

# LISTENING TO ‘THE OTHER’? THE *CONVENTION ON THE RIGHTS OF THE CHILD*

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*[This paper seeks to analyse whether the Convention on the Rights of the Child, its text and its monitoring procedure, successfully meets the challenge posed by cultural relativism to the legitimacy of the United Nations’ international human rights regime. The first part of the paper argues that whilst the cultural relativist’s critique of international human rights law must be taken seriously, agreement on ‘culturally legitimate’ universal standards is, at least as a matter of theory, possible. Furthermore, the second section of the paper argues that the drafting of the Convention on the Rights of the Child was, in some respects, encouraging as a model of inclusive norm creation. However, the final part of the paper concludes that whilst the Convention’s monitoring committee, the Committee on the Rights of the Child, is ideally placed to respond positively to the demands of cultural difference, it has unfortunately not done so. The Committee’s analysis of particular norms and practices has, to date, been marked by a striking ‘Western’ bias.]*

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The Convention on the Rights of the Child has the same meaning for people in all parts of the world. While laying down common standards, the Convention takes into account the different cultural, social, economic and political realities of individual states so that each state may seek its own means to implement the rights common to all.<sup>1</sup>

## I INTRODUCTION

On 20 November 1989 the United Nations General Assembly, by a unanimous vote, formally adopted the *Convention on the Rights of the Child* ('CROC').<sup>2</sup> With unprecedented speed the CROC has since achieved near universal ratification. As of September 2001 the number of States Parties stood at 191, leaving only the United States and Somalia yet to ratify.<sup>3</sup> Taking a purely positivistic view of international human rights law, the formal acceptance of the CROC across the world's political, social, economic and cultural divides validates the claim that it embodies truly universal standards — standards that are applicable, without distinction or derogation, to all children, regardless of the cultural particularities of the communities in which they live.

However, a claim to universality based solely on near universal ratification, in itself, does nothing to distinguish the CROC from the numerous other UN instruments which purport to enshrine and protect humankind's universal human rights. Despite widespread ratification by many non-Western states, these documents have not escaped the charge that they embody ethnocentric Western standards which are meaningless or irrelevant to much of the non-Western world.<sup>4</sup> What makes the CROC different? It is the claim of the CROC to have successfully reconciled the search for universal standards with respect for cultural diversity. As Philip Alston notes, the

prospect of universal ratification, combined with the objective of laying down universally applicable standards ... serves to place the Convention at the forefront

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<sup>1</sup> United Nations Centre for Human Rights, *Fact Sheet No 10 (Rev 1): The Rights of the Child* (1996) 2 <<http://www.unhchr.ch/html/menu6/2/fs10.htm>> at 24 August 2001.

<sup>2</sup> Opened for signature 20 November 1989, 1577 UNTS 44, 28 ILM 1457 (entered into force 2 September 1990).

<sup>3</sup> For a discussion of why the US has not ratified the CROC, see Susan Kilbourne, 'The Wayward Americans — Why the USA Has not Ratified the UN Convention on the Rights of the Child' (1998) 10 *Child and Family Law Quarterly* 243, 243.

<sup>4</sup> For purposes of discussion, this article will refer to the 'Western' and 'non-Western' world. It is however recognised that in doing so there is a danger of essentialising and oversimplifying the many diverse cultural, philosophical and political beliefs and practices which exist within these broad categorisations. An early example of objections to perceived ethnocentrism in human rights law arose during debates over the *Universal Declaration of Human Rights*: see Thomas Franck, 'Is Personal Freedom a Western Value?' (1997) 91 *American Journal of International Law* 593, 601. For a broader critique of the Western bias inherent in the human rights regime, see Makau Mutua, 'Savages, Victims and Saviors: The Metaphor of Human Rights' (2001) 42 *Harvard International Law Journal* 201; Makau Mutua, 'The Ideology of Human Rights' (1996) 36 *Virginia Journal of International Law* 589; Adamantia Pollis and Peter Schwab, 'Human Rights: A Western Construct with Limited Applicability' in Adamantia Pollis and Peter Schwab (eds), *Human Rights: Cultural and Ideological Perspectives* (1979) 1.

of debates about whether human rights norms are capable of attaining 'universality' or are inevitably relative to each individual society.<sup>5</sup>

As part of that debate, the first section of this article argues that universal human rights which are responsive to cultural difference are possible in theory. In assessing whether the *CROC* has achieved that objective in practice, the second section of the article argues that a more inclusive drafting procedure has ensured that those states previously excluded from UN norm creation processes, in particular states from the developing world, were able to secure the inclusion of some non-Western ideas and practices in the final *CROC* text. This recognition of culturally diverse practices, combined with the powers of the Committee on the Rights of the Child ('CRC')<sup>6</sup> to interpret and apply the *CROC*'s abstract norms in a manner responsive to the demands of cultural difference, justifiably raised expectations that the UN had managed to achieve a universal text. If it was not a perfect exemplar of 'cultural legitimacy', it was hoped that the *CROC* would provide a promising foundation on which the subsequent work of the CRC could build. Unfortunately, as the final section of this article argues, this promise has not been realised. An analysis of the work of the CRC reveals that, rather than promoting a positive attitude towards culturally diverse norms and practices, the CRC has insisted upon a uniform and very 'Western' interpretation of what the *CROC* requires, in which any respect for cultural diversity has been lost.

## II THE CHALLENGE OF DIFFERENCE

A growing number of states representing a wide range of cultural and geographical spheres are now asserting with increasing confidence that, 'because of social and cultural differences in their countries',<sup>7</sup> they should not be subject to existing universal standards. These appeals to cultural difference have solid foundations that cannot be dismissed as simply amounting to cynical attempts by state leaders to shield themselves from justifiable criticism. Those who argue that human rights, as enshrined in the *Universal Declaration of Human Rights*, are a purely Western construct, can point to the clear philosophical and historical rooting of the concept in Western liberal thought and socioeconomic experiences, as well as to the reality of power politics within the UN.<sup>8</sup> In contrast to the grounding of human rights in Western understanding, many would argue that an individualistic, rights-based ethos is foreign to the traditional cultures of

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<sup>5</sup> Philip Alston, 'The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights' in Philip Alston (ed), *The Best Interests of the Child: Reconciling Culture and Human Rights* (1994) 1, 2.

<sup>6</sup> Established for the purpose of 'examining the progress made by States Parties in achieving the obligations undertaken': *CROC*, above n 2, art 43.

<sup>7</sup> Christina Cerna, 'Universality of Human Rights and Cultural Diversity: Implementation of Human Rights in Different Socio-Cultural Contexts' (1994) 16 *Human Rights Quarterly* 740, 740. See, also, Adamantia Pollis, 'Cultural Relativism Revisited: Through a State Prism' (1996) 18 *Human Rights Quarterly* 316, 328, 332; Harriet Samuels, 'Hong Kong on Women, Asian Values, and the Law' (1999) 21 *Human Rights Quarterly* 707, 710–11.

<sup>8</sup> A classic exposition of this argument is provided in Pollis and Schwab, above n 4.

much of the non-Western world.<sup>9</sup> It is clear that many non-Western cultures have a very different understanding as to how the dignity of the human being is secured. This understanding, which is deeply embedded in their own philosophical and cultural traditions, often includes a fundamentally different view of the correct place of the individual within the framework of society and the appropriate social, economic and political relations between members of the group.<sup>10</sup>

The marginalisation of these cultural values by the UN raises fundamental concerns as to the basic legitimacy of the international human rights regime. As a matter of empirical observation, cultural relativists assert that each community or society has developed its own moral values which are rooted in particular philosophical and cultural traditions.<sup>11</sup> They assert that human rights, as currently defined, are a culturally determined moral code specific to the West.<sup>12</sup> Why then, when seeking to formulate a set of universally applicable standards, should the cultural values of those in the West prevail over all others?

The response of Western jurists to this question is attractive in its simplicity. They assert that the philosophical origin of human rights in natural law theories leads logically to the presumption that they are universal in scope.<sup>13</sup> As Donnelly points out, 'if human rights are literally the rights everyone has simply as a human being, they would seem to be universal by definition.'<sup>14</sup>

This argument has been the subject of fierce attack on the basis of its inherent ethnocentricity. The concept of 'enculturation' is of fundamental importance to the cultural relativist's critique of universal human rights. As Alison Renteln explains, '[e]nculturation is the idea that people unconsciously acquire the categories and standards of their culture.'<sup>15</sup> In other words, the moral truths in which the members of a particular society believe, are, to a large extent, culturally determined. Morals are simply adopted by members without any

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<sup>9</sup> I reiterate my previous statement on the dangers of essentialising the cultural differences between the 'Western' and 'non-Western' world. It is acknowledged that not all in the West would endorse the individualistic ideals of liberalism, preferring instead a communitarian/group based approach.

<sup>10</sup> To give just one example, Harriet Samuels identifies the key 'Asian values', as derived from the region's popular literature, to be 'a sense of loyalty and duty toward one's family, self-reliance, thrift, a general tolerance of benign authoritarianism, a stress on education, respect for the elderly and respect for the accumulation of wealth': Samuels, above n 7, 712. Reflecting this, the Singapore Government has identified its core shared values as:

(1) nation before community ...; (2) upholding the family as the basic unit of society; (3) regard and community support for the individual; (4) resolving issues through consensus instead of contention; and (5) racial and religious tolerance and harmony.

See Goh Chok Tong, 'Five Shared Values', *The Straits Times* (Singapore), 6 January 1991, 16-7, cited in Samuels, above n 7, 712-13.

<sup>11</sup> See, eg, Alison Dundes Renteln, *International Human Rights: Universalism Versus Relativism* (1990) 66.

<sup>12</sup> *Ibid* 30.

<sup>13</sup> *Ibid* 47.

<sup>14</sup> Jack Donnelly, 'Cultural Relativism and Universal Human Rights' in Jack Donnelly (ed), *Universal Human Rights in Theory and Practice* (1989) 109, 109.

<sup>15</sup> Renteln, above n 11, 74.

conscious critical evaluation. Renteln argues that this cultural conditioning goes largely undetected — members of the group do not appreciate the extent to which their moral convictions are 'culture-bound'.<sup>16</sup>

Renteln regards ethnocentrism as the natural partner of enculturation, arguing that when members of a particular community adopt their preferred moral code, it is natural that they perceive its normative value to extend beyond the confines of their own cultural group.<sup>17</sup> Consequently, if a cultural group is asked to resolve a particular moral dilemma it will answer by applying its own moral standards, regardless of the cultural context in which the problem arises. Any alternative moral code, which may lead to a different answer, will inevitably be rejected as inadequate.<sup>18</sup>

Furthermore, as Renteln points out, a group's faith in the superiority of its moral code is not the result of a truly objective assessment of the merits of the group's approach, as compared with suggested alternatives.<sup>19</sup> She argues that any judgment of the group, from its position within the particular culture, will be clouded by subjective prejudices, because people see and judge everything through their own culturally conditioned eyes.<sup>20</sup> It is this inability of individuals to extricate themselves effectively from their own culture which makes objective judgment impossible. In order to make a truly objective assessment of the superiority or otherwise of a particular group's moral code, there would need to exist an independent and objective benchmark, which stands outside any particular culture, against which competing moral theories could be judged. It is a fundamental premise of cultural relativism that such a benchmark does not exist.<sup>21</sup>

The ethnocentrism in the '*presumed* universality of human rights'<sup>22</sup> is immediately apparent once one appreciates the importance of culture to a specific group's formulation and adoption of a moral code. It is further apparent when one recognises the importance of culture in conditioning the way in which an individual perceives and judges others and their beliefs. 'Universal human rights' are a culture specific code, incapable of objective verification, believed to be of universal application because of a culturally determined faith in their absolute truth. In light of this, to simply assert that human rights must, by definition, be universal in scope, is rightly dismissed as moral imperialism.

In an attempt to meet accusations of moral imperialism and ethnocentrism, an alternative attempt to justify the universality of human rights, despite their cultural particularity, has emerged. This attempted rationale focuses on the socioeconomic changes which accompanied the development of the liberal doctrine — the transition to a modern capitalist economy and the rise of a

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<sup>16</sup> Ibid 75–6.

<sup>17</sup> Ibid 74–5.

<sup>18</sup> Ibid 75.

<sup>19</sup> Ibid.

<sup>20</sup> Ibid 76.

<sup>21</sup> Ibid 72.

<sup>22</sup> Ibid 47 (emphasis in original).

powerful centralised organ of state — and appeals to the efficacy or ‘instrumental value’ of rights when applied in this context.<sup>23</sup> Jack Donnelly and Rhoda Howard argue that, in this particular economic and political environment, human rights provide the only effective mechanism for securing human dignity, for without them the individual is left vulnerable to the machinations of the state.<sup>24</sup> From this premise they go on to argue that human rights can now claim to be ‘of near universal contemporary relevance’<sup>25</sup> because of the ‘social evolution of the entire world towards State societies.’<sup>26</sup> In other words, whilst the absence of rights in small traditional communities may be defensible,<sup>27</sup> the political reality that more and more societies are becoming modern state-centred societies provides the moral imperative for the recognition of human rights on a universal scale.<sup>28</sup>

In so far as entrenching the protection of human rights provides one possible solution to potential abuses by a powerful centralised state, perhaps even the most effective solution, Donnelly and Howard’s argument for the universal relevance of human rights is not only unobjectionable, but extremely persuasive to the ears of a Western audience. However, it must be recognised that it is a solution rooted in Westerners’ own cultural ideals. Other potential solutions to the problem of a powerful centralised state do exist. As Adamantia Pollis points out, modern developed states in East Asia, such as Japan, Singapore, Taiwan and South Korea, have neither accepted nor incorporated into their political and legal ideology liberal ideals such as ‘individualism, individual freedoms and equal rights’.<sup>29</sup> To support this argument, Pollis focuses on Japan — a modernised ‘economic giant’, boasting ‘technologically advanced manufacturing and information sectors’.<sup>30</sup> Although the *Japanese Constitution*, which is modelled on that of the US, protects individual rights, Pollis argues that the dominant values of Japanese society remain ‘subordination of the individual to his/her membership group, solidarity and consensus among those in the “community” and a reinforcing organic nationalist ideology.’<sup>31</sup> The traditional socio-cultural norms of Japanese society have of course had to adapt to the demands of modernity. Thus Pollis contends that the ‘definition of the self, traditionally determined by one’s status and role in the family and in the rural village has

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<sup>23</sup> Jack Donnelly, ‘Non-Western Conceptions of Human Rights’ in Jack Donnelly (ed), *Universal Human Rights in Theory and Practice* (1989) 49; Rhoda Howard, ‘Dignity, Community, and Human Rights’ in Abdullahi An-Na’im (ed), *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus* (1992) 81.

<sup>24</sup> This argument is stated in Donnelly, ‘Non-Western Conceptions of Human Rights’, above n 23, 62.

<sup>25</sup> Donnelly, ‘Non-Western Conceptions of Human Rights’, above n 23, 50.

<sup>26</sup> Howard, ‘Dignity, Community and Human Rights’, above n 23, 81.

<sup>27</sup> Donnelly, ‘Non-Western Conceptions of Human Rights’, above n 23, 59.

<sup>28</sup> Howard, above n 23, 81–3; Rhoda Howard and Jack Donnelly, ‘Human Dignity, Human Rights, and Political Regimes’ in Jack Donnelly (ed), *Universal Human Rights in Theory and Practice* (1989) 66, 66–71.

<sup>29</sup> Pollis, ‘Cultural Relativism Revisited’, above n 7, 317.

<sup>30</sup> *Ibid* 333–4.

<sup>31</sup> *Ibid* 333.

been transposed to modern structures — the factory, the bureaucracy, the business enterprise'.<sup>32</sup>

According to Pollis a commitment within society to individual human rights has not, however, developed alongside economic growth. Japan continues to follow its own 'distinctive historical and cultural traditions', marked by 'a self-identity defined in terms of group membership and the deeply held values of loyalty, harmony and conciliation.'<sup>33</sup> This indifference to individual rights has not, however, resulted in widespread human rights abuses. In fact, Pollis argues that in the post-World War II era Japan can boast a relatively good human rights record.<sup>34</sup>

Such alternative views, regarding how best to protect the members of society against a powerful centralised state, are deserving of respect. In addressing this and other key issues facing international society, there is a growing awareness among previously marginalised non-Western states that their own traditions and value systems can make a significant contribution to the international debate.

### III THE SEARCH FOR A THEORY OF CULTURALLY LEGITIMATE UNIVERSALISM

Culture can play an important role in the practice of international human rights in three distinct ways: 'in the *substance* of lists of human rights, in the *interpretation* of individual rights and in the *form* in which particular rights are *implemented*.'<sup>35</sup> A successful theory of 'culturally legitimate universalism' must address the importance of cultural diversity at all three suggested levels.

#### A *Culturally Legitimate Universal Standards — A Theoretical Possibility?*

If the dangers of enculturation and ethnocentrism are to be taken seriously at the formulation stage of normative 'universal' standards, one is driven to endorse what Donnelly terms a position of 'radical relativism'.<sup>36</sup> Radical relativism does not preclude the possibility of achieving commitment to universal standards. It simply recognises that the legitimacy of the posited norms derives from their acceptance within particular cultures. Despite her views on the dangers of moral imperialism, Renteln contends that culturally legitimate universal standards are possible. She proposes engaging in a program of empirical investigation aimed at

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<sup>32</sup> Ibid 334.

<sup>33</sup> Ibid. For a critical response to Pollis's argument that these values are rooted in Japanese culture, as opposed to being constructed and imposed upon the people by the State, see Annette Marfording, 'Cultural Relativism and the Construction of Culture: An Examination of Japan' (1997) 19 *Human Rights Quarterly* 431. For Pollis's response to these criticisms, see Andamantia Pollis, 'Conformity vs Compliance: A Response to Marfording' (1998) 20 *Human Rights Quarterly* 429. For similar arguments concerning the manipulation of distinct 'Asian values' by Singapore's Government, see Neil Englehart, 'Rights and Culture in the Asian Values Argument: The Rise and Fall of Confucian Ethics in Singapore' (2000) 22 *Human Rights Quarterly* 548.

<sup>34</sup> Pollis, 'Cultural Relativism Revisited', above n 7, 333.

<sup>35</sup> Donnelly, 'Cultural Relativism and Universal Human Rights' above n 14, 110.

<sup>36</sup> 'Radical relativism' would hold that 'culture is the sole source of the validity of a moral right or rule': *ibid* 109. The importance of respecting cultural diversity in the process of interpretation and implementation will be discussed below in Part V.

'seeking out specific moral principles held in common by all societies.'<sup>37</sup> The principles discovered will then provide the substantive content for a system of 'cross-cultural universals' against which the behaviour of a particular group may be criticised or judged.<sup>38</sup> In Renteln's view, the existence of these cross-cultural norms remains to be tested by empirical investigation. However, she is optimistic that, despite cultural differences, there is in fact considerable convergence between cultures on fundamental moral values.<sup>39</sup> Donnelly agrees with this preliminary analysis, observing that there is 'a striking cross-cultural consensus on many of the values that today we seek to protect through human rights, especially when those values are expressed in relatively general terms.'<sup>40</sup>

In considering the feasibility of developing culturally legitimate universal standards, it is important that the differences between Western and non-Western cultures are not overstated. The depiction of culture in human rights literature has been the subject of a convincing anthropological critique by Ann-Belinda Preis.<sup>41</sup> She argues that, within contemporary debates on whether human rights are universal or culturally relative, culture is typically 'conceptualised as a static, homogenous, and bounded entity.'<sup>42</sup> One frequently recurring example of this is the juxtaposition of the individualistic rights-based ethos of the West, with the romanticised depiction of the duty-based ethos of traditional indigenous or African communities.<sup>43</sup> The essentialist 'them' and 'us' mentality which underlies these conceptualisations of culture, as both Preis and Howard point out, is no longer appropriate in the postmodern world, if it ever was. The freezing of 'traditional' cultures in pre-colonial history ignores the effects of decades of colonial rule, the breakdown of traditional communal structures in the wake of economic transformation, and the 'corrupting' influence of 'Western values' on the ideological aspirations of the members of the group.<sup>44</sup> It also denies these various cultures the capacity to change, develop and evolve. One important effect of this crossing of cultural boundaries, as Preis points out, is that the language of rights now has meaning for many people in all parts of the world:

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<sup>37</sup> Renteln, above n 11, 78.

<sup>38</sup> *Ibid* 81.

<sup>39</sup> *Ibid* 80.

<sup>40</sup> Donnelly, 'Cultural Relativism and Universal Human Rights', above n 14, 113. It is important to note in this respect that non-Western states do not generally contend that they do not want to be part of an international human rights regime. Rather, they usually argue for a system that is more responsive to their particular needs and values. See, eg, Eva Brems, 'Enemies or Allies? Feminism and Cultural Relativism as Dissident Voices in Human Rights Discourse' (1997) 19 *Human Rights Quarterly* 136, 143–7.

<sup>41</sup> Ann-Belinda Preis, 'Human Rights as Cultural Practice: An Anthropological Critique' (1996) 18 *Human Rights Quarterly* 286.

<sup>42</sup> *Ibid* 289.

<sup>43</sup> See Rhoda Howard, 'Cultural Absolutism and the Nostalgia for Community' (1993) 15 *Human Rights Quarterly* 315, 327–8.

<sup>44</sup> Donnelly, 'Cultural Relativism and Universal Human Rights', above n 14, 119. See also *ibid* 326.



In several, formerly 'remote' areas of the world, different human rights discourses have now become a vehicle for the articulation of a wide variety of concerns of different people at different levels of society. Human rights increasingly form part of a wider network of perspectives which are shared and exchanged between the North and South, centers and peripheries, in multiple, creative and sometimes conflict-ridden ways. Human rights have become 'universalised' as values subject to interpretation, negotiation and accommodation.<sup>45</sup>

The interchange between cultures and the resulting hybridity is in no way limited to post-colonial states. Cultural interpenetration has also had a liberating effect on the Western liberal tradition. Growing appreciation of alternative understandings of 'rights' and socioeconomic demands have led many liberals to endorse a much broader framework of human rights, incorporating social, economic, group and humanitarian rights alongside the more traditional civil and political rights.<sup>46</sup> It is not suggested that significant differences between cultures no longer exist. However, the breakdown of cultural enclaves must greatly enhance the possibility of discovering a broad consensus among cultural groups on a body of cross-cultural universal norms.

The dynamic nature of culture also ensures that, even where there is currently no universal consensus on a particular moral standard, disagreement does not prove an impenetrable bar to achieving such consensus in the future. In working to extend the cultural legitimacy of existing universal standards, Abdullahi An-Na'im places great emphasis on the evolutionary character of culture and its capacity for 'continuing change' in response to both internal and external pressures.<sup>47</sup> He argues that internal transformation within a particular culture is always possible because of the 'ambivalence of cultural norms and their susceptibility to different interpretations.'<sup>48</sup> Recognising that culture is a 'multivocal and multidimensional'<sup>49</sup> force, he argues that new interpretations of cultural norms and values are constantly developing to compete with and encourage change to the accepted institutionalised orthodoxy.<sup>50</sup> He is therefore confident that by engaging in a process of internal dialogue aimed at establishing 'enlightened perceptions and interpretations of cultural values and norms',<sup>51</sup> a cultural grounding for human rights within all cultures will eventually be achieved.

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<sup>45</sup> Preis, above n 41, 289–90.

<sup>46</sup> Jack Donnelly, 'Human Rights and Western Liberalism' in Jack Donnelly (ed), *Universal Human Rights in Theory and Practice* (1989) 88. See also Virginia Leary, 'Postliberal Strands in Western Human Rights Theory: Personalist-Communitarian Perspectives' in Abdullahi An-Na'im (ed), *Human Rights in Cross-Cultural Perspectives* (1992) 105; Pollis, 'Cultural Relativism Revisited', above n 7, 342–3.

<sup>47</sup> Abdullahi An-Na'im, 'Toward a Cross-Cultural Approach to Defining International Standards of Human Rights: The Meaning of Cruel, Inhuman, or Degrading Treatment or Punishment' in Abdullahi An-Na'im (ed), *Human Rights in Cross-Cultural Perspectives* (1992) 19, 27.

<sup>48</sup> Ibid.

<sup>49</sup> Preis, above n 41, 306.

<sup>50</sup> An-Na'im, 'Toward a Cross-Cultural Approach', above n 47, 28.

<sup>51</sup> Ibid 21.

External pressure also has an important part to play in this process of internal cultural evolution and transformation. As An-Na'im points out, external criticism is one means of bringing pressure to bear on a particular community to re-evaluate its normative commitments and encourage adherence to a universal standard of behaviour. It is important to recognise that respect for cultural diversity does not preclude criticism being directed at the practices or value systems of another culture. 'Ethical relativism as descriptive hypothesis', as Renteln argues, is not an ethical theory which demands tolerance of the norms and practices of other cultures.<sup>52</sup> It allows for continuing commitment to one's own belief system and, from that position, for criticism to be directed at other groups' practices and beliefs. This process of external criticism can be achieved in a constructive manner by engaging in what An-Na'im terms 'cross-cultural dialogue'.<sup>53</sup> He contends that the combination of internal discourse and re-evaluation, aided by cross-cultural dialogue at the international level, is the key to achieving true cross-cultural consensus on universal human rights.<sup>54</sup>

### B *Formulating Culturally Legitimate Universal Human Rights in Practice*

The lessons which international society can take from this theoretical debate, if culturally legitimate universals are to be achieved in practice, are clear and straightforward. The chief complaint made by some non-Western states, despite their expressed commitment to the universality of human rights at the United Nations World Conference on Human Rights,<sup>55</sup> is that existing international human rights norms do not reflect their cultural values. These states argue that their voices have been marginalised in the norm-setting processes of the UN.<sup>56</sup> It is thus a simple point that if the 'universal norms' enshrined within UN human rights instruments are to be accepted as culturally legitimate, the process by which these instruments are drafted must be truly inclusive. However, if a culturally inclusive drafting process is to be successful in meeting the criticisms of non-Western states, more is required than mere procedural inclusiveness. An inclusive process will not be effective if, despite full representation of States Parties, dominant groups continue to dictate the outcome of proceedings. This means that all states must have the right not only to be heard, but to have their views and insights treated with equal consideration and respect. If this latter demand is met, the cultural values of non-Western states should be reflected to a much greater extent in the final substantive content of UN texts.

It must be acknowledged at this point that the right of all states to contribute in a meaningful way to international norm creation is not the final answer to the problem of formulating universal human rights norms. Effective participation by states from different geographical and cultural contexts will not be sufficient to secure a genuine universal consensus, unless the state elites who act in the

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<sup>52</sup> Renteln, above n 11, 73.

<sup>53</sup> An-Na'im, 'Toward a Cross-Cultural Approach', above n 47, 21–2.

<sup>54</sup> Ibid 38.

<sup>55</sup> Held in Vienna, Austria, 14–25 June, 1993.

<sup>56</sup> See Mutua, 'Savages, Victims and Saviors', above n 4.

international sphere truly represent the cultures of those states. State representatives have been subjected to fierce attack in this respect. On the one hand they are criticised for Western bias and alienation from the people they represent, leading commentators to counsel caution before accepting the 'cultural legitimacy' of their 'Westernised' views.<sup>57</sup> As An-Na'im points out:

From the point of view of universal cultural legitimacy of international human rights standards, we should not assume from the fact that governmental delegates 'participated' in their formulation and adoption that there is necessarily sufficiently broad popular acceptance of these standards, and commitment to their implementation, in our respective countries.<sup>58</sup>

On the other hand, whilst An-Na'im warns against an automatic acceptance of the cultural legitimacy of state elites' genuinely held convictions, other commentators attack state representatives for cynically manipulating their culture to serve their own ends. At one level this can amount to no more than a slightly uncomfortable, hypocritical appeal to culture by state elites who have personally adopted a lifestyle far removed from the traditional life of the communities they espouse.<sup>59</sup> More seriously, it can amount to making questionable appeals in international debates to a 'dying, lost or even mythical cultural past'.<sup>60</sup> More seriously still, Pollis argues that the modern state,

with its capacity to repress, exploits the language of cultural relativism to justify and rationalize its own repressive actions in the ... drive to consolidate or to hold on to political power.<sup>61</sup>

Whichever view of state elites is preferred, the problem remains that in many cases the 'interpretation' of culture or tradition they present on the international stage has no legitimate foundation within popular understanding. This raises the very difficult question of who is, and should be, entitled to speak for any one particular 'culture'. The UN, as a community of states, is premised on the basis of state sovereignty and remains dependent on the will of the state for its effective operation. This means that the state, as the traditional 'player' in the international arena, has the exclusive power to define the cultural values of its people and thereby to determine appropriate international standards. This power to define culture has both internal and external dimensions. Internally, marginalised groups, such as women, who are excluded from the power structures of the state, are denied the opportunity to contribute to defining and

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<sup>57</sup> See, eg, Abdullahi An-Na'im, 'Conclusion' in Abdullahi An-Na'im (ed), *Human Rights in Cross-Cultural Perspectives* (1992) 427, 428; Pollis, 'Cultural Relativism Revisited', above n 7, 328–9.

<sup>58</sup> An-Na'im, 'Conclusion', above n 57.

<sup>59</sup> Donnelly, 'Cultural Relativism and Universal Human Rights' above n 14, 119–20.

<sup>60</sup> *Ibid* 119.

<sup>61</sup> Pollis, 'Cultural Relativism Revisited', above n 7, 320. For similar views, see Marfording, above n 33; *Ibid* 118–21.

interpreting national cultural values.<sup>62</sup> At the international level, because of the state-centric nature of the UN, women excluded from the power structures of the state suffer the double disempowerment of being denied the opportunity to contribute a valuable female perspective to the debate on the formulation of legitimate universal standards.<sup>63</sup> This problem is compounded by the fact that women are seriously under-represented within the institutional bodies of the UN. As Gallagher points out:

Almost without exception, managerial and strategic level positions within the High Commissioner/Centre for Human Rights are occupied by men. National delegations to political bodies such as the Commission on Human Rights rarely include more than a token female presence. Relatively few women have been appointed or elected to serve on the mainstream treaty bodies or as investigators, researchers or consultants.<sup>64</sup>

While women are denied a voice in defining and determining cultural values at both the national and international level, the international human rights regime will never be able to sustain a claim to be truly universal. The implications of this for the UN are important and far-reaching. To substantiate a claim that the UN is truly inclusive, it is not enough that it can point to the active participation of states covering vast geographical regions and social and cultural spheres. The UN must also demonstrate that it has taken effective steps to listen to those groups that are silenced by the state. In other words, when formulating international standards, the UN must have a means of listening to the 'grassroots'. One way in which this can be achieved, in addition to increasing the number of female delegates working in international fora, is by affording a greater role to non-governmental organisations ('NGOs') and representational groups in the drafting procedures employed by the UN. There are, for example, a growing number of women's groups in Africa and East Asia which could play an essential role in bringing a much needed female perspective from the developing world into the international human rights arena.<sup>65</sup>

#### IV THE CULTURAL LEGITIMACY OF THE *CROC*

One of the claims made for the *CROC* is that a fully inclusive drafting process has ensured that the norms enshrined within it build on all the world's cultural traditions and are thus considered culturally legitimate by all the participating

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<sup>62</sup> Marfording, above n 33, 444. For an excellent analysis of the marginalisation of women within the UN human rights regime, see Anne Gallagher, 'Ending the Marginalization: Strategies for Incorporating Women into the United Nations Human Rights System' (1997) 19 *Human Rights Quarterly* 283.

<sup>63</sup> See Hilary Charlesworth, Christine Chinkin and Shelly Wright, 'Feminist Approaches to International Law' (1991) 85 *American Journal of International Law* 613, 621–2.

<sup>64</sup> Gallagher, above n 62, 292–3. There are of course some important exceptions to this, such as the appointment of Mary Robinson as the United Nations High Commissioner for Human Rights in 1997.

<sup>65</sup> Joe Oloka-Onyango and Sylvia Tamale, "'The Personal is Political', or Why Women's Rights are Indeed Human Rights: An African Perspective on International Feminism' (1995) 17 *Human Rights Quarterly* 691, 704–5; Samuels, above n 7, 731–2.

states.<sup>66</sup> The *CROC*'s claim to cultural legitimacy thus depends to a large extent on the validity of the assertion that the drafting process was fully inclusive and the extent to which that inclusive participation, in particular the participation of developing states, is reflected in the substantive content of the final text.

#### A *Participation in the Drafting Process*

In 1979 the United Nations Commission on Human Rights established the open-ended Working Group on a Draft Convention on the Rights of the Child ('the Working Group').<sup>67</sup> In terms of securing an inclusive process, the fact that the Working Group was open-ended was vitally important, for it entitled all states that were members of the UN, or that held observer status, to participate. Non-state actors, such as NGOs and inter-governmental organisations ('IGOs') were also entitled to participate.<sup>68</sup> A technical distinction was drawn between the rights of participation afforded to member states of the Commission and those afforded to non-member states, IGOs and NGOs. The former were automatically entitled to participate and vote in the Working Group, whereas the latter could only participate as non-voting observers. However, as the Working Group operated on the basis of consensus, and all states, IGOs and NGOs were able to participate fully in the Working Group's debates, this distinction was of no practical importance.<sup>69</sup>

##### 1 *States*

The drafting of the *CROC* took place over a ten year period and during that time there was wide participation by states from all of the world's regions. That is not to say, however, that all cultural traditions were equally represented throughout the process. In fact, a purely quantitative assessment of state participation in the Working Group shows that it was dominated by states from Western Europe allied with Australia, New Zealand, Canada and the US. States from Africa, the Asia Pacific, the Middle East and Latin America were extremely poorly represented.<sup>70</sup> The low levels of participation by non-Western states 'did not go unnoticed'.<sup>71</sup> In 1985 a group of NGOs submitted a statement to the Commission, raising strong concern over the lack of participation by developing states.<sup>72</sup>

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<sup>66</sup> See, eg. Alston, above n 5, 2.

<sup>67</sup> Lawrence LeBlanc, *The Convention on the Rights of the Child: United Nations Law Making on Human Rights* (1995) 25.

<sup>68</sup> Ibid 25–7. See also Nigel Cantwell, 'The Origins, Development and Significance of the United Nations Convention on the Rights of the Child' in Sharon Detrick (ed), *The United Nations Convention on the Rights of the Child: A Guide to the "Travaux Préparatoires"* (1992) 19, 21–2.

<sup>69</sup> LeBlanc, above n 67, 25–7; Cantwell, above n 68, 22.

<sup>70</sup> LeBlanc, above n 67, 27–37.

<sup>71</sup> Ibid 33.

<sup>72</sup> Ibid 34.

## 2 Women and NGOs

As argued above, a truly inclusive drafting process demands not only participation from states across all cultural divides, but also participation from groups representing community interests at a grassroots level. The inclusion of groups that can give a voice to those, such as women, who are marginalised within state boundaries is particularly important. It might have been anticipated that if state participation in the drafting procedure was far from inclusive, participation by these groups would also be disappointing. However, perhaps somewhat surprisingly, there was an encouraging level of participation by women and NGOs.

The reports of the Working Group do not specify the gender of state representatives participating in the drafting process. It is therefore impossible to be certain of the relative number of female delegates. An analysis of the Working Group reports, in which gender is frequently indicated, does, however, suggest a high level of female participation.<sup>73</sup> Of particular importance, in terms of trying to achieve a fully inclusive, representative drafting process, was the apparently strong female presence from the developing world. Algeria, for example, sent a female representative to the Working Group in 1980, 1985, 1986 and 1987.<sup>74</sup>

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<sup>73</sup> At the 1980 meeting Canada, Poland and Algeria were all headed by female representatives: Working Group on a Draft Convention on the Rights of the Child ('Working Group'), *Question of a Convention on the Rights of the Child: Report of the Working Group on a Draft Convention on the Rights of the Child*, UN Doc E/CN.4/L.1542 (10 March 1980) ('1980 Working Group Report'). In 1983 Canada again sent a female delegate: Working Group, *Report of the Working Group on a Draft Convention on the Rights of the Child*, UN Doc E/CN.4/1983/62 (25 March 1983) ('1983 Working Group Report'). At the 1984 session the US was represented by a woman (as was Algeria), as it was in 1985: Working Group, *Question of a Convention on the Rights of the Child: Report of the Working Group on a Draft Convention on the Rights of the Child*, UN Doc E/CN.4/1984/71 (23 February 1984) ('1984 Working Group Report'); Working Group, *Question of a Convention on the Rights of the Child: Report of the Working Group on a Draft Convention on the Rights of the Child*, UN Doc E/CN.5/1985/64 (3 April 1985) ('1985 Working Group Report'). In 1986 the US, France, Algeria, Venezuela and Mexico all sent female delegates: Working Group, *Question of a Convention on the Rights of the Child: Report of the Working Group on a Draft Convention on the Rights of the Child*, UN Doc E/CN.4/1986/39 (13 March 1986) ('1986 Working Group Report'). At the 1987 session Canada, Sweden, Italy, Algeria and Venezuela were all represented by women: Working Group, *Question of a Convention on the Rights of the Child: Report of the Working Group on a Draft Convention on the Rights of the Child*, UN Doc E/CN.4/1987/25 (9 March 1987) ('1987 Working Group Report'). Italy and Venezuela again sent female representatives in 1988: Working Group, *Question of a Convention on the Rights of the Child: Report of the Working Group on a Draft Convention on the Rights of the Child*, UN Doc E/CN.3/1988/28 (6 April 1988) ('1988 Working Group Report'). Finally, in 1989 Portugal, Italy, Yugoslavia, Venezuela, China, and Brazil were all headed by female delegates: Working Group, *Question of a Convention on the Rights of the Child: Report of the Working Group on a Draft Convention on the Rights of the Child*, UN Doc E/CN.4/1989/48 (2 March 1989) ('1989 Working Group Report').

<sup>74</sup> Venezuela also sent a female delegate in 1986–89: 1986 Working Group Report, above n 73; 1987 Working Group Report, above n 73; 1988 Working Group Report, above n 73; 1989 Working Group Report, above n 73; Mexico and Brazil were headed by female delegates in 1986 and 1989 respectively: 1986 Working Group Report, above n 73; 1989 Working Group Report, above n 73.

Participation by NGOs with a particular interest in women's issues was also high. The International Federation of Women in Legal Careers had a strong presence throughout the drafting process, as did Zonta International and Associated Country Women of the World.<sup>75</sup> The International Council of Jewish Women also had a strong level of attendance at the Working Group and although the attendance by other NGOs was more sporadic, between them they ensured a strong female presence throughout the process.<sup>76</sup> It is again particularly encouraging that many of these organisations were able to bring a 'culturally legitimate gender perspective', that is one not dominated by the agenda of Western feminists, to the drafting process. NGOs such as Associated Country Women of the World and Zonta International have a worldwide grassroots membership, crossing cultural, religious and social divides, and are committed to giving their grassroots members a voice on the international stage.<sup>77</sup> Consequently, their participation in the Working Group provided an invaluable opportunity for the international community to hear from women and children who would otherwise be silenced.

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<sup>75</sup> The International Federation of Women in Legal Careers attended all the Working Group sessions between 1982 and 1989: *Working Group, Report of the Working Group on a Draft Convention on the Rights of the Child*, UN Doc E/CN.4/1982/L.41 (8 March 1982) [5] ('1982 Working Group Report'); *1983 Working Group Report*, above n 73, [5A]; *1984 Working Group Report*, above n 73, [7]; *1985 Working Group Report*, above n 73, [7]; *1986 Working Group Report*, above n 73, [7]; *1987 Working Group Report*, above n 73, [8]; *1988 Working Group Report*, above n 73, [8]; *1989 Working Group Report*, above n 73, [8]. Zonta International attended all the Working Group sessions between 1983–89: *1983 Working Group Report*, above n 73, [5A]; *1984 Working Group Report*, above n 73, [7]; *1985 Working Group Report*, above n 73, [7]; *1986 Working Group Report*, above n 73, [7]; *1987 Working Group Report*, above n 73, [8]; *1988 Working Group Report*, above n 73, [8]; *1989 Working Group Report*, above n 73, [8]. Associated Country Women of the World attended in 1982–83, 1987–89: *1982 Working Group Report*, above n 75, [5]; *1983 Working Group Report*, above n 73, [5A]; *1986 Working Group Report*, above n 73, [7]; *1987 Working Group Report*, above n 73, [8]; *1988 Working Group Report*, above n 73, [8]; *1989 Working Group Report*, above n 73, [8].

<sup>76</sup> The International Council of Women ('ICW') attended in 1985–89: *1985 Working Group Report*, above n 73, [7]; *1986 Working Group Report*, above n 73, [7]; *1987 Working Group Report*, above n 73, [8]; *1988 Working Group Report*, above n 73, [8]; *1989 Working Group Report*, above n 73, [8]. The International Federation of Women Lawyers attended in 1982, 1986–87: *1982 Working Group Report*, above n 75, [5]; *1986 Working Group Report*, above n 73, [7]; *1987 Working Group Report*, above n 73, [8]. The World Federation of Methodist Women attended in 1988–89: *1988 Working Group Report*, above n 73, [8]; *1989 Working Group Report*, above n 73, [8]. The World Movement of Mothers attended in 1982: *1982 Working Group Report*, above n 75, [5]. The World Association of Girl Guides and Girl Scouts attended the final session of the Working Group in 1989: *1989 Working Group Report*, above n 73, [8].

<sup>77</sup> Information about the membership of participating NGOs can be found on the Associated Country Women of the World web-site: <<http://www.acww.org.uk/>> at 24 August 2001; the Zonta International web-site: <<http://www.zonta.org/>> at 24 August 2001; the ICW section of the World Health Organisation web-site: <<http://www.who.int/ina-ngo/ngo/ngo055.htm>> at 24 August 2001; the International Council of Jewish Women web-site: <<http://www.icjw.org.uk/>> at 24 August 2001; the World Movement of Mothers web-site: <<http://mmmeres.citeweb.net/mmmang.htm>> at 24 August 2001; and the World Association of Girl Guides and Girl Scouts web-site: <<http://www.wagggsworld.org/about/index.html>> at 24 August 2001.

It is, of course, not only NGOs with a specific gender focus that can make an invaluable contribution to the drafting of international human rights instruments. NGOs can provide effective representation for a wide variety of grassroots groups, all of which have the right to be heard. In the context of the *CROC*, it was to be expected that NGOs with a particular interest in the rights of the child would want to play a leading role in the standard-setting process. The extent to which they were able to do so,<sup>78</sup> alongside special interest groups<sup>79</sup> and NGOs

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<sup>78</sup> The International Catholic Child Bureau attended all of the Working Group sessions. Save the Children and Rådda Barnen's Rikförbund (Sweden) attended all Working Group sessions between 1982–89: *1982 Working Group Report*, above n 75, [5]; *1983 Working Group Report*, above n 73, [5A]; *1984 Working Group Report*, above n 73, [7]; *1985 Working Group Report*, above n 73, [7]; *1986 Working Group Report*, above n 73, [7]; *1987 Working Group Report*, above n 73, [8]; *1988 Working Group Report*, above n 73, [8]; *1989 Working Group Report*, above n 73, [8]. Save the Children Fund (UK) attended in 1986, 1988–89: *1986 Working Group Report*, above n 73, [7]; *1988 Working Group Report*, above n 73, [8]; *1989 Working Group Report*, above n 73, [8]. Save the Children Fund Alliance attended in 1987–88: *1987 Working Group Report*, above n 73, [8]; *1988 Working Group Report*, above n 73, [8]. The Defence for Children International Movement attended all the Working Group sessions between 1984–89: *1984 Working Group Report*, above n 73, [7]; *1985 Working Group Report*, above n 73, [7]; *1986 Working Group Report*, above n 73, [7]; *1987 Working Group Report*, above n 73, [8]; *1988 Working Group Report*, above n 73, [8]; *1989 Working Group Report*, above n 73, [8]. The International Union for Child Welfare attended all the Working Group sessions between 1981–85: Working Group, *Report of the Working Group on a Draft Convention on the Rights of the Child*, UN Doc E/CN.4/L.1575 (17 February 1981) ('*1981 Working Group Report*'); *1982 Working Group Report*, above n 75, [5]; *1983 Working Group Report*, above n 73, [5A]; *1984 Working Group Report*, above n 73, [7]; *1985 Working Group Report*, above n 73, [7]. It is also encouraging that the World Federation of Democratic Youth, an association of national youth organisations, was able to participate directly in the 1988 meeting: *1988 Working Group Report*, above n 73, [8].

<sup>79</sup> Groups that specialise in the administration of justice, including penal reform, had a strong presence throughout, with the International Association of Juvenile and Family Court Magistrates, Amnesty International, and the International Commission of Jurists attending nearly all the Working Group sessions. The International Association of Penal Law and the International Association of Democratic Lawyers attended less frequently but were nevertheless represented on a fairly regular basis. Other specialist interest groups that were able to contribute vital expertise in particular areas were the Anti-Slavery Society and the Internationalist Abolitionist Federation, between them attended in 1983, 1985–88: *1983 Working Group Report*, above n 73, [5A]; *1985 Working Group Report*, above n 73, [7]; *1986 Working Group Report*, above n 73, [7]; *1987 Working Group Report*, above n 73, [8]; *1988 Working Group Report*, above n 73, [8]; and The International Committee of the Red Cross which attended all the Working Group sessions between 1985–89: *1985 Working Group Report*, above n 73, [7]; *1986 Working Group Report*, above n 73, [8]; *1987 Working Group Report*, above n 73, [8]; *1988 Working Group Report*, above n 73, [8]; *1989 Working Group Report*, above n 73, [8].



representing minorities and indigenous peoples,<sup>80</sup> is one of the most important distinguishing features of the *CROC*.

The NGOs played an active role in the drafting of the *CROC* from the very early stages of the process.<sup>81</sup> However, in 1983 the NGOs decided that in order to help achieve their objectives they would work together by forming an NGO alliance, called the 'Informal NGO Ad Hoc Group on the Drafting of the Convention on the Rights of the Child' ('NGO Group').<sup>82</sup> The NGO Group met twice a year to review the draft convention. Before each Working Group session they produced an annual report outlining their concerns and reservations, and setting down detailed proposals for amendments to the current provisions, including suggestions for entirely new articles.<sup>83</sup> The NGO Group's annual reports had a substantial impact on the drafting process.<sup>84</sup> The reports were widely distributed among government officials,<sup>85</sup> who relied heavily on their contents for the purpose of the Working Group debates. The NGO Group also organised 'briefing sessions' for government representatives and distributed books, materials and information on all aspects of the *CROC*, as well as engaging in their usual lobbying activities.<sup>86</sup> These considerable efforts did not

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<sup>80</sup> Minority Rights Group International participated in the sessions of the Working Group held between 1982–84: *1982 Working Group Report*, above n 75, [5A]; *1983 Working Group Report*, above n 73, [5A]; *1984 Working Group Report*, above n 73, [7]. The Four Directions Council attended between 1985–87: *1985 Working Group Report*, above n 73, [7]; *1986 Working Group Report*, above n 73, [7]; *1987 Working Group Report*, above n 73, [8]. The Indian Council of South America attended in 1988–89: *1988 Working Group Report*, above n 73, [8]; *1989 Working Group Report*, above n 73, [8]. The Grand Council of the Crees of Quebec attended in 1989: *1989 Working Group Report*, above n 73, [8]. The attendance of the World Council on Indigenous Peoples in 1989 ensured that the interests of indigenous groups were represented: *1989 Working Group Report*, above n 73, [8]. Religious groups were also strongly represented. The International Catholic Child Bureau had the most impressive attendance record, attending all Working Group sessions between 1981–89: *1981 Working Group Report*, above n 78; *1982 Working Group Report*, above n 75, [5]; *1983 Working Group Report*, above n 73, [5A]; *1984 Working Group Report*, above n 73, [7]; *1985 Working Group Report*, above n 73, [7]; *1986 Working Group Report*, above n 73, [7]; *1987 Working Group Report*, above n 73, [8]; *1988 Working Group Report*, above n 73, [8]; *1989 Working Group Report*, above n 73, [8]. This was closely followed by the Baha'i Faith, which attended every session between 1983 and 1989: *1983 Working Group Report*, above n 73, [5A]; *1984 Working Group Report*, above n 73, [7]; *1985 Working Group Report*, above n 73, [7]; *1986 Working Group Report*, above n 73, [7]; *1987 Working Group Report*, above n 73, [8]; *1988 Working Group Report*, above n 73, [8]; *1989 Working Group Report*, above n 73, [8]. Representatives of Judaism and the Religious Society of Friends (Quakers) also attended on a fairly regular basis.

<sup>81</sup> Cynthia Price Cohen, 'The Role of Nongovernmental Organizations in the Drafting of the Convention on the Rights of the Child' (1990) 12 *Human Rights Quarterly* 137, 139. See also Cantwell, above n 68, 24–5; LeBlanc above n 67, 40–5.

<sup>82</sup> Cohen, above n 81, 141.

<sup>83</sup> *Ibid* 140.

<sup>84</sup> *Ibid*.

<sup>85</sup> Cantwell, above n 68, 24.

<sup>86</sup> *Ibid* 24–5; Cohen, above n 81, 142.

go without reward. The result, as Cynthia Cohen succinctly puts it, is that ‘the imprint of the NGO Group can be found in almost every article.’<sup>87</sup>

NGO involvement in the drafting of the *CROC* can therefore be viewed with some considerable satisfaction. Not only did the NGO Group make a substantial contribution to the drafting of the final text, but also the NGOs that participated in the Working Group sessions did much to improve the overall inclusiveness of the process. Many of the NGOs, such as the International Save the Children Alliance, the International Catholic Child Bureau, Defence for Children International, and International Social Services, are able to boast extensive cross-cultural membership and would therefore have been able to draw on their own extensive local knowledge, or the knowledge of their grassroots members.<sup>88</sup> Other groups, such as Rädä Barnen and Save the Children, although firmly established in the West, have acquired considerable expertise and knowledge of developing world conditions and customs through their work in developing countries. Other NGOs based in the West, such as Minority Rights Group International and ATD Fourth World, have committed themselves to empowering the groups they seek to assist and have therefore been able to give them a voice at the local, national and international level.<sup>89</sup> That is not to say that NGO participation could not have been improved. In particular, NGOs from the developing and Arabic worlds were notably absent. It is also unfortunate that no independent representatives from the Islamic, Hindu or Buddhist faiths attended the Working Group meetings. Given the controversy over many ‘traditional’ practices and attitudes which have strong religious foundations, representatives from these major religions could have made a vitally important contribution to the *CROC*’s norm-setting process.

### B *The Effect of Non-Western Voices on the CROC Text*

Even with such extensive NGO participation, the disappointing level of participation by states from Africa, the Asia-Pacific, Latin America and the Middle East seriously undermined the possibility of securing a fully inclusive final text. However, although states from these regions were small in number, it by no means follows that they were unable to exert any influence over the

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<sup>87</sup> Cohen, above n 81, 142. Cantwell identifies the following *CROC* articles as ones for which the NGO Group were primarily responsible: 9(3), 9(4), 24(3), 28, 29(1)(d)(e), 30, 34, 35, 37, 38(4), 39, 41, 42, 44(6). He identifies the following articles as ones which the NGO Group had a direct impact on formulation, form, or content: 8, 13, 16, 19, 20(3), 23, 25, 27(3), 27(4), 28, 29, 32, 33, 40, 45; Cantwell, above n 68, 25.

<sup>88</sup> Other participating NGOs with worldwide membership included the International Association of Juvenile and Family Court Magistrates, International Commission of Jurists, the International Association of Democratic Lawyers and the Inter-Parliamentary Union.

<sup>89</sup> Eg, in a document prepared for the United Nations Department of Economic and Social Affairs, ATD Fourth World states that: ‘people living in poverty need opportunities to build up confidence – confidence in their right to hold views, to articulate their thoughts, to have a voice ... They need to know that they are really being listened to and that their contributions are valued’: International Movement ATD Fourth World, *Redefining Human Rights-Based Development: The Wresinski Approach to Partnership with the Poorest* (1999) <<http://www.atd-quartmonde.org/Cop+5UN.htm>> at 24 August 2001.

content of the *CROC*. Close analysis of the *travaux préparatoires* and the final *CROC* text suggests, perhaps somewhat surprisingly, that the determined and constructive participation throughout the drafting process of states such as Algeria, Argentina, Senegal and Venezuela ensured that the *CROC* reflected, at least to some extent, a diversity of cultural traditions.

### 1 *Recognition of Duties as Well as Rights*

One of the key differences between the philosophical traditions of states in the West and the philosophical traditions of non-Western states is their respective understanding of the relationship between rights and duties. In particular, some traditional cultures in the developing world prioritise duties to the family, the community and the country over individual rights. The *African Charter on the Rights and Welfare of the Child* ('*African Charter*')<sup>90</sup> provides an interesting point of comparison. Article 31 of the *African Charter* makes it clear that, in addition to rights, the child has certain duties and responsibilities:

Every child shall have responsibilities towards his family and society, the state and other legally recognised communities and the international community. The child, subject to his age and ability and such limitation as may be contained in the present Charter, shall have the duty:

- (a) to work for the cohesion of the family, to respect his parents, superiors and elders at all times and to assist them in case of need;
- (b) to serve his national community by placing his physical and intellectual abilities at its service;
- (c) to preserve and strengthen social and national solidarity;
- (d) to preserve and strengthen African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and to contribute to the moral well-being of society;
- (e) to preserve and strengthen the independence and the integrity of his country;
- (f) to contribute to the best of his abilities, at all times and at all levels, to the promotion and achievement of African Unity.

Similarly, article 20 sets down the duties and responsibilities of the child's parents:

Parents or other persons responsible for the child shall have the primary responsibility of the upbringing and development of the child and shall have the duty:

- (a) to ensure that the best interests of the child are their basic concern at all times;
- (b) to secure within their abilities and financial capacities conditions of living necessary to the child's development; and
- (c) to ensure that domestic discipline is administered with humanity and in a manner consistent with the inherent dignity of the child.

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<sup>90</sup> Opened for signature 11 July 1990, OAU Doc CAB/LEG/24.9/49 (1990) (entered into force 29 November 1999).

If states from the African region had been given an equal voice in the Working Group, it would be expected that the *CROC* might reflect these provisions. In fact, the *CROC* does contain some limited recognition of the importance of duties and responsibilities as well as rights. Although there is no direct parallel to article 31 of the *African Charter*, at the 1989 session of the Working Group Senegal proposed including an article which recognised that ‘the child has the duty to respect his parents and to give them assistance, in case of need.’<sup>91</sup> The proposal attracted considerable support from some delegations.<sup>92</sup> Other members of the Working Group were, however, more cautious. Whilst not openly hostile to the idea of children having a duty to respect their parents, those members felt this was a moral, not a legal, obligation and would be impossible for the state to police.<sup>93</sup> In light of this, Canada suggested it would be more appropriate to discuss the proposal within the context of article 16, which is now article 29.<sup>94</sup> Senegal agreed, and the issue when raised again attracted no debate. An amendment to article 29(1)(c) to include ‘development of respect for the child’s parents’ as one of the objectives of education was adopted without comment.<sup>95</sup>

Clearly article 29(1)(c) falls far short of Senegal’s initial proposal to impose a legal duty on children to respect their parents and render them assistance in case of need. To that extent, particularly given the importance of the principle in many cultures, the failure of the Working Group to incorporate Senegal’s proposal in its initial form is disappointing. However, given that the imposition of such duties on a child within the context of an international human rights convention would be extremely controversial, the prospect of reaching a consensus on the issue was always remote. It is therefore at least encouraging that, rather than simply dismissing the idea, the Working Group sought a compromise solution. This ensured that the central principle lying behind the Senegalese proposal — the importance of instilling within the child a sense of responsibility and duty towards parents and community — was not completely absent from the final *CROC* text.

The *CROC* also contains limited recognition of the duties and responsibilities of the child’s parents. The most important provision in this respect is article 18. The basic working text on article 18, as adopted by the 1980 Working Group, read:

The duty of bringing up the child shall lie equally with both the parents, who, in any case should be guided by his best interests and, in keeping with their own

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<sup>91</sup> 1989 Working Group Report, above n 73, [704].

<sup>92</sup> Ibid [707].

<sup>93</sup> Ibid [706].

<sup>94</sup> Ibid [709]. Article 29 sets down the objectives of education.

<sup>95</sup> Ibid [475].

beliefs and in compliance with the stipulations of article 7, shall prepare him for an individual life.<sup>96</sup>

The US attempted to rephrase the article so that, rather than impose a direct duty on the child's parents, it simply imposed an obligation on states to recognise the 'common responsibility of men and women in the upbringing and development of their children.'<sup>97</sup> This attempt to remove all direct reference to the duties of parents was not, however, entirely successful. Following the debate on the proposed article, the Working Group decided to retain the original text, recognising the primary responsibility of the child's parents, as well as to incorporate the US proposal regarding the obligations of the state:

Parents or, as the case may be, guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern. States parties shall use their best efforts to ensure recognition of the principle that both parents have common and similar responsibilities for the upbringing and development of the child.<sup>98</sup>

At the 1989 session of the Working Group, the US objected to this formulation of the article, commenting that 'the way in which paragraph 1 had been formulated to create responsibilities for private individuals was rather strange for an international covenant which, after all, could only create binding obligations for ratifying Governments'.<sup>99</sup> Despite these objections the substance of the article remained unchanged.

## 2 *Recognition of Diverse Family Forms*

A second key area in which the Working Group needed to be particularly sensitive and responsive to cultural difference was the concept of 'family'. Family structures and corresponding responsibilities for the care of children vary greatly among differing cultural traditions. Whereas the ideal model of family life found in the West is that of the nuclear household headed by two parents, many tribal and indigenous cultures recognise a much wider, less structured concept of the extended family.<sup>100</sup> The extended family may include grandparents, siblings, aunts and uncles, with child care responsibilities shared among them. A different concept of the 'nuclear family' is also found in many Islamic states.<sup>101</sup>

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<sup>96</sup> Question of a Convention on the Rights of the Child: Note Verbale Dated 5 October 1979 Addressed to the Division of Human Rights by the Permanent Representation of the Polish People's Republic to the United Nations in Geneva (17 January 1980) UN Doc E/CN.4/1349, 3.

<sup>97</sup> *1981 Working Group Report*, above n 78, [84].

<sup>98</sup> *Ibid* [95].

<sup>99</sup> *1989 Working Group Report*, above n 73, [311].

<sup>100</sup> See the explanation of the importance of the extended family given in the South African State Party Report: CRC, *Initial Report of States Parties Due in 1997: South Africa*, UN Doc CRC/C/51/Add.2 (22 May 1999) [276].

<sup>101</sup> In his study of the concept of the family in Islamic life, Hammūdah 'Abd al 'Atī, states that 'the family in Islam is not fully of the nuclear type', and uses the term 'family' to designate

Russell Barsh argues that the concept of ‘family’ employed in the *CROC* is inherently ‘euro-centric’ because it excludes from its ambit the central role played by members of the extended family in the upbringing and care of children.<sup>102</sup> However, although many of the references within the *CROC* are restricted to parents or legal guardians, the important role played by members of the extended family is expressly recognised. Article 5 of the *CROC* deals with the crucial relationship between the child, its caregivers and the state. It provides that

States Parties shall respect the responsibilities, rights and duties of parents, or, where applicable the *members of the extended family or community* as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognised in the present Convention.<sup>103</sup>

The text for this article was first submitted by the delegations of Australia and the US at the 1987 session of the Working Group.<sup>104</sup> At that stage, the protection guaranteed to the family ‘as the natural and fundamental unit of society’ covered only ‘parents or legal guardians.’<sup>105</sup> However, at the 1989 session of the Working Group, several delegations questioned the scope of the article, arguing that the *CROC* should recognise the ‘notion of extended family or community responsibility for the child.’<sup>106</sup> The *1989 Working Group Report* records that, although there was no strong opposition to this suggestion, an objection was raised that introducing the concept of the extended family ‘would change essentially the traditional triangular responsibility for the child.’<sup>107</sup> The Working Group was not persuaded by this concern and despite the express preference of at least one delegate to retain the original text, article 5 was successfully amended to reflect those ‘local customs’ which recognise the role of the extended family in providing an alternative to parental care.

The recognition afforded to the extended family in article 5 is particularly significant because of the central role played by that article within the overall framework of the *CROC*. When the US delegate first introduced the article to the Working Group for discussion, he requested that it be included early in the *CROC* to emphasise ‘its importance and relationship to all the other rights

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a special kind of structure whose principles [sic] are related to one another through blood ties and/or marital relationships, and whose relatedness is of such a nature as to entail ‘mutual expectations’ that are prescribed by religion, reinforced by law, and internalized by the individual.

Hammūdāh ‘Abd al ‘Aṭī, *The Family in Islam* (1977) 19–20 (citations omitted).

<sup>102</sup> Russell Barsh, ‘The Convention on the Rights of the Child: A Re-Assessment of the Final Text’ (1989) 7 *New York Law School Journal of Human Rights* 142, 146–7.

<sup>103</sup> *CROC*, above n 2, art 5 (emphasis added).

<sup>104</sup> *1987 Working Group Report*, above n 73, [100].

<sup>105</sup> *Ibid.*

<sup>106</sup> *1989 Working Group Report*, above n 73, [180].

<sup>107</sup> *Ibid.*

contained in the draft Convention.<sup>108</sup> Given that a number of articles within the *CROC* refer to those who have primary responsibility for the care of the child,<sup>109</sup> article 5 provides an essential point of reference for interpretation. It is therefore difficult to agree with Barsh that the concept of 'family' adopted within the *CROC* is 'euro-centric'. On the contrary, the importance of article 5, both as a free-standing article and as an interpretative provision, has done much to ensure that the concept of 'family' employed in the *CROC* should have meaning for a wide variety of cultures and traditions.

### 3 *Harmful Traditional Practices*

The issue of how best to deal with harmful traditional practices brings into sharp relief the potential conflict between human rights and the need to respect cultural diversity. As the representative of Senegal pointed out in the Working Group debate on article 24(3), States Parties must exercise 'prudence when dealing with issues that [entail] differences in cultural values.'<sup>110</sup> In fact, the way in which the issue was dealt with in the Working Group reflects the importance of the strong and constructive contribution made by developing states.

It was Rädä Barnen International, on behalf of the NGO Group, which first put forward a concrete proposal to include an additional paragraph, under article 24, dealing specifically with harmful traditional practices. The proposed text read:

The States Parties to the present Convention shall seek to eradicate traditional practices harmful to the health of children and shall take all appropriate action including necessary legislative, administrative, social and educational measures to ensure that children are not subjected to such practices.<sup>111</sup>

Although Senegal 'counselled prudence' in dealing with this issue, there was no absolute hostility concerning the inclusion of an article dealing with harmful traditional practices. The discussion in the Working Group centred on the most appropriate wording and, in particular, whether or not the article should make specific reference to female circumcision.<sup>112</sup> The US delegation argued that including 'female circumcision' after 'traditional practices' would 'explicitly address the traditional practice of greatest concern' and would demonstrate that 'the practices to be abolished were those of a serious nature.'<sup>113</sup> Similar proposals were put forward by the representatives of the UK, Canada and the Netherlands.<sup>114</sup> However, despite the widespread support for making specific reference to the practice of female circumcision, it was not included in the final text. The explanation for this lies in the determined stance taken on the issue by

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<sup>108</sup> *1987 Working Group Report*, above n 73, [101].

<sup>109</sup> Arts 3(2), 19, 20, 20(3), 26(2), 27.

<sup>110</sup> *1987 Working Group Report*, above n 73, [29].

<sup>111</sup> *1986 Working Group Report*, above n 73, [50].

<sup>112</sup> *1987 Working Group Report*, above n 73, [28]–[39].

<sup>113</sup> *Ibid* [35].

<sup>114</sup> *Ibid* [29], [30], [38] respectively.

the Senegalese delegate. Although he was prepared to support a general provision dealing with harmful traditional practices, he was adamant that female circumcision should not be singled out.<sup>115</sup> In the face of this opposition, it was clear that the Working Group would have to drop the reference if it was to secure a consensus and it duly agreed to do so.<sup>116</sup>

Senegal was also successful in resisting the West's attempts to strengthen the article in other respects. The Netherlands was unhappy with the strength of the obligations to be undertaken by the state and wanted the expression 'States Parties to the present Convention shall seek to eradicate' to be replaced with 'more forceful language'.<sup>117</sup> However, when the Senegalese delegation amended the draft text to reflect the points which had been raised in the Working Group debate, it effectively ignored the Netherlands objections and retained the original language without comment.<sup>118</sup>

Senegal's active participation in the drafting of article 24(3) clearly had a strong impact on the final text. In terms of assessing the inclusiveness of the drafting process, such strong and effective participation by a state from the developing world is to be welcomed. Some commentators have, however, expressed disappointment in the consensus reached. Lawrence LeBlanc comments that the compromise reached over female circumcision

was a significant concession to Third World states. It is one of the most important examples of how the cultural diversity of the United Nations forced a compromise that, rather than making advances in the area of children's rights, actually resulted in the adoption of very weak norms.<sup>119</sup>

It is true that the obligation on States Parties under article 24(3) is weak. However, the importance of securing agreement from states, such as Senegal, in a binding international convention, that they must work to abolish all traditional practices harmful to health, must not be underestimated. A more inclusive drafting process does entail the possibility that states with differing cultural values will disagree on what should be included within a convention. There is also a strong possibility that the states in which these practices continue will be reluctant to accept stringent obligations to abolish them. The result in relation to the *CROC* was the adoption of a weaker norm than states from the West would have liked. However, it is only by securing the agreement and cooperation of states where these practices continue that progress on the issue will be made. Having made space for states such as Senegal at the negotiation table, the international community secured cross-cultural agreement on the basic principle that practices harmful to health must be eradicated, whether embedded in cultural values or not. This marks an important step forward in the protection of children's rights.

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<sup>115</sup> Ibid [38].

<sup>116</sup> Ibid [39].

<sup>117</sup> Ibid [32].

<sup>118</sup> Ibid [37].

<sup>119</sup> LeBlanc, above n 67, 88–9.



#### 4 *Continuing Domination by the West?*

These specific examples of successful attempts by non-Western states to secure the recognition of particular cultural values and practices are important. They are, however, limited. The possibility of this small group of states exerting any great influence over a Working Group dominated by powerful Western nations was always remote. This is particularly so when the quality, as well as the quantity, of participation by non-Western states is taken into account. A truly inclusive drafting procedure requires the participation of non-Western states that can negotiate from a position of equality with their richer, more powerful counterparts. States from the developing world have complained that this is simply not possible when they lack the financial resources to train skilled and competent staff, and to provide them with the technical support they require to participate effectively in treaty negotiations.<sup>120</sup> LeBlanc argues that this complaint is borne out by the difference in quality between developing world and developed world representatives at the *CROC Working Group*. He observes that, whereas the representatives of the developed world tended to be 'experts and higher ranking diplomatic agents', representatives of the developing world tended to be 'lower ranking members of their permanent delegations to the United Nations'<sup>121</sup> who presumably lacked the authority, knowledge and expertise of their developed world colleagues.

There was certainly a strong feeling among some states that Western domination of the Working Group resulted in the marginalisation of their views. During the 1988 session of the Working Group, Senegal, supported by Morocco and Egypt, launched an unequivocal attack on the perceived inadequacies of the drafting process. According to the *1988 Working Group Report*,

the Senegalese representative nevertheless stated that the drafting exercise had failed to take account of the concerns of the developing countries and he expressed his concern over the imbalance of the draft, which did not reflect the universality that was desired ... He also indicated his misgivings concerning the future work of the working group if the concerns and needs of developing countries were not borne in mind at all times. He urged the Working Group to be more responsive to those countries in the course of the second reading of the draft convention so that there would be more chance of universal recognition of the future convention.<sup>122</sup>

The response of Adam Lopatka, the Chairperson of the Working Group, to these concerns was defensive. He dismissed the Senegalese complaint out of hand, arguing that

participants from a wide range of developing and developed countries had taken part in the work of the group and that, through their declarations and suggestions,

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<sup>120</sup> Ibid 11.

<sup>121</sup> Ibid 27.

<sup>122</sup> *1988 Working Group Report*, above n 73, [251].

they had made significant and positive contributions to the draft convention ... which reflected universal concerns.<sup>123</sup>

This was a view obviously not shared by the Senegalese delegation and they reiterated their concern at the 1989 session of the Working Group. The *1989 Working Group Report* recorded that:

The representative of Senegal stated that account should be taken of the concerns of the developing countries to ensure that the draft convention reflected the desired universality. The concerns and needs — including cultural needs — of all countries, but particularly of the developing countries, to express their aspirations and to make their contributions to the draft convention should be taken into account. Noting that the same concerns had been expressed at previous sessions of the Working Group, he expressed the hope that the current session would see reflected in the draft convention the cultural diversity of the various nations and that universality which was so much desired.<sup>124</sup>

Quite considerable support for the concern expressed by Senegal can be found in the way the Working Group dealt with article 14 of the *CROC*. As the Working Group operated on the basis of ‘consensus’, this article should not have been included within the final *CROC* text unless all the members of the group were in agreement. However, far from the existence of a consensus, the reports of the Working Group suggest that the article was adopted despite fierce opposition, particularly from Islamic states.

The question of including a right to freedom of religion was first discussed in detail at the third session of the Working Group in 1983, when the US representative reintroduced a proposal he had first made in 1982.<sup>125</sup> It was made clear to the Working Group at this very early stage of the debate that the inclusion of such a right would cause considerable difficulty for Islamic states, because of the inherent conflict that existed between the right to freedom of religion and the fundamental tenets of the Muslim faith. As explained to the Working Group, in many Islamic countries ‘a child follows the religion of his parents and does not generally make a choice of his own.’<sup>126</sup> Given this opposition, it proved impossible to reach an agreement on the incorporation of article 14 at the 1983 session of the Working Group.<sup>127</sup>

The US was more successful the following year. After a largely technical debate, in which only Western states participated, the US secured agreement on the adoption of the basic text of article 14.<sup>128</sup> However, this far from ended the controversy. In the last four sessions of the Working Group, Islamic opposition to the inclusion of the right intensified, as did the determination of the

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<sup>123</sup> *Ibid* [252].

<sup>124</sup> *1989 Working Group Report*, above n 73, [12].

<sup>125</sup> *1983 Working Group Report*, above n 73, [52].

<sup>126</sup> *Ibid* [55].

<sup>127</sup> *Ibid* [56].

<sup>128</sup> *1984 Working Group Report*, above n 73, [15]–[33]. Participants in the debate included the Holy See, Canada, US, the Netherlands and Finland.

Chairperson that it would stay.<sup>129</sup> Dissent on the inclusion of article 14 was first voiced again by Bangladesh in a special paper submitted to the Working Group in 1986.<sup>130</sup> In the paper, Bangladesh argued that cultural and religious diversity on the question of the child's right to freedom of religion had to be respected. They emphasised that this freedom, which is typical of the liberal, secular ideology of the West, was completely foreign to other societies, by stating:

Article [14] appears to run counter to the traditions of the major religious systems of the world and in particular to Islam. It appears to infringe upon the sanctioned practice of a child being reared in the religion of his parents. We believe that the article as presently drafted will give rise to considerable difficulties in application and appears also to be in conflict with Article [18].<sup>131</sup>

The same objection was raised again by Morocco at the 1988 meeting of the Working Group. The Moroccan delegation reiterated the 'reservations' which had already been raised to this article because of its incompatibility with the basic tenets of Islam. It again pointed out that

[t]he above rule not only raised a problem of assessment of the best interests of the child and his capacity of forming his own views, but was in contradiction with certain provisions of the Moroccan Code on Personal Status. Furthermore, article [14], which allowed the child (under the age of 18) freely to choose his religion, ran counter to the principles of Muslim law: the child of a Muslim was bound to be a Muslim, and in order to renounce that fact, he had to conform to the rules of Muslim law on the matter.<sup>132</sup>

The objections raised by Bangladesh seemed to go unnoticed by the Working Group at its subsequent sessions, but Morocco's objection at least received a response, albeit completely dismissive. The *1988 Working Group Report* recorded that

[t]here was a general consensus on not reopening the discussion on texts already adopted. It was stated that article [14], as already adopted, reflected globally all points of view and covered all aspects relating to divorce, adoption, custody and career development concerning minors.<sup>133</sup>

Given that this was the third occasion on which an Islamic state had voiced strong dissent to article 14, it seems somewhat disingenuous to suggest that article 14 'as adopted, reflected globally all points of view.'<sup>134</sup>

The complete absence of any kind of 'global' consensus on this text, and the increasing frustration of the Islamic states that their objections were not being given proper consideration, became obvious during the course of the final

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<sup>129</sup> See generally: *1986 Working Group Report*, above n 73; *1987 Working Group Report*, above n 73; *1988 Working Group Report*, above n 73.

<sup>130</sup> *1986 Working Group Report*, above n 73, annex IV.

<sup>131</sup> *Ibid* 2. Art 18 addresses the 'primary' responsibility of parents or legal guardians for the upbringing of their children.

<sup>132</sup> *1988 Working Group Report*, above n 73, [42].

<sup>133</sup> *Ibid* [43].

<sup>134</sup> *Ibid*.

session of the Working Group in 1989, when it was clearly divided. There were those who felt that amending the adopted text was unacceptable,<sup>135</sup> because it lowered the standards already established in various human rights instruments, particularly the *International Covenant on Civil and Political Rights* ('*ICCPR*').<sup>136</sup> Others felt that agreement on the issue would be impossible, unless an alternative text was adopted, which 'better reflected the position of those who could not accept any provision giving the child a freedom to choose and change his or her religion or belief.'<sup>137</sup> During the ensuing debate, an explicit appeal was made regarding the importance of respecting the views of all those involved in the process. The *1989 Working Group Report* recorded that

[i]t was emphasised by some speakers that in the final analysis article [14] should reflect all legal systems and all models of social development. One participant urged that all attempts to impose one's position upon other delegations should be abandoned as contrary to the principal task of the Working Group which was to elaborate a universally acceptable legal document.<sup>138</sup>

At this point of the discussion, the Chairperson conceded that a consensus on the various proposals was not going to be possible.<sup>139</sup> However, rather than abandon the article, as suggested by some delegations, he proposed a compromise, whereby the basic right to freedom of thought, conscience and religion would be guaranteed, but the express right of children to choose their own religion would be removed.<sup>140</sup> Having tabled this suggestion, the Chairperson immediately declared that this considerably abridged version of article 14 was not controversial and adopted it without any further debate.<sup>141</sup>

The amendment to article 14 secured at the final session of the Working Group amounted to a significant victory for the Islamic states. Their success in finally forcing a response from the Working Group on the right to freedom of religion undoubtedly lay in the increase in the number of states from the Middle East which participated in the 1989 session. LeBlanc argues that nine of the 17 states from this region attended the meeting with the 'main objective of pushing through last-minute substantive changes in the norms of the Convention, to make them more compatible with Islamic thought and practice.'<sup>142</sup> Without doubt the increased strength of the Islamic group made their objections difficult to ignore and they used this power to extract some important concessions from the Working Group. These concessions were obtained not only on article 14, but also on article 21, dealing with adoption, and article 7, dealing with the right of a child to know and be cared for by his or her parents. The increased participation

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<sup>135</sup> *1989 Working Group Report*, above n 73, [285].

<sup>136</sup> Opened for signature 19 December 1966, 999 UNTS 171, 6 ILM 368 (entered into force 23 March 1976).

<sup>137</sup> *1989 Working Group Report*, above n 73, [286].

<sup>138</sup> *Ibid* [287].

<sup>139</sup> *Ibid* [288].

<sup>140</sup> LeBlanc, above n 67, 35.

<sup>141</sup> *1989 Working Group Report*, above n 73, [288].

<sup>142</sup> LeBlanc, above n 67, 35.

by Middle Eastern states mirrored, albeit less dramatically, the number of states attending from other geographical regions, including, most importantly, Africa, the Asia-Pacific and Latin America.<sup>143</sup> Although the impact of these increased attendance rates was mitigated to some degree by similar increases in attendance by states from Western and Eastern Europe,<sup>144</sup> the 1989 session of the Working Group was considerably more balanced than previous sessions. It is a matter for speculation as to how the *CROC* would have looked if the drafting process had been more balanced and inclusive throughout the ten years of its drafting history.

The above analysis makes clear that the concerns expressed by the Senegalese delegation over the deficiencies in the drafting procedure were, to a large extent, justified. There are certainly many other examples of the concerns of states from the developing world being effectively ignored by the Working Group.<sup>145</sup> In terms of the overall balance of the *CROC* and the respect it affords to the values and practices of non-Western cultures, the *CROC* is a great improvement on many other UN human rights instruments.<sup>146</sup> It is evident, however, that a great deal more work still needs to be done to improve both the quantity and effectiveness of non-Western participation in the drafting process of international conventions if the ideals of a fully inclusive, cross-cultural human rights regime are to be realised.

## V THE INTERPRETATION AND IMPLEMENTATION OF UNIVERSAL STANDARDS

Achieving agreement on culturally legitimate universal norms is the first crucial step towards a more effective system of international human rights. The next step in seeking to ensure that human rights are meaningful to people across the world's social, cultural and economic divides is the process of interpretation and implementation. Human rights norms are, by their very nature, formed at an extremely general and abstract level. Some commentators argue that this is a serious weakness in the human rights regime. They argue that international human rights standards on which universal consensus proves possible are so vague and general, and subject to such differing interpretations, that it is never clear whether or not a norm has been violated.<sup>147</sup> However, whilst it is certainly true that human rights norms can often be interpreted in many different ways, this is not necessarily a weakness in the international human rights regime. To

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<sup>143</sup> Ibid 36.

<sup>144</sup> Ibid 37.

<sup>145</sup> Examples include detailed proposals by Algeria to (1) impose obligations on States Parties to cooperate and assist in the economic and social development of developing world states, including the right to food; (2) to recognise the needs of states living under colonial domination or foreign occupation; and (3) to include the right of peoples to self-determination: see *1987 Working Group Report*, above n 73, [40]; *1985 Working Group Report*, above n 73, [96]; *1983 Working Group Report*, above n 73, annex II.

<sup>146</sup> Alston, above n 5, 7. Other human rights instruments to which the *CROC* could be favourably compared in this regard are the *ICCPR* and the *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13, 19 ILM 33 (entered into force 3 September 1981).

<sup>147</sup> See, eg, John Tilley, 'Cultural Relativism' (2000) 22 *Human Rights Quarterly* 501, 514.

the contrary, it is a further means of ensuring that the international community remains responsive to the demands of cultural difference.

The generality and flexibility of language employed in formulating human rights standards allows each community to interpret the standard in a manner which is informed by, and relevant to, its own particular cultural traditions and values.<sup>148</sup> If human rights norms are to have cross-cultural meaning and relevance they cannot be interpreted at an abstract level. Adopting the language of Eva Brems, general abstract norms must be contextualised.<sup>149</sup> They must be 'given a measure of concreteness, specificity or particularity' in light of the specific needs, practices and values of particular groups.<sup>150</sup> The CRC, which is charged with the responsibility of interpreting and implementing the standards enshrined in the *CROC*, will undoubtedly find that there are significant differences in the interpretations given to its various provisions. If the CRC is to be responsive to the demands of cultural difference, it is essential that it recognises the legitimacy of these differing interpretations. In particular, it must avoid dismissing one state's culturally based interpretation of a *CROC* norm in favour of an alternative culturally based interpretation.

Cultural context is equally important when it comes to the question of a state's compliance with *CROC* obligations. It is a trite observation that what may look like a 'harmful traditional practice' to an outside observer, may look very different when properly considered against the cultural values of that community. Again, if the CRC is to be responsive to the demands of cultural difference, it must evaluate the practices and attitudes of particular groups in light of their socioeconomic needs, traditions and beliefs.

#### A *The Committee on the Rights of the Child and Its Interpretation of the CROC*

Given the flexibility of language employed in the *CROC* and the susceptibility of its provisions to differing interpretations, it is certainly open to the CRC to adopt and promote a positive view of cultural and religious diversity when interpreting and applying *CROC* norms.<sup>151</sup> The commitment given by States Parties in article 43 of the *CROC* to ensure that the CRC members represent a wide range of cultural and legal traditions should also assist in ensuring a culturally sensitive approach, particularly as the membership of the CRC has in fact reflected this desired diversity.<sup>152</sup> Unfortunately, despite these

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<sup>148</sup> Ibid.

<sup>149</sup> Brems, above n 40, 158. Tilley terms this 'situationism': ibid 520.

<sup>150</sup> Brems, above n 40, 158.

<sup>151</sup> See generally Cynthia Price Cohen, 'Elasticity of Obligation and the Drafting of the Convention on the Rights of the Child' (1987) 3 *Connecticut Journal of International Law* 71.

<sup>152</sup> Article 43 of the *CROC* provides:

positive indicators, the work of the CRC in this respect has been extremely disappointing.

After examining State Party reports, the CRC adopts its *Concluding Observations*, in which it indicates positive aspects of the state's performance, the factors and difficulties impeding implementation of the *CROC*, its principal subjects of concern, suggestions and recommendations. The CRC's *Concluding Observations* have, with only very limited exceptions, presented non-Western cultural values and practices in an entirely negative light.<sup>153</sup> The CRC has identified traditional and/or cultural practices, including customary law, as a factor impeding the implementation of the *CROC* in the case of 41 states.<sup>154</sup> To

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The Committee shall consist of ten experts of high moral standing and recognised competence in the field covered by this Convention. The members of the Committee shall be elected by States Parties from among their nationals and shall serve in their personal capacity, consideration being given to equitable geographical distribution, as well as to the principal legal systems.

As of September 2001, the members of the CRC were: Abdul Aziz Al-Sheddi (Saudi Arabia, elected 2001), Ghalia Mohd Bin Hamad Al-Thani (Qatar, elected 2001), Saisuree Chutikul (Thailand, elected 2001), Luigi Citarella (Italy, elected 2001), Jacob Egbert Doek (Netherlands, elected 1999), Amina Hamza El Guidi (Egypt, elected 1999), Elisabeth Tigerstedt-Tähtelä (Finland, elected 1999), Awa N'Deye Ouedraogo (Burkina Faso, elected 1997), Judith Karp (Israel, elected 1995) and Marilia Sardenberg (Brazil, elected 1991): Office of the High Commissioner for Human Rights, *Treaty Body Database* <<http://www.unhchr.ch/tbs/doc.nsf/>> at 24 August 2001.

- <sup>153</sup> Based on an examination of the CRC's *Concluding Observations* over an eight year period from the beginning of its work in 1992 to the conclusion of its 23<sup>rd</sup> Session in January 2000. (For the purposes of the following discussion I have also included the Committee's consideration of Jordan's second periodic report at the 24<sup>th</sup> Session in May–June 2000.) During that period the CRC made only two references to traditional practices which could be construed in a positive light: a reference to the importance of traditional education within remote communities, in the case of Vanuatu: CRC, *Report on the Twenty-Second Session*, UN Doc CRC/C/90 (7 December 1999) [156]; and the use of traditional mechanisms of conciliation in the juvenile justice system, in the case of the Lao People's Democratic Republic: CRC, *Concluding Observations of the Committee on the Rights of the Child: Lao People's Democratic Republic*, UN Doc CRC/C/15/Add.78 (10 October 1997) [53].
- <sup>154</sup> See CRC, *Concluding Observations of the Committee on the Rights of the Child: Burkina Faso*, UN Doc CRC/C/15/Add.19 (25 April 1994) [5]; CRC, *Concluding Observations of the Committee on the Rights of the Child: Honduras*, UN Doc CRC/C/15/Add.105 (24 August 1999) [19]; CRC, *Concluding Observations of the Committee on the Rights of the Child: Indonesia*, UN Doc CRC/C/15/Add.7 (18 October 1993) [6]; CRC, *Concluding Observations of the Committee on the Rights of the Child: Jamaica*, UN Doc CRC/C/15/Add.32 (15 February 1995) [6], [11], [22], [27]; CRC, *Concluding Observations of the Committee on the Rights of the Child: Jordan*, UN Doc CRC/C/15/Add.21 (25 April 1994) [8]; CRC, *Concluding Observations of the Committee on the Rights of the Child: Madagascar*, UN Doc CRC/C/15/Add.26 (14 October 1994) [6], [8], [17]; CRC, *Concluding Observations of the Committee on the Rights of the Child: Namibia*, UN Doc CRC/C/15/Add.14 (7 February 1994) [5], [15]; CRC, *Concluding Observations of the Committee on the Rights of the Child: Nicaragua*, UN Doc CRC/C/15/Add.36 (20 June 1995) [9]; CRC, *Concluding Observations of the Committee on the Rights of the Child: Pakistan*, UN Doc CRC/C/15/Add.18 (25 April 1994) [8]; CRC, *Concluding Observations of the Committee on the Rights of the Child: Philippines*, UN Doc CRC/C/15/Add.29 (15 February 1995) [5]; CRC, *Concluding Observations of the Committee on the Rights of the Child: Poland*, UN Doc CRC/C/15/Add.31 (15 January 1995) [12]; CRC, *Concluding Observations of the Committee on the Rights of the Child: Senegal*, UN Doc

take the example of Chad, the CRC noted that

certain traditional practices and customs, prevailing particularly in rural areas, hamper the effective implementation of the Convention, especially with regard to girls.<sup>155</sup>

Attitudes and practices based on deeply entrenched religious beliefs fare no better. To take just one example, in the case of Jordan the *CRC's Concluding Observations* stated:

Noting the universal values of equality and tolerance inherent in Islam, the Committee observes that narrow interpretations of Islamic texts by authorities, particularly in areas relating to family law, are impeding the enjoyment of some human rights protected under the Convention.<sup>156</sup>

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CRC/C/15/Add.44 (27 November 1995) [8]; CRC, *Concluding Observations of the Committee on the Rights of the Child: Sudan*, UN Doc CRC/C/15/Add.6 (18 February 1993) [4]; CRC, *Concluding Observations of the Committee on the Rights of the Child: Sudan*, UN Doc CRC/C/15/Add.10 (18 October 1993) [13]; CRC, *Concluding Observations of the Committee on the Rights of the Child: Tunisia*, UN Doc CRC/C/15/Add.39 (21 June 1995) [5]; CRC, *Concluding Observations of the Committee on the Rights of the Child: Viet Nam*, UN Doc CRC/C/15/Add.3 (18 February 1993) [5]; CRC, *Concluding Observations of the Committee on the Rights of the Child: Yemen*, UN Doc CRC/C/15/Add.47 (13 February 1996) [5]; CRC, *Concluding Observations of the Committee on the Rights of the Child: Yemen*, UN Doc CRC/C/15/Add.102 (10 May 1999) [8]; CRC, *Concluding Observations of the Committee on the Rights of the Child: Zimbabwe*, UN Doc CRC/C/15/Add.55 (7 June 1996) [11], [13], [26]; CRC, *Concluding Observations of the Committee on the Rights of the Child: China*, UN Doc CRC/C/15/Add.56 (7 June 1996) [9], [12]; CRC, *Concluding Observations of the Committee on the Rights of the Child: Nepal*, UN Doc CRC/C/15/Add.57 (7 June 1996) [12], [26]; CRC, *Concluding Observations of the Committee on the Rights of the Child: Guatemala*, UN Doc CRC/C/15/Add.58 (7 June 1996) [30]; CRC, *Concluding Observations of the Committee on the Rights of the Child: Morocco*, UN Doc CRC/C/15/Add.60 (30 October 1996) [4], [22]; CRC, *Concluding Observations of the Committee on the Rights of the Child: Nigeria*, UN Doc CRC/C/15/Add.61 (30 October 1996) [6], [8]; CRC, *Concluding Observations of the Committee on the Rights of the Child: Uruguay*, UN Doc CRC/C/15/Add.62 (11 October 1996) [26]; CRC, *Concluding Observations of the Committee on the Rights of the Child: Ethiopia*, UN Doc CRC/C/15/Add.67 (24 January 1997) [8]; CRC, *Concluding Observations of the Committee on the Rights of the Child: Ghana*, UN Doc CRC/C/15/Add.73 (18 June 1997) [6]–[7]; CRC, *Concluding Observations of the Committee on the Rights of the Child: Bangladesh*, UN Doc CRC/C/15/Add.74 (18 June 1997) [10], [12], [38]; CRC, *Concluding Observations of the Committee on the Rights of the Child: Algeria*, UN Doc CRC/C/15/Add.76 (18 June 1997) [9]; CRC, *Concluding Observations of the Committee on the Rights of the Child: Uganda*, UN Doc CRC/C/15/Add.80 (21 October 1997) [7], [9]; CRC, *Concluding Observations of the Committee on the Rights of the Child: Togo*, UN Doc CRC/C/15/Add.83 (10 October 1997) [7]; CRC, *Concluding Observations of the Committee on the Rights of the Child: Micronesia*, UN Doc CRC/C/15/Add.86 (4 February 1998) [6], [22]; CRC, *Report on the Nineteenth Session*, UN Doc CRC/C/80 (9 October 1998) [44]; CRC, *Report on the Twentieth Session*, UN Doc CRC/C/84 (5 March 1999) [76], [97]; CRC, *Report on the Twenty-First Session*, UN Doc CRC/C/87 (30 July 1999) [43], [138], [174]; CRC, *Report on the Twenty-Second Session*, UN Doc CRC/C/90 (7 December 1999) [142], [202]; CRC, *Report on the Twenty-Third Session*, UN Doc CRC/C/94 (3 March 2000), [41], [63], [121], [122], [135], [423].

<sup>155</sup> CRC, *Report on the Twenty-First Session*, UN Doc CRC/C/87 (30 July 1999) [174].

<sup>156</sup> CRC, *Concluding Observations of the Committee on the Rights of the Child: Jordan*, UN Doc CRC/C/15/Add.125 (2 June 2000) [9].



Similarly, the CRC concluded its consideration of Jordan's second periodic report by taking the unequivocal position that, 'Islamic customs and traditions clearly had an adverse impact on the lives of women and children'.<sup>157</sup>

The CRC's overwhelmingly negative view of non-Western culture and tradition is particularly disappointing in the face of efforts by some states to encourage the CRC to take account of and respect the particular socioeconomic and cultural conditions prevailing within their territory.<sup>158</sup> The CRC's dialogue with states that are especially concerned that due account be taken of religious autonomy, provide particularly good examples of the CRC's negative response to such arguments. At several points during its dialogue with the CRC, the Moroccan delegation reminded the CRC that the beliefs and practices of Islam should be treated with respect. The Moroccan delegate pointedly commented that

children's rights had been protected in Morocco well before the adoption of the Convention in 1989. Morocco had been an Islamic country for the past 1,400 years and, during that time, a wide range of children's rights had been recognized and protected under the Koran, Shariya law and various subsequent writings on those and other texts.<sup>159</sup>

Turning to deal with its reservation to article 14, the Moroccan delegate explained that

Moroccan laws were based on religious law. He therefore [believed] that the Government would [not] change its laws, as they were appropriate to the specific situation in his country ... No one was forced to become Muslim. There was, however, no possibility that a person born a Muslim might change his religion because such an act would be contrary to the principles of basic Muslim law. A proposal that that law should be changed would be totally unacceptable to Moroccan society.<sup>160</sup>

The CRC's response to this argument was robust and uncompromising. Despite acknowledging that 'flexibility' is the key to understanding, the then Chairperson of the CRC, Akila Belembaogo, stated in no uncertain terms that '[i]t was not up to individual countries to interpret the Convention as they saw

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<sup>157</sup> CRC, *Summary Record of the 622<sup>nd</sup> Meeting: Jordan*, UN Doc CRC/C/SR.622 (24 May 2000) [72].

<sup>158</sup> The following discussion is based on an analysis of the State Party reports of 20 of the 41 states where the CRC identified tradition and cultural practices as a factor impeding implementation of the *CROC*. The 20 states have been selected at random but with a mind to geographical diversity. The states forming the subject matter of analysis were: Jordan, China, Nepal, Guatemala, Morocco, Nigeria, Uruguay, Ethiopia, Ghana, Bangladesh, Barbados, Benin, Chad, Vanuatu, Mali, India, Sierra Leone, South Africa and the Lao People's Democratic Republic.

<sup>159</sup> CRC, *Summary Record of the 317<sup>th</sup> Meeting: Morocco*, UN Doc CRC/C/SR.317 (26 September 1996) [29]. See also similar arguments raised by the Jordanian delegation in CRC, *Summary Record of the 621<sup>st</sup> Meeting: Jordan*, UN Doc CRC/C/SR.621 (11 July 2000) [29].

<sup>160</sup> CRC, *Summary Record of the 317<sup>th</sup> Meeting: Morocco*, UN Doc CRC/C/SR.317 (26 September 1996) [57].

fit. States were allowed to formulate reservations, provided that such reservations did not conflict with the Convention's aims and objectives'.<sup>161</sup>

Morocco has not, however, adopted a completely inflexible stance on traditional practices. The Moroccan delegate expressed the Government's willingness to work towards changing prevailing societal attitudes. However, he warned that, in introducing changes concerning children's rights, account must be taken of existing traditions.<sup>162</sup> Furthermore, care must be taken to ensure that parental authority is not weakened and the impression created that traditional values are being undermined.<sup>163</sup> He went on to warn that reforms

should be planned with great care to avoid any negative reaction among the population in view of Moroccan traditions, especially religious tradition. He also observed that well-meaning, but perhaps hasty, policies of modernisation have caused hostile reactions in some neighbouring countries.<sup>164</sup>

Such warnings appear to have made little impression on the CRC. The need for Islam to change through more 'progressive' interpretations of its religious texts is a constantly recurring theme of the CRC's analysis<sup>165</sup> and its commitment to help bring about these changes in Islamic law and understanding is clear:

Traditional ways of life had almost ceased to exist in many countries. In Muslim countries, classic Islamic law was not always adapted to present-day conditions; there was an increasing tendency to talk of modern Islamic law. It was incumbent on the Committee to encourage the acceleration of the changes in that direction that were already taking place in Morocco without undermining fundamental principles.<sup>166</sup>

As far as the CRC is concerned, modernisation and change is the only satisfactory response to apparent conflicts between Islamic law and the *CROC*.

In addition to these general pleas to respect cultural diversity in interpretation and implementation, several states have attempted to argue that certain traditions and practices do not violate the *CROC*'s norms when properly considered within their correct socioeconomic and cultural context. Unfortunately, as the following analysis of the CRC's approach to the issues of early and arranged marriage and adoption will demonstrate, the CRC has not been prepared to endorse a more

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<sup>161</sup> Ibid [60].

<sup>162</sup> CRC, *Summary Record of the 318<sup>th</sup> Meeting: Morocco*, UN Doc CRC/C/SR.318 (12 October 1996) [13].

<sup>163</sup> Ibid [28].

<sup>164</sup> Ibid [43].

<sup>165</sup> See, eg, the comments of Judith Karp (Israel) and Sandra Mason (Barbados), with regard to Morocco, in CRC, *Summary Record of the 319<sup>th</sup> Meeting: Morocco*, UN Doc CRC/C/SR.319 (30 September 1996) [80]–[81]. See also the comment of Amina Hamza El Guindi (Egypt), with regard to Jordan, in CRC, *Summary Record of the 622<sup>nd</sup> Meeting: Jordan*, UN Doc CRC/C/SR.622 (24 May 2000) [72]. See also the comment of Hoda Badran (Egypt), with respect to Nigeria, in CRC, *Summary Record of the 322<sup>nd</sup> Meeting: Nigeria*, UN Doc CRC/C/SR.322 (27 November 1996) [8].

<sup>166</sup> CRC, *Summary Record of the 319<sup>th</sup> Meeting: Morocco*, UN Doc CRC/C/SR.319 (30 September 1996) [34].

flexible and inclusive approach to determining the best interests of the child. Moreover it has allowed very little room for cultural variations in the interpretation of *CROC* rights. In fact, the CRC has taken a particularly uncompromising and 'Western' view of what the *CROC* demands, and is intent on pushing states towards effective abolition of nonconforming traditions.

### 1 *Early and Arranged Marriages*

Early marriage, that is marriage entered into before the age of 18, potentially contravenes articles 1 and 2 of the *CROC*. Article 1 provides that every human being below the age of 18 years is a child, unless, under the law applicable to the child, majority is attained earlier. Early marriage in and of itself cannot be said to contravene this provision. If the child continues to be regarded as a child post-marriage, the *CROC* rights continue to apply. If, on the other hand, the child attains majority upon marriage, he or she will fall within the caveat 'unless majority is attained earlier.' This flexible approach to defining a 'child' for the purposes of the *CROC* reflects the apparent concern of some delegates at the drafting stage that the *CROC* in this respect should remain responsive to cultural difference. There was considerable debate during the drafting of article 1 between those delegates who wanted a child to be defined as any person under the age of 18 and those who wanted a much lower age. At the 1980 session of the Working Group, several delegations argued that, out of deference to the traditional practices of many of the States Parties, the specified age for a child should be much lower. The *1980 Working Group Report* stated:

Concerning the terminal point of the concept of the child as defined in the article, some delegates pointed out that the age of 18 appeared to be quite late in light of some national legislations and that a lower age limit should be recommended. ... It was also pointed out that 14 was the age of the end of compulsory education in many countries, and the legal marriage age for girls in many parts of the world.<sup>167</sup>

Although the definition of a child remained as 'every human being below the age of 18', it is important to note that, in response to these objections, opposing delegates emphasised that the reference in article 1 to national legislative provisions on majority would provide sufficient flexibility to meet any concerns about particular practices.<sup>168</sup> In fact, at the very earliest stage of the drafting process, the International Committee of the Red Cross applauded the inherent flexibility this gave to the definition of a child by stating that

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<sup>167</sup> *1980 Working Group Report*, above n 73, [32]. Both Kuwait and Nepal raised further objections to this age limit at the 1989 session of the Working Group: *1989 Working Group Report*, above n 73, [81]–[82].

<sup>168</sup> *1980 Working Group Report*, above n 73, [33]–[34].

[t]he notion of ‘child’ has not, however, been made clear. The concept varies from one culture to another. This silence seems wise and will facilitate universal application of the Convention irrespective of local peculiarities.<sup>169</sup>

Thus it is clear that, as regards early marriage, a State Party can only be in contravention of article 1 if taken in conjunction with article 2 (the non-discrimination clause) and if two conditions are met. Firstly, the minimum age for marriage for boys and girls is different and, secondly, a child is deprived of his or her *CROC* rights upon marriage. If these conditions are fulfilled, a state may be in breach of article 2, but only if there is no reasonable and objective justification for the differential treatment of males and females. This is clearly a question which is open to debate.

Both early and arranged marriages may also fall foul of article 24(3) as traditional practices. However, in order to contravene this provision the ‘traditional practice’ in question must be shown to be prejudicial to the health of the child. Whether or not this is the case with early or arranged marriages is something on which views among states can and do differ. The important contribution made by Senegal to the drafting of article 24(3) has been discussed in detail above. It is, however, worth noting that although it was emphasised by several delegates during the debate that ‘traditional practices’ extended beyond female circumcision — the clear target of the provision<sup>170</sup> — at no point was the practice of early or arranged marriage specifically mentioned.<sup>171</sup>

When condemning certain practices, the CRC has generally preferred to take a ‘broad-brush’ approach to interpreting the *CROC*’s provisions. In particular, the CRC has tended to avoid undertaking any kind of close textual analysis of specific articles. It is, however, clear from the above analysis of articles 1, 2 and 24(3), that the text of the *CROC* allows considerable scope for differing cultural perspectives on the issue of early and arranged marriage. This has not escaped the notice of several states where such practices prevail. A variety of arguments have been placed before the CRC as to why early marriage, different minimum ages for marriage and arranged marriages do not contravene either articles 1, 2 or 24(3). Two of those arguments are of particular relevance to the present discussion.

One approach which has been taken by states to support the contention that early and arranged marriage is neither harmful nor discriminatory is to place the

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<sup>169</sup> 35<sup>th</sup> Session of the Commission of Human Rights as reported in Sharon Detrick, ‘Compilation of the Travaux Préparatoires’ in Sharon Detrick (ed), *The United Nations Convention on the Rights of the Child: A Guide to the ‘Travaux Préparatoires’* (1992) 31, 58.

<sup>170</sup> See, eg, the comments of the representative of the International Movement for Fraternal Union among Races and People, and the comments made by the delegations from Canada, Japan, Sweden and Venezuela: *1987 Working Group Report*, above n 73, [36]–[37].

<sup>171</sup> In an attempt to give some substantive content to the term ‘traditional practices’ the Canadian delegation referred to the *Report of the Working Group on Traditional Practices Affecting the Health of Women and Children*, UN Doc E/CN.4/1986/L.34 (1986). According to LeBlanc this report focuses on ‘female circumcision, the preference for male children, and traditional birth practices such as dietary restrictions on pregnant women and unsanitary conditions and practices during and immediately after birth’: LeBlanc, above n 67, 88.

issue in context, by emphasising the important part played by marriage traditions in the social and cultural life of the community. It is apparent from the initial State Party report of Benin that the concept of marriage and its place in Benin society is something very different from the romantic ideal of marriage in the West. The report stated that

in traditional law and in rural areas marriage is an act entered into, not by two persons but by two families, and that consequently the wishes of the father exercising parental responsibility have a considerable impact on the conclusion of a marriage.<sup>172</sup>

When before the CRC, the Benin delegate reiterated the difference between marriage as a social institution in the West and marriage as understood in sub-Saharan Africa, whilst also hinting at the Western bias of the *CROC*. In relaying the story of the marriage of his own son, the Benin delegate stated that

[b]oth he and the father of the bride had approved the idea of a traditional wedding. Those were realities that were not reflected in the Convention or in the national law, but which all sub-Saharan Africans would surely understand.<sup>173</sup>

Vanuatu's delegate took a similar approach when appearing before the CRC, asserting that traditional customs surrounding the institution of marriage in Vanuatu are very different to those in the West. Such customs make marriage incompatible with ideas such as a minimum age and unfettered choice as to one's partner. Vanuatu's delegate stated that

marriages were often arranged very early by families on the basis of mutual interest. That practice was still commonly accepted albeit less and less widespread.

According to the custom, arrangements were made whereby a child was given in marriage to a landed family or as a way of peacefully settling disputes between families. In principle, the child remained with his own family until he was married. The survival of the family and the interests of the community were placed above the individual desires of the child, although customs were slowly changing as young people moved to cities.<sup>174</sup>

Nepal, during its dialogue with the CRC, took a different approach to disputing the notion that arranged marriage is harmful. The Nepalese delegation conceded in their initial State Party report that there was a 'significant rate of child marriage in the country', and that the parent's right to choose their child's partner could 'sometimes run counter to the individual interests of the child'.<sup>175</sup> Nepal also conceded that the number of girls 'married off' at an early age has a

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<sup>172</sup> CRC, *Initial Reports of States Parties Due in 1992: Benin*, UN Doc CRC/C/3/Add.52 (4 July 1997) [51].

<sup>173</sup> CRC, *Summary Record of the 543<sup>rd</sup> Meeting: Benin*, UN Doc CRC/C/SR.543 (31 May 1999) [59].

<sup>174</sup> CRC, *Summary Record (Partial) of the 566<sup>th</sup> Meeting: Vanuatu*, UN Doc CRC/C/SR.566 (4 November 1999) [21], [25].

<sup>175</sup> CRC, *Initial Reports of States Parties Due in 1992: Nepal*, UN Doc CRC/C/3/Add.34 (10 May 1995) [157]. See also [107].

detrimental impact on the number of girls enrolling in full time education.<sup>176</sup> However, in the course of its dialogue with the CRC, the Nepalese delegation responded strongly to the suggestion by CRC member, Judith Karp, that, in order to change attitudes towards the practice of enforced marriage, arranging such marriages should be made a criminal offence. The Nepalese delegation pointed out that ‘most marriages in Nepal were arranged and, if the low divorce rate was any indicator, the system seemed to function well’.<sup>177</sup>

Despite these direct appeals to the different cultural understanding of the institution of marriage in non-Western societies, the CRC has taken an uncompromising stance on the issue. The CRC has been of the clear opinion that the marriage of young girls, which is often accompanied by early pregnancy, represents a danger to their health and deprives them of their right to education. It is therefore both harmful (under article 24(3)) and discriminatory (under article 2).

Given the social and cultural reality of marriage practices in Benin, the Benin Government has adopted what could be described as a ‘realistic’ position on the issue. They have assured the CRC that ‘efforts are being made to combat *excessively early and forced* marriages’,<sup>178</sup> including the introduction of new legislation supported by a long-term program of education.<sup>179</sup> Nevertheless the CRC has noted

with concern the limited efforts of the State party to introduce adequate measures to eradicate ... harmful traditional practices affecting the health of girls, including early and forced marriages. The Committee recommends that the State party strengthen its efforts to combat and eradicate ... practices harmful to the health of girls. In this regard, the Committee further urges the State party to carry out sensitization programmes for practitioners and the general public to change traditional attitudes and discourage harmful practices.<sup>180</sup>

Taking a slightly different approach, the CRC reached a similar conclusion in the case of Nepal:

The Committee is particularly concerned at the insufficient measures adopted to ensure the effective implementation of the principle of non-discrimination. It notes the persistent discriminatory attitudes towards girls, as reflected in ... the persistence of early marriages.<sup>181</sup>

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<sup>176</sup> Ibid [300].

<sup>177</sup> CRC, *Summary Record of the 303<sup>rd</sup> Meeting: Nepal*, UN Doc CRC/C/SR.303 (4 June 1996) [23], [39].

<sup>178</sup> CRC, *Initial Reports of States Parties Due in 1992: Benin*, UN Doc CRC/C/3/Add.52 (4 July 1997) [224]; CRC, *Summary Record of the 54<sup>th</sup> Meeting: Benin*, UN Doc CRC/C/SR.544 (4 January 2000) [14].

<sup>179</sup> Ibid.

<sup>180</sup> CRC, *Report on the Twenty-first Session*, UN Doc CRC/C/87 (30 July 1999) [157] (emphasis removed).

<sup>181</sup> CRC, *Concluding Observations of the Committee on the Rights of the Child: Nepal*, UN Doc CRC/C/15/Add.57 (7 June 1996) [12].

Taken together, the strong message which emerges from the CRC's examination of State Party reports and its *Concluding Observations*, is that marriage must be a 'voluntary union' between 'one man and one woman' and to the exclusion of all others.<sup>182</sup> The Western bias in this concept of marriage is self-evident.

## 2 *Alternative Care and Adoption*

Articles 20 and 21 of the *CROC* deal with the provision of alternative care of a child deprived of a family environment. Article 20 simply provides that States Parties shall, in accordance with their national laws, ensure alternative care for such a child and that such care could include, among other things, foster placement, 'Kafala' in Islamic law, adoption, or, if necessary, placement in suitable institutions. The broad scope of article 20 was due in large part to the determination of a few states from the Islamic and developing world, who argued that the *CROC*'s provisions on alternative care for children should be fully inclusive of different cultural traditions. The text of article 20, as adopted by the Working Group at first reading, focused exclusively on adoption and foster care. It stated that:

The States Parties to the present Convention shall undertake measures so as to facilitate adoption of children and create favourable conditions for establishing foster families.<sup>183</sup>

At the 1982 session of the Working Group, the representative of India proposed an alternative wording for the text, in order to make it more inclusive of traditional child care practices, such as care within the extended family or community. India suggested the following wording:

The States Parties to the present Convention shall ensure that a child deprived of his natural family environment or who for reasons of his well-being cannot be brought up in that environment shall be provided with alternative family care

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<sup>182</sup> See, eg, the CRC's Concluding Observations in respect of Lebanon: CRC, *Concluding Observations of the Committee on the Rights of the Child: Lebanon*, UN Doc CRC/C/15/Add.54 (7 June 1996) [16], [23]; Cyprus: CRC, *Concluding Observations of the Committee on the Rights of the Child: Cyprus*, UN Doc CRC/C/15/Add.59 (7 June 1996) [16]; Nigeria: CRC, *Concluding Observations of the Committee on the Rights of the Child: Nigeria*, UN Doc CRC/C/15/Add.61 (30 October 1996) [15]; Ethiopia: CRC, *Concluding Observations of the Committee on the Rights of the Child: Ethiopia*, UN Doc CRC/C/15/Add.67 (24 January 1997) [14]; Ghana: CRC, *Concluding Observations of the Committee on the Rights of the Child: Ghana*, UN Doc CRC/C/15/Add.73 (18 June 1997) [21]; Bangladesh: CRC, *Concluding Observations of the Committee on the Rights of the Child: Bangladesh*, UN Doc CRC/C/15/Add.74 (18 June 1997) [15]; Lao People's Democratic Republic: CRC, *Concluding Observations of the Committee on the Rights of the Child: Lao People's Democratic Republic*, UN Doc CRC/C/15/Add.78 (10 October 1997) [18], [42]; Maldives: CRC, *Report on the Eighteenth Session*, UN Doc CRC/C/79 (27 July 1998) [234]; Kuwait: CRC, *Report on the Nineteenth Session*, UN Doc CRC/C/80 (9 October 1998) [133], [146]; Yemen: CRC, *Report on the Twentieth Session*, UN Doc CRC/C/84 (5 March 1999) [166]; Chad: CRC, *Report on the Twenty-First Session*, UN Doc CRC/C/87 (30 July 1999) [181]; and Mali: CRC, *Report on the Twenty-Second Session*, UN Doc CRC/C/90 (7 December 1999) [221].

<sup>183</sup> Note Verbale, above n 96, 3.

which would include, *inter alia*, foster placement and placement in community and State child care institutions.<sup>184</sup>

Several delegates spoke in favour of India's proposal, arguing that 'it was not right to present adoption as the only solution in cases when a child cannot be cared for by his biological family.'<sup>185</sup> A compromise text was thus agreed, modelled on the more inclusive approach taken by India:

The States Parties to the present Convention shall ensure that a child permanently or temporarily deprived of his normal family environment or who in his best interests cannot be allowed to remain in that environment shall be provided with alternative family care which could include, *inter alia*, adoption, foster placement, or placement in community or state child care institutions.<sup>186</sup>

This text was then subject to further amendment at the 1989 session of the Working Group, in order to address the concern of Islamic states that the concept of 'Kafala' should also be included. Egypt, on behalf of the Drafting Group on Adoption and Family Issues,<sup>187</sup> introduced an amended text which was intended 'to incorporate ... the principal features of all legal systems, including the concept of "Kafala" from Islamic law.'<sup>188</sup> The text of article 20, as amended and adopted, reads:

- (1) A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.
- (2) States Parties shall in accordance with their national laws ensure alternative care for such a child.
- (3) Such care could include, *inter alia*, foster placement, kafala of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

It is therefore clear that, throughout the drafting of article 20, there was a basic consensus among the members of the Working Group that the *CROC*'s provisions regarding alternative care should be inclusive of a wide variety of national practices and traditions, and certainly should not be limited to formal adoption.

Article 21 of the *CROC* is intended to deal more specifically with the practice of adoption, and provides that

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<sup>184</sup> Working Group, *Commission on Human Rights, Report of the 35<sup>th</sup> Session, Addendum: Contents Notes — Reports of the Informal Open-Ended Working Group of the Commission*, UN Doc E/CN.4/1982/30/Add.1 (15 March 1982) [C51].

<sup>185</sup> *Ibid* [C53].

<sup>186</sup> *Ibid* [C54].

<sup>187</sup> The Drafting Group on Adoption and Family Issues comprised Argentina, Australia, Brazil, China, France, Italy, Netherlands, Pakistan, Sweden, the USSR, the UK and Portugal: *1989 Working Group Report*, above n 73, [339].

<sup>188</sup> *Ibid* [340].



States Parties that recognise and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

(a) Ensure that the adoption of a child is authorised only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary.

The wording of this article was again subject to amendment during the drafting process, in order to protect the traditions of the Islamic states. The first sentence of the text, as adopted by the Working Group at first reading, read: 'The States Parties to the present Convention shall undertake measures, where appropriate, to facilitate the process of adoption.'<sup>189</sup> Bangladesh raised concerns about this wording of the article in the paper submitted by its Permanent Representative in 1986:

Article 21 is liable to give difficulties in Muslim countries since the understanding of Bangladesh is that adoption is not a recognized institution under Muslim law. In cases of such adoption the question of inheritance rights will give rise to complex problems in Islamic jurisdictions. A form of words may be found to protect Islamic conceptions on the subject.<sup>190</sup>

This concern was taken up at the 1989 session of the Working Group. A Drafting Group on Adoption and Family Issues amended the first sentence of the article to remove the obligation placed on States Parties to 'facilitate the process of adoption', and introduced new wording to make it clear that article 21 would only apply to those States Parties in which the system of adoption is recognised and permitted.<sup>191</sup> For those states that recognise and permit adoption, article 21 appears to demand a very formal procedure. 'Competent authorities' suggests detached professionals in the form of social workers or legal officials, and 'applicable law and procedures' implies a series of officially determined guidelines and standards to be met and followed by the professionals involved. There was very little debate within the Working Group concerning these particular provisions.

The formal, legalistic concept of adoption enshrined in article 21 is plainly familiar to those in the West. However, for much of the non-Western world 'adoption' is a very different practice. In many states, the duty of providing alternative care for children falls principally upon members of the extended family or, failing that, upon the immediate community. 'Adoption' is consequently arranged at the family or community level, with no formal rules or procedures and no outside professional scrutiny. Of key importance to the

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<sup>189</sup> Working Group, *Draft Convention on the Rights of the Child: Text of the Draft Convention as Adopted by the Working Group (First to Ninth Sessions: 1979–1987)*, UN Doc E/CN.4/1988/WG.1/WP.1/Rev 2 (16 October 1988).

<sup>190</sup> *1986 Working Group Report*, above n 73, annex IV, 2.

<sup>191</sup> *1989 Working Group Report*, above n 73, [349]–[350].

success of these alternative care arrangements is the traditional role played by the extended family in the upbringing and care of children.

The prevalence of traditional adoption based on the extended family system is apparent from States Parties' reports. In the first paragraph of its initial State Party report, Vanuatu set out the importance of the extended family to Vanuatu society:

[F]amily is viewed as the foundation of the society and in addition to this is the extended family system. A child is given the very best care and protection by parents, grandparents and all members of the extended family. Therefore, no child, whether in an urban or rural area, is allowed or left to be in any kind of problem or trouble unless it is beyond the reach of everyone.<sup>192</sup>

The report went on to explain that 'traditional' adoption, as practised in Vanuatu, 'takes place within the extended family system and the community'.<sup>193</sup> Although there is no law on adoption, 'adoption in accordance with native custom is treated as legal adoption'.<sup>194</sup>

The Lao People's Republic also went to some lengths in its initial State Party report to explain carefully the role of the family within its very traditional society. According to the report,

[t]he family is the most important component in Lao society. On average there are six to seven members in a family. Each member cares for each other in order to make the family a strong unit of society. The family decides who inherits land, properties and wealth from ancestors. According to Lao custom, youth must respect their elders. The head of the family is responsible for overseeing all matters including living conditions, maintaining unity and harmony, and improving the situation of the family as well as contributing to society. Women's duties include bringing up children, as well as other household duties. A village consists of several families. The village heads are responsible for implementing State law, making decisions, issuing instructions, maintaining peace and security and developing the villages to become stable and prosperous.<sup>195</sup>

Within that context, it would appear from the State Party report that children deprived of parental care are dealt with in one of two ways. If the village authorities are notified of a child not being cared for they will appoint a 'tutor' for the child from among his or her close relatives.<sup>196</sup> If the chosen relative refuses, then other individuals may be chosen. Tutors have a duty to care for and educate the child and to protect his or her rights and interests. Alternatively, with the consent of the child's natural parents, the child may be adopted.<sup>197</sup> An adopted child is treated as the natural child of the adoptive parents and their

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<sup>192</sup> CRC, *Initial Reports of States Parties Due in 1995: Vanuatu*, UN Doc CRC/C/28/Add.8 (26 May 1997) [1].

<sup>193</sup> *Ibid* [143].

<sup>194</sup> *Ibid* [34].

<sup>195</sup> CRC, *Initial Reports of States Parties Due in 1993: Lao People's Democratic Republic*, UN Doc CRC/C/8/Add.32 (24 January 1996) [16]–[18].

<sup>196</sup> *Ibid* [85].

<sup>197</sup> *Ibid* [87].

relatives.<sup>198</sup> As with the appointment of tutors, the adoption is dealt with by the village administrative authorities, who receive and consider applications from potential adoptive parents and will issue, where appropriate, a note of approval.<sup>199</sup>

Ethiopia has a very similar system of customary adoption. In Ethiopia, the customary system of adoption exists alongside 'formal' adoption under the Civil Code.<sup>200</sup> In practice, however, adoption under the Civil Code is rare and adoption is usually effected by agreement between the families in accordance with custom.<sup>201</sup>

Similarly, in South Africa, traditional systems of adoption exist alongside the formal adoption process. Recent moves towards legislative reform indicate that official recognition will be given to these traditional systems. In its initial State Party report, South Africa gave a spirited defence of the role of the extended family in providing alternative care for the child. The Government began by pointing out that 'traditional practices have served various communities through the centuries' and are frequently 'beneficial'.<sup>202</sup> Of particular interest, however, is the attempt by the South African Government to demonstrate the advantages of the extended family over the model of the nuclear family preferred by the West:

[T]he concept of the nuclear family could be seen as harmful to children, when counterpoised with the tradition of the extended family. The latter is a practice which has widespread benefits for all its members, and for society in general. In extended families, the grandparents and other members of the family play an important role in supporting the development and care of the children. The involvement of these caregivers in plans to promote child health and well-being is essential.<sup>203</sup>

This comparison of the two alternative family forms is one of the very few examples of 'cultural' practices in the West being subjected to criticism before the CRC. In other words, it is one of the few examples of a genuine cross-cultural dialogue.

One way in which South Africa is attempting to draw on the strengths of the extended family system is to 'encourage the placement and adoption of HIV-positive orphans or orphans with AIDS within the extended family and in the community'.<sup>204</sup>

It is perfectly feasible to argue that these informal adoption arrangements, based as they are on the role of the extended family, serve the best interests of

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<sup>198</sup> Ibid [86].

<sup>199</sup> Ibid [88].

<sup>200</sup> CRC, *Initial Reports of States Parties Due in 1993: Ethiopia*, UN Doc CRC/C/8/Add.27 (12 September 1995) [84].

<sup>201</sup> Ibid [87].

<sup>202</sup> Ibid [273].

<sup>203</sup> Ibid [276].

<sup>204</sup> CRC, *Summary Record of the 610<sup>th</sup> Meeting: South Africa*, UN Doc CRC/C/SR.610 (19 May 2000) [26].

the child. In a society based on the model of the nuclear family, informal adoption within the extended family might not work. Care of the child would therefore be entrusted to strangers. Where, however, the extended family lies at the heart of the social organisation of a community and members of the extended family are willing and able to assume the care of a child, informal 'adoption' can often provide an appropriate solution.

It is more difficult to argue that informal adoption will meet the requirements of article 21(a). Of course, it can be argued that it should not need to. Where the child is entrusted to the care of a stranger, you would expect to find in place clear procedures and safeguards to protect the child and its natural parents. Where, however, care is entrusted to an aunt or a grandparent, it is less obvious that such procedures are required. Faced with this difficulty, the CRC really has two options. It could demand that these informal adoption arrangements be overhauled to bring them into line with the legal formality expected under article 21. Alternatively, it could accept that traditional or customary adoption is far removed from adoption as understood in the *CROC* and, therefore, whilst it constitutes a means of alternative care under article 20, it should not have to comply with the formality requirements of article 21. To take the latter approach would be to recognise that different cultures have different methods of securing the best interests of a child who is deprived of parental care. To take the former approach would be to say that there is only one way of meeting the best interests of a child when arranging alternative care: the Western way. Unfortunately, in contrast to the more sensitive approach of the Working Group, the CRC has tended to insist on the legal formality of the West.

The CRC's disapproval of traditional adoption systems was made absolutely clear in its recent *Concluding Observations* regarding South Africa. Despite noting that the *Child Care Act 1996* (South Africa) provides for the regulation of adoption, the CRC was

concerned at the lack of monitoring with respect to both domestic and intercountry adoptions as well as the widespread practice of informal adoptions within the State party ... In light of article 21 of the Convention, the Committee recommends that the State party establish proper monitoring procedures with respect to both domestic and intercountry adoptions and introduce adequate measures to prevent the abuse of the practice of informal adoptions.<sup>205</sup>

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<sup>205</sup> CRC, *Report on the Twenty-Third Session*, UN Doc CRC/C/94 (23 March 2000) [439].

This concern regarding customary adoption is a recurring theme in the CRC's work.<sup>206</sup> The delegation from the Lao People's Republic faced a number of questions from the CRC as to the manner in which adoption was handled at the village level. The Chairperson of the CRC, Sandra Mason, raised two points. The first concerned whether village authorities had the necessary 'professional competence' to deal with such matters and whether the courts had any role to play in the proceedings.<sup>207</sup> The second concerned whether there is any provision to ensure that the best interests of the child are taken into account.<sup>208</sup> The delegation responded to these questions by explaining that adoption is a simple procedure and, as a purely administrative matter, the courts have no involvement. The delegation added that there were no plans to revise the procedure to bring it into line with the *CROC*.<sup>209</sup> The CRC was clearly dissatisfied with this response. The Chairperson immediately responded by pointing out that

[t]he Convention required that, where adoption was concerned, the best interests of the child should be the paramount consideration; it also required States parties to ensure that the adoption was authorized only by the competent authorities. After hearing the replies given, she was concerned that there was no procedure to guarantee that, even if the parents agreed to give their child for adoption, its best interests would be taken into account.<sup>210</sup>

The stance taken by members of the CRC during the course of the dialogue was echoed in the CRC's *Concluding Observations*. The CRC was concerned that 'the provisions of the Family Law regarding adoption do not conform fully to article 21 of the Convention, or with the principle of the best interests of the

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<sup>206</sup> See, eg, the *Concluding Observations* in respect of Mali: CRC, *Report on the Twenty-Second Session*, UN Doc CRC/C/90 (7 December 1999) [216]; Ethiopia: CRC, *Concluding Observations of the Committee on the Rights of the Child: Ethiopia*, UN Doc CRC/C/15/Add.67 (24 January 1997) [32]; Ghana: CRC, *Concluding Observations of the Committee on the Rights of the Child: Ghana*, UN Doc CRC/C/15/Add.73 (18 June 1997) [18]; Lao People's Democratic Republic: CRC, *Concluding Observations of the Committee on the Rights of the Child: Lao People's Democratic Republic*, UN Doc CRC/C/15/Add.78 (10 October 1997) [22], [46]; Federated States of Micronesia: CRC, *Concluding Observations of the Committee on the Rights of the Child: Federated States of Micronesia*, UN Doc CRC/C/15/Add.86 (4 February 1998) [18], [36]; Belize: CRC, *Report on the Twentieth Session*, UN Doc CRC/C/84 (5 March 1999) [80]; Benin: CRC, *Report on the Twenty-First Session*, UN Doc CRC/C/87 (30 July 1999) [153]; Chad: CRC, *Report on the Twenty-First Session*, UN Doc CRC/C/87 (30 July 1999) [187]–[188]; Armenia: CRC, *Report on the Twenty-Third Session*, UN Doc CRC/C/94 (3 March 2000) [324]; and South Africa: CRC, *Report on the Twenty-Third Session*, UN Doc CRC/C/94 (3 March 2000) [439], [454].

<sup>207</sup> CRC, *Summary Record of the 401<sup>st</sup> Meeting: Lao People's Democratic Republic*, UN Doc CRC/C/SR.401 (30 September 1997) [64].

<sup>208</sup> *Ibid.*

<sup>209</sup> CRC, *Summary Record of the 401<sup>st</sup> Meeting: Lao People's Democratic Republic*, UN Doc CRC/C/SR.401 (30 September 1997) [66].

<sup>210</sup> *Ibid.* [68].

child'.<sup>211</sup> The CRC recommended 'that the legislation on adoption be brought into conformity with the provisions of article 21'.<sup>212</sup>

The Ethiopian delegation faced similar questioning by the CRC over traditional adoption practices. The concerns of the CRC focused on the arrangements for official supervision and authorisation, and procedures to ensure the best interests of the child, in accordance with the formality requirements of article 21.<sup>213</sup> The CRC's strong preference for adoption under the Civil Code, as opposed to adoption in accordance with custom, was clear. The summary record of the debate records that Judith Karp wanted

to know more about the provisions of the Civil Code on adoption and have it confirmed that legal adoption was possible only with the approval of the authorities. An arrangement under which adoption was purely a matter of agreement between families was hardly compatible with the Convention. It was perfectly possible in such a situation for children to be sold.<sup>214</sup>

These concerns were reiterated at a later point in the discussion, when Judith Karp stated that

she was still particularly concerned about in-country adoption because of the absence of an appropriate mechanism to safeguard the best interests of the child. There seemed to be no guarantees to ensure that the child was not sold into adoption.<sup>215</sup>

The response of the Ethiopian delegation to these questions was evasive. Apart from an earlier suggestion that they intended to bring adoption under 'official control'<sup>216</sup> they made no attempt to defend the practices in any substantive way. On the other hand, neither did they commit themselves to reform. They simply reasserted the factual information concerning traditional adoption found in the initial report.<sup>217</sup> Given this, it is not surprising that the question of adoption was addressed in the CRC's *Concluding Observations*:

The Committee recommends that appropriate legislative measures be adopted and implemented with regard to adoption of children, in the light of the principles of the best interests of the child and respect for his or her views and articles 20 and 21 of the Convention.<sup>218</sup>

Ethiopia's second periodic report was silent on the issue.

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<sup>211</sup> CRC, *Concluding Observations of the Committee on the Rights of the Child: Lao People's Democratic Republic*, UN Doc CRC/C/15/Add.78 (19 October 1997) [22].

<sup>212</sup> Ibid [46].

<sup>213</sup> CRC, *Summary Record of the 350<sup>th</sup> Meeting: Ethiopia*, UN Doc CRC/C/SR.350 (17 January 1997) [37], [50], [56].

<sup>214</sup> Ibid [48].

<sup>215</sup> Ibid [67].

<sup>216</sup> Ibid [39].

<sup>217</sup> CRC, *Summary Record of the 351<sup>st</sup> Meeting: Ethiopia*, UN Doc CRC/C/SR.351 (21 March 1997) [3].

<sup>218</sup> CRC, *Concluding Observations of the Committee on the Rights of the Child: Ethiopia*, UN Doc CRC/C/15/Add.67 (24 January 1997) [32].

## VI CONCLUSION

If the international human rights regime is to distance itself from the Western imperialism of the past, it is vital that it starts talking and listening to 'the other'. Listening to 'the other' will not, however, mean the end of universal standards. The fluidity of culture, combined with the effects of globalisation and cultural interpenetration, greatly enhances the possibility of achieving a consensus among all cultural groups on a body of cross-cultural human rights standards. Has the *CROC* achieved this in practice? The text of the *CROC* is still marked by a heavy Western bias, but, in some respects, the drafting process was encouraging as a model of inclusive norm creation. Although state participation was far from fully inclusive, participation by women and NGOs can be viewed with some satisfaction. The determined and constructive contributions of a small number of states from the developing world, in addition to a strong Islamic presence in the final stages of the drafting process, also ensured that, to a limited extent, a diversity of cultural traditions was reflected in the final text. Listening to 'the other' does not, however, end at the doors of the drafting chamber. Respect for cultural difference must be carried through into the process of interpretation and implementation. Given the scope for adopting a culturally sensitive approach to the *CROC*, the CRC was ideally placed to respond positively to the demands of cultural difference. It has not done so. Tradition and culture are constantly presented as a 'problem', rather than a potential strength, and the CRC's analysis of particular norms and practices has been marked by a striking lack of respect for social and cultural diversity.

The CRC's commitment to avoiding a weakening of existing standards, and to upholding and strengthening children's rights wherever possible, is undoubtedly one reason for its negative response to culturally based arguments. The need to uphold existing standards was also a key concern during the drafting process. However, cultural inclusiveness demands a fresh approach. It is perhaps inevitable that listening to 'the other' will require changes to the existing body of human rights norms and a willingness to accept a greater diversity of practices. Listening to 'the other' will certainly require compromise and flexibility — a 'broadening of the mind'. This should not, however, be regarded as a 'problem' or 'weakness' in respecting cultural difference. The rich diversity of culture and tradition which 'the other' offers can be drawn on to strengthen and broaden both the scope and effectiveness of the international human rights regime. The West does not have a monopoly on 'good culture'.