Introduction

The International Law on the Rights of the Child is based upon the premise that international law is a valuable tool for those seeking to improve the daily lives of children. In addition to its obvious potential use in litigation, international law provides policy-makers with a diplomatic and non-political framework within which it is possible to argue for the incorporation of specific children’s entitlements. The international laws discussed in the text encompass both the principles which apply only to children and those universally applicable to all sections of the community. An analysis and description of both is presented to provide for those familiar and unfamiliar with international law a coherent study on the international status of children and the rights which attach to this status.

The international law on the rights of the child is primarily concerned with two branches of public international law: international human rights law, a term which is self-explanatory, and international humanitarian law, which is concerned with the conduct of armed conflicts. Provisions of private international law are considered only where relevant.

Texts on international human rights law and international human rights instruments have been the subject of criticism because they are perceived as only reflecting ‘Western’ case law and cultural values. Whether these criticisms are justifiable in some cases or not, the text which follows attempts to make clear the contributions which a large number of developing states and Eastern European states have made, in an attempt to dispel the myth that the international law on the rights of the child is exclusively the product of Western states. However, as far as individual complaints brought either under international or regional human rights tribunals are concerned, the text inevitably reflects the fact that the majority of these have been submitted through the machinery of the Council of Europe.

The concept that children possess rights is viewed by some as a radical notion and denied by others. The denial is partly based on the belief that if children are acknowledged as rights-holders this will cause conflicts of interest, particularly within the family. It is not, however, the possession of rights which inevitably cause conflicts of interest, although on occasion this may happen. It is rather that until individuals are acknowledged as possessors of rights they may be forced to suffer intolerable treatment because of the absence of a framework within which to mount a challenge. It may well be true that to deny the rights of the child would make the world a more peaceful and less complicated place, but it would not necessarily make it less conflict-laden or qualitatively better.
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There are a number of competing theories regarding the nature and substance of rights, and the same is true in relation to children’s rights. Within the ‘child rights field’ there has been such great divergence that ‘children’s rights’ has been described as a slogan in search of a definition. In one sense, however, it can be argued that the definitional search has ended or, at the very least, like an actor, is resting. The formulation of children’s rights as found in the principal children’s treaty, the United Nations Convention on the Rights of the Child 1989, has defined, at least in general terms, the rights of children. It has provided ‘a much needed legitimization’ for the concept of the rights of the child. In addition the Convention has served as a facilitator for further developments in the international law on the rights of the child, which in turn helps to improve the acceptability of specific rights of children.

The Convention also has a symbolic function. It provides a necessary focus which the scattering of law amongst so many treaties and standards has so far failed to provide. The sheer range of rights applicable to the child will surprise many, to whom education and basic protection rights summed up the duties of the state towards the child. Through its adoption of these standards the international community has underlined its commitment to children, and in so doing has raised their visibility in international and diplomatic arenas. The raising of the profile of children should not be underestimated. Many violations of children’s rights are only possible because of the invisibility of children. In general children are less able to draw attention to violations of their rights because they are disenfranchised and may lack the verbal skills or necessary contacts to make their protests heard. In addition many societies have not established accessible and effective channels of communication for children.

Violations of children’s rights are not necessarily perpetrated on a greater scale than violations of adults’ rights, but children in many ways are regarded as easier targets, partly because of their vulnerability. Babies and younger children in particular are less able than adults to withstand reductions in basic nutrition and health services. Children are also regarded as a symbol of a community’s future, and targeted and seized in order to subjugate their families and neighbours, creating general unease. No one is safe in a country capable of torturing children. There is also an understandable disbelief that such horrors can be perpetrated against children; however, this has led to an unfortunate slowness in reaction or even denial of such grave violations by the international community.

Violations of children’s rights occur on other levels which sometimes prove more difficult to identify. A failure to perceive children as separate human beings has led to breaches of their rights where actions are purportedly taken in the genuine belief that they are in the best interests of the child.

The complexities behind the violations of children’s rights provide international law with a great challenge, that of transforming the rhetoric into reality. To be effective, international law cannot be used in isolation. In particular, the implementation of certain international standards in the social, economic and cultural spheres is directly related to the availability of resources. The text seeks to analyze how the international law on the rights of the child can be integrated into development programmes and projects and protected, even in states in the process of adjusting or restructuring their economies.
A brief comparative history of the concept of childhood demonstrates how the international law on the rights of the child reflects a variety of cultural traditions. In Western Europe four important related developments affected the legal status of children. Firstly, the traditional economic benefits of children lessened as the numbers of people working in labour-intensive agriculture decreased. Secondly, the value of education was recognised by the introduction of compulsory education laws in the nineteenth century, and corresponding limits were placed on labour so that children were able to take advantage of educational opportunities. Legislation was passed restricting the number of hours per day which children could work and regulating their working conditions. Thirdly, the position of women in western societies also underwent profound changes. Women were gradually regarded as separate juristic persons and no longer part of the chattels of the man. Consequently children were no longer considered the sole responsibility or property of the father. Finally, with the emergence of new roles for the parents, the state began to intervene in areas which until then had been regarded as areas only of family concern, thus establishing a clear link between the state’s responsibilities and the child.

Some jurisdictions had enacted laws protecting animals at a time when they did not have child protection legislation. In one case the parents could only be prosecuted for mistreating their daughter by pleading that a girl was as much a member of the animal kingdom as a cat or a dog. This was known as the Mary Ellen affair, in New York City in 1874. A church social worker discovered a girl who was seriously ill from being beaten frequently, chained to a bed and fed only on bread and water. Because of the absence of legal protection against such abuse the only solution was the prosecution of the parents on the basis that the girl was a member of the animal kingdom.

In the twentieth century effective family planning became a possibility and the family began to develop in a world of choice, responsibilities and rights. The family was and is regarded as a separate unit around which society is arranged, hence the comparison to the physical world and its nucleus. National western European child laws, which once were principally concerned with matters of life and death, now focus on the well-being of children. Contemporary domestic laws seek to improve the judicial and administrative safeguards for the increased representation and protection of children, whereas previously the law was struggling with the very status of the child as a separate legal person. A transformation had to occur just for many of the instruments on the international rights of the child to be adopted, not only of the role of the family, but also of the child’s role within the family and within society.

Islamic law also has had an influence on the formation of the international rights of the child, most obviously with kafalah. According to kafalah a family is able to take in an abandoned child or a child without a family, but unlike adoption the child is not entitled to use the family name or inherit from the family. The basic concept of the rights of children is one familiar to Islamic law. The child’s first right under Islamic law is to establish parentage. Once parentage has been established certain rights and duties follow, the most important of which are fosterage, custody, maintenance and guardianship. A child is entitled to custody from birth. It is a form of guardianship which jurists divide into three categories: guardianship of the infant
(hadhana), which Islamic law places on women, to look after the child during the child’s early life; guardianship of education (al wilayat at Tarbiya), which according to the sharia is the responsibility of the man; and guardianship of property (al wilayat alal maal), which entrusts the management of any property of the child to the man.  

African states have also participated in the development of the international law on the rights of the child. The Organisation of African Unity is the first regional organisation to adopt specific regional child rights instruments. According to the President of Uganda, ‘Time was, in traditional African society, when the well-being of a child was the responsibility of every adult in the community.’ Through kinship African children are exposed to a wider range of social relationships, a fact which is reflected in a number of African languages. The Somali word for aunt, for example, is ‘little mother’. Hence childcare is often viewed as a communal activity, and extended family members can be equally involved in the child’s development, each having a legitimate basis for asserting family rights and responsibilities in relation to the child. In return the social role of children is sometimes perceived as furthering the interests of their kin.

Denials of the entitlements of children do not necessarily stem from a lack of love, but, as DeMaue observes, from the lack of emotional maturity needed to see the child as a separate person. Hence the central issue is not one of law, but of respect, and of recognition that children as human beings are entitled not only to care and protection, but also to participate in decisions involving their own destinies to a greater extent than is generally recognised.

NOTES

2. See Chapter 1.
4. The international and regional instruments focusing on children can be found in Van Bueren, International Documents on Children (1993).
8. The disenfranchisement is not universal. In Nicaragua and Brazil children are entitled to vote at the age of 16, see further Chapter 5.
9. See Chapter 11.
10. See further Chapter 2.
13. This is reflected in the standards developed by the International Labour Organisation, see further Chapter 9.
15. *Kafalah* was first mentioned in an international instrument in the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children with Special Reference to Foster Placement and Adoption Nationally and Internationally. GA Res 41/85, adopted 3 December 1986. See further Pearl, *A Textbook on Muslim Personal Law* (1987), and below Chapter 3.
17. Ibid., Nasir at 156.
18. See Chapter 1.
19. This is reflected in article 5, Convention on the Rights of the Child, and see further Chapters 3 and 14.