

United Nations General Assembly Resolution 51/77: The Rights of the Child  
12 December 1996

Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, Adopted by GA resolution A/RES/54/263 25 May 2000 (entered into force 12 February 2002)

Status of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, Updated 29 July 2002

International Legal Standards Governing Child Soldiers  
Human Rights Watch website  
<http://www.hrw.org/campaigns/crp/int-law.htm>

The Child Soldiers Protocol  
Human Rights Watch website  
<http://www.hrw.org/campaigns/crp/protocol.htm>