

The World On Her Shoulders: The Rights of the Girl-Child in the Context of Culture & Identity

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Abstract

Somewhere in the balance between protecting human rights and promoting culture hangs the girl-child, on the margins of equality. In order to move the girl-child from the margin to the centre of equality, any analysis must give full consideration to her intersecting identities, as well as the cultural context in which she lives. The method of analysis proposed herein is the GRACE model, and is premised on the fact that Gender, Race, Age and Culture intersect to inform the girl-child's particular Experience of the world. The way in which the girl-child experiences the world is traditionally negative, as it is characterized by disadvantage, marginalization and discrimination of the girl-child, vis-à-vis other members of her society. The GRACE analysis is suggested as a means to demarginalize the girl-child, and empower her through fully acknowledging her intersecting identity.

This article argues that there is a cultural context to rights, and that the specific rights that the girl-child lacks may vary from culture to culture. Despite this variation in rights, the link between culture and lack is one that identifies the girl-child in all cultures. By way of example, reference is made to the cultural practices of *Trokosi* (sexual slavery) in Ghana, and female infanticide. Through these practices the girl-child is marginalized, because of the intersection of her gender, age, race and culture. Since it is the intersection of these characteristics that has disadvantaged the girl-child, the solution must also lie in a thorough analysis of the intersectionality. The Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child are presented as international human rights instruments which prescribe the human rights of children. However, without a consideration of the intersecting identity of the girl-child, and a corresponding intersectionality analysis to rights promotion and protection, these instruments fall short of the needs of the girl-child. If the girl-child's right to substantive equality is to be fully realized, then consideration must be given to her intersecting identity and the cultural context in which she lives. Anything less aggravates the burden of inequality borne on the shoulders of the girl-child. The GRACE analysis however, empowers the girl-child to stand tall, liberated by the acknowledgment of her intersecting identity, rather than stooped under the weight of inequality and disadvantage that results from a failure to consider her intersecting identity.

1. Introduction

At the core of the international human rights system is the theory that human rights apply equally to all persons. In reality, the broader one's membership in equality-seeking communities¹, the less likely one is to enjoy the full spectrum of human rights protection. Human beings socialize, associate and interact through their affiliation with those who

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¹ Equality-seeking communities refer to those groups which have been traditionally denied access to equality on the basis of personal characteristics. This list includes, but is not limited to, women, racialized peoples, children, persons with physical and mental disabilities, and the poor.

share similar categories of identity. Some categories are inherent at birth, such as race and gender. Others, such as religion, class and geographical location, are developed from circumstances in one's life. At any given time, individuals can claim membership in a whole range of categories. Depending upon time, location and context, membership in any one of these categories could be more beneficial than others.

Also fundamental to the realization and full enjoyment of human rights is a commitment to equal treatment for rights holders. Equal treatment demands substantive and not formal equality.² In spite of these commitments and realizations, however, there is universal consistency in the fact that those who are children and those who are female are disproportionately subjected to inequality. In so far as human rights instruments endeavour to protect and promote the cultures of the world and the traditional practices³ associated with them, they also promote the inequality of the girl-child. Despite the diversity of cultures, there is a startling similarity in terms of the negative ways in which each culture perceives and treats the girl-child.

This paper explores the rights of the girl-child as provided for in international law, specifically through the United Nations Convention on the Rights of the Child (hereinafter CRC)⁴ and the African Charter on the Rights and Welfare of the Child.⁵ The challenge is how to negotiate a balance between the protection and promotion of culture and the protection and promotion of rights for the girl-child. The solution lies not in a complete reconstruction of human rights principles currently provided for in the instruments, but rather in a vision that reconciles or reinterprets these rights, so that the rights of the girl-child are not subordinate to culture.

Part 2. presents a broad discussion of culture and the protection it receives in the international arena. Part 3. expands the discussion of culture to explore the way in which rights become contextualized within culture. It will be demonstrated that, despite international consensus on the provision of certain rights, culture and context influence the way in which these rights are applied. Parts 4. and 5. focus particularly on the girl-child and examines the social construction of the girl-child, both within the context of the international instruments as well as within the framework of her own culture. Particular emphasis will be given to the location of the girl-child at the intersection of age and gender (and often running through this intersection are avenues of race, class and religion). The cultural practices of *Trokosi* (sexual slavery) and female infanticide will be discussed as rendering the girl-child particularly vulnerable to abuse. Part 6. explores an analytical method that involves interpreting and applying international law tools in a manner that is reflective of the intersecting identity of the girl-child. Such an approach will be mindful of the cultural context in which the girl-child is located, thus balancing the rights of the girl-child with the protection and promotion of cultural values. I have coined the name GRACE for this analytical model, as it recognizes that the intersecting identities of gender, race, age and culture impact upon the girl-child's experience of the world.⁶

² Greschner explains that 'unlike formal equality approaches, which exclude people's lives from their lens, any substantive method for interpreting section 15 must look at the impact of a particular law on people's circumstances, both on those to whom the law applies and on those who are excluded.' See Donna Greschner, 'Does Law Advance the Cause of Equality' (2001) 27 *Queen's Law Journal* 299 at 304.

³ Examples of human rights instruments that promote culture include: the International Covenant on Economic Social and Cultural Rights, Arts. 1(1) and 15(1)(a); the International Covenant on Civil and Political Rights, Art. 27; and CRC, Art. 31(2).

⁴ United Nations General Assembly Resolution 44/25, 1989. In force 2 Sept. 1990.

⁵ OAU Doc.CAB/LEG/24.9/49 (1990). In force 29 Nov. 1999.

⁶ The model was developed using the African girl-child as the prototype subject. For a detailed discussion of the GRACE model of intersectionality analysis, please refer to the forthcoming publication by Wilson &

2. Culture in the International Arena

Given that the world is comprised of a variety of cultures, each with its own set of values and practices, what is it that one refers to when one speaks of culture? To begin with, it is essential to distinguish between cultural and traditional practices and the cultural values underlying them. This distinction makes it possible to 'modify practices without damage to culture and tradition'.⁷ The notions of 'value' and 'practice' often become blurred or inseparable within the context of culture. Keeping a healthy distance between them maintains clarity of each and makes it easier to make changes in one without altering the other. Where a cultural practice is found to be harmful or problematic, allowances should be made to vary the practice without detracting from the underlying cultural value.

Culture, by its very nature, is not something that is universal. The parameters of culture may be delineated by time as well as geography. Although it is often slow to change, culture is not necessarily rigid or fixed, as it may find itself moving across borders and languages just as often as it defines them. Due to the continuity of culture over time, when one speaks of culture, embedded within that concept is the notion of tradition; and 'tradition represents that part of a people's culture that gives continuity and meaning to people's lives.'⁸ Where the continuity of a traditional practice is far-reaching, it is often an indication that the practice has a significant meaning to the culture. Often, long-standing traditional practices are not questioned or re-interpreted with the passage of time. This may be so even where the current time reflects conditions and attitudes that may be incompatible with the traditional practice at issue.

There is an old axiom that holds that the only constant is change. In the context of culture, if things are always changing – or if change is an inevitable and expected occurrence in life – then traditional practices ought also to be subject to change. By recognizing the value of change in the context of human rights, it is also acknowledged that rigid adherence to culture and tradition may be at the root of the problem of denying rights to the girl-child. In light of this, consider that 'tradition – the reluctance to break with age-old practices that symbolize the shared heritage of a particular ethnic group - is the most frequent reason that diverse ethnic groups cling fiercely to a practice that inflicts significant pain and suffering on women and children.'⁹ The emphasis on keeping culture and traditional practices relevant to the changing times ensures that 'culture must not be used as a smoke screen to prevent recognizing and dealing with the historic oppression of women and their universal, cross-cultural subordination.'¹⁰

In attempting to weigh the cost of violating a human rights norm against the sustained benefit of a cultural practice that appears to disadvantage only women, Hernández-Truyol suggests that the following questions be asked:

LaFleur of the conference proceedings of the International Child Rights Conference held at the University of Ottawa 14-16 Mar. 2007. The author's paper is entitled 'Crossroads of Identity: Equality Rights for GRACE, the African girl-child'.

⁷ UN Economic and Social Council, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights 54th Session: Traditional Practices Affecting the Health of Women and the Girl-child - Sixth report on the situation regarding the elimination of traditional practices affecting the health of women and the girl-child, produced by Mrs. Halima Embarek Warzazi, E/CN.4/Sub.2/2002/32, para. 9.

⁸ Anna Funder, 'De Minimis Non Curat Lex: The Clitoris, Culture and the Law' (1993) 3 *Transnational Law and Contemporary Problems* 417 at 427.

⁹ (No Author Cited), 'What's Culture Got to Do With It? Excising the Harmful Tradition of Female Circumcision' (1993) 106 *Harvard Law Review* 1944 at 1949.

¹⁰ Berta Esperanza Hernández-Truyol, 'Women's Rights as Human Rights – Roles, Realities and the Role of Culture: A Formula for Reform' (1996) 21 *Brooklyn Journal of International Law* 605 at 672-3.

- a.) What is the origin and value of the cultural practice?
- b.) What is its level of significance to the culture and within the community?
- c.) What is its level of intrusion on a protected individual right? and
- d.) How significant is the human rights norm to the international community?¹¹

Perhaps the process of contextualizing the cultural practice as laid out above will not result in a change in the practice. However, it is important that the practice be subjected to some form of review and analysis by the process of contextualization, because not only is analysis the precursor to change, but a structured analysis as laid out helps to determine whether substantial change is in fact necessary. Often, even where the harmful effects of traditional practices have been recognized, these practices continue because a greater importance is placed on the maintenance of culture and tradition than on the rights of a vulnerable minority.

In order to arrive at a truly objective determination of culture – in terms of assessing its impact on the girl-child - due consideration must be given to both those within and outside the culture. Often those within a cultural group lack a certain objectivity and have a certain degree of devotion invested in the culture, for in many respects an analysis of one's culture is an analysis of one's self. Similarly, those outside a culture lack the familiarity, contextual background and knowledge to observe and understand the particular nuances of a given culture and its traditional practices. Thus, 'for any analysis of cultural practices to be valid, it must be conducted from the perspective of both "insiders" and outsiders.'¹² When weighing culture and tradition against a modern conception of human rights, input must come from a cross-section of representatives.

3. The Cultural Context of Rights

The international community's concern for human rights has not been limited to a general theory of rights, but includes the development and realization of group and individual rights. Children are one particular group whose rights have been identified by the international community as warranting action and attention, as is evidenced by the CRC. However, children are not a homogenous monolithic group. Children and their needs vary according to a myriad cultural contexts within which they can realize these rights. Thus, the exercise of rights may vary from one cultural context to another. Children's rights, and in particular the rights of the girl-child, cannot be properly examined and understood outside the cultural context in which they occur. However, one of the reasons for setting international standards is to ensure that there is minimal variation between cultures in terms of the exercise of a right. This ideal of international standards is a lofty goal, but may be difficult to achieve when transposed into reality, considering that 'even though human rights standards and norms are universal in terms of their general formulation, their actual application and exact content has to take cognizance of cultural diversity.'¹³

The multitude of cultures in the international community also means that there is a multitude of ways in which rights can be interpreted and applied. These differences translate into variations in the standard of treatment children receive. As a consequence of these differences, 'there is often significant disagreement from one culture to another, for

¹¹ Ibid.

¹² Ibid., at 673.

¹³ Welshman Ncube, 'Prospects and Challenges in Eastern and Southern Africa: The Interplay Between International Human Rights Norms and Domestic Law, Tradition and Culture' in Welshman Ncube, ed., *Law, Culture, Tradition and Children's Rights in Eastern and Southern Africa* (Hampshire: Ashgate, 1998) 1.

example, on whether or not a particular act or practice is in the best interests of the child.¹⁴ The fact that there is disagreement does not necessarily make one cultural interpretation more correct than another, but only serves to emphasize that, since the international community has permitted the recognition of various cultures, then so too must it permit the various interpretations of rights that these cultures will offer.

Rights are universal, but the interpretation and application of rights may vary from country to country, culture to culture, group to group and person to person. Recognizing that rights are exercised within and reflective of the cultural context in which they occur, it can be seen that:

[t]he rights of a person tell us more about that person's place in society than about the rights themselves. Rights are signs of what the human has been made to not be. Rights are the void. Rights are emptiness. Rights are the emptiness that remains when a person is made to be less than human. The language of rights takes the place of the unspeakable pain and suffering that is inflicted on people, by people. Rights are the bandages on already-inflicted injuries. Bandages do not heal; they cover and hide wounds. Instead of seeing the harms inflicted, one sees the bandages. Instead of seeing the pain and suffering, one sees the right.¹⁵

When you have an individual or group that is consistently denied access to a particular right, or a set of rights, then this denial can be seen to be reflective of the positioning of the individual or group within the cultural hierarchy. The greater the denial of rights, the lower the status, influence and power in society. This is certainly true of the girl-child, and the link between culture and lack is one that identifies the girl-child, regardless of the cultural context in which she lives.

The ability to exercise one's entitlement forms part of the identity of the individual or group. This relationship between identity and the enjoyment of rights is a way of characterizing groups or individuals. Identification or group association is also founded on the basis of denial of rights. Individuals and groups are marked, not by what they are able to do, but by what they are prevented from doing – the rights that they are denied. If the basis for this denial is cultural, then it will become repeated in cultural traditions and practices until the essence of denial becomes a fundamental characteristic of those who have been denied. Eventually, it becomes difficult to describe the group or individual without reference to the denial of rights. The girl-child is clearly identified and identifiable by what she is denied: power, privilege and decision-making capacity – all of which are inherently caught up in her age and gender, and often her race and class as well. If either gender or age were different in the girl-child, then her access to power, privilege and decision-making would be considerably enhanced. If both gender and age were different – meaning that the girl-child moved completely into different categories of gender and age, then her access to power, privilege and decision-making would be far greater.

4. Intersectionality and the Social Construction of the Girl-child

Culture, social context and geographical environment all have a formative impact on one's identity. Although people often define and identify themselves by their nationality, self-identification just as often can be through ethnicity and religion, or a combination of all of these. The point is that all people have multiple identities, and as Wing and Murray Smith point out:

¹⁴ *Ibid.*, at 2. In addition, Ncube points out that although children's rights 'are expressed in abstract formulations embodying universally accepted general norms and ideals, there remains a yawning gap in the understanding of specific practices, laws, traditions and customs which would be regarded as offending these and universal standards.'

¹⁵ Maria Grahn-Farley, 'A Theory of Child Rights' (2003) 57 *University of Miami Law Review* 867.

For some, such as Anglo-Saxon American males, these identities may secure positions of privilege. On the other hand, when an identity stems from membership in a minority group or a group traditionally disadvantaged, the oppression can be devastating. The problem is further exacerbated and compounded when an individual is simultaneously a member of many minority groups, and consequently, experiences discrimination from identification with each of the groups at the same time.¹⁶

This notion of 'multiple identities', where two or more categories of identity overlap to present a thorough picture of one's identity, is referred to as intersectionality.¹⁷ The more categories of identity one is able to discern, the more information will be available about that particular group or individual. The more the various categories of identity intersect, the more complex one's identity becomes. For instance, the girl-child is readily identified by the categories of gender and age. Add to this race and religion, both of which are key aspects of identity, with their importance varying with culture and context. Next, consider class or social standing. This aspect of identity becomes a relative comparative factor vis-à-vis others in society. Consideration must also be given to the status of the girl-child within the family unit. The point is that the multiple and intersecting identities of the girl-child will vary with culture and context. However, they are always necessary in the analysis of equality rights for the girl-child.

The identity categories discussed above, namely gender, age, race, religion and class, are categories over which the girl-child has no control. Either she is born into them, or they are thrust upon her. Of these, age is the only one that is guaranteed not to be permanent: the girl-child will eventually grow into womanhood. Religion and class are also changeable categories, but the girl-child's (and later the woman's) ability to change them is often dependent upon a whole host of societal factors that dictate the extent of power and decision-making capacity that is allotted to her. As power and decision-making capacity increase, females will be able to make their own choices in such a way as to improve their class or social standing.

The various categories of identity and the ways in which they interact are shaped by social and economic factors. This shaping is what creates the social context. Social context serves as a lens through which to view or interpret the ways in which categories of identity intersect (and are formed) in various cultures.¹⁸ The emphasis that is given to identity categories is essentially the defining force of culture.

The surrounding culture and social context are what define the girl-child. Generally, those responsible for the creation and promotion of culture and social context do not share the same identity as the girl-child. The fact that so many aspects of her identity are determined for her by others, or dictated by cultural norms and ideologies that she will never participate in creating or amending, indicates the girl-child's position of powerlessness and vulnerability. The girl-child, as compared with other members of her society, is marginalized. This marginalization renders her 'less than', and very often she internalizes this social construction of herself as 'unequal', and that is how she comes

¹⁶ Adrienne Katherine Wing and Tyler Murray Smith, 'The New African Union and Women's Rights' (2003) 13 *Transnational Law and Contemporary Problems* 33 at 37.

¹⁷ The notion of intersectionality has been widely discussed over the past decade by American Critical Race theorists and Critical Race Feminists, who examine the way in which race, gender and often class combine or intersect, to heighten the disadvantage, marginalization and vulnerability experienced by women of colour. See Kimberle Crenshaw, 'Demarginalizing the Intersection of Race and Sex', (1989) *University of Chicago Legal Forum* 139; Regina Austin, 'Sapphire Bound!', (1989) *Wisconsin Law Review* 539; Angela P. Harris, 'Race and Essentialism in Feminist Legal Theory', (1990) 42 *Stanford Law Review*; Paulette Caldwell, 'A Hair Piece: Perspectives on the Intersection of Race and Gender', (1991) *Duke Law Journal* 365.

¹⁸ See Janet Kabeneri-Macharia, 'Reconstructing the Image of the Girl-Child' in Welshman Ncube, ed., *Law, Culture, Tradition and Children's Rights in Eastern and Southern Africa* (Hampshire: Ashgate, 1998) at 47.

to develop in the world.¹⁹ This marginalized status of the girl-child will be how she comes to be identified. This identity is solidified and carried on throughout womanhood.²⁰

Just as the girl-child is literally born into powerlessness, there are those who are simply born to power – or at least with a right of entry, or easier access, to power. Consider that:

White-adult-male hegemony and the rule of law are like water in water, together becoming an ocean of power. The hegemon is the rule of law and the rule of law is the hegemon. The one is the other and the other is the one. He begins and ends with the rule of law and the rule of law begins and ends with him. There is no way to separate the one from the other, or the other from the one. When law is speaking, it is the voice of him. The rule of law is the rule of white-adult-male hegemony.²¹

The white adult male is to power what the girl-child is to powerlessness. The point of reference for power is dependent upon the precise intersection between gender, race and age. To be located on the wrong side of the street where these identity categories intersect is to be denied access to power.

Not only does culture determine individual identities and group affiliations, it is itself determined by the relationship between identities. In her relationships with other members of her society, the girl-child is culturally determined to be marginalized, vulnerable and powerless. This powerlessness not only includes her lack of the full enjoyment of rights and benefits available in her society, but also means that she is powerless to remedy or redress this lack.

Enter the panacea of international human rights. The theory behind an internationally accepted set of rights and freedoms is that there are certain minimum standards of human rights protection and entitlement that should be available to all human beings; and further, that national governments, by ratifying treaties outlining these minimums, accept that they have a duty to provide them for their citizens. The problem with attempting to establish international standards lies in the realization that values and priorities differ from country to country, as well as between cultures within countries. Some argue that these differences have been taken into account, and that the minimal standards reflect the lowest common denominator of human rights entitlements across the board. However, despite the existence of minimum standards, culture and social context often operate to diminish these international standards. The lack of rights and rights protection afforded the girl-child is a universal phenomenon; and where human rights denial begins in girlhood and becomes part of the identity of the girl-child, it follows that this identity of denial and marginalization remains part of the identity as the girl-child enters womanhood.²² This is why the focus on the rights of the girl-child should be a primary consideration. Nations cannot pride themselves on being respectful and supportive of human rights while a substantial portion of their populations languish at the margins of full human rights development. The most vulnerable amongst the population at the margins is the girl-child. Although girls grow into women, their

¹⁹ See *Traditional and Cultural Practices Harmful to the Girl-child: A Cross-Sectional Review*, African Economic Commission for Africa Occasional Paper No. 1 (1997). Addis Ababa, African Centre for Women

²⁰ Ladan Askari comments that 'inequalities during girlhood are the basis of discrimination during womanhood.' See Ladan Askari, 'The Convention on the Rights of the Child: The Necessity of Adding a Provision to Ban Child Marriages' (1998) 5 *ILSA Journal of International and Comparative Law* 123 at 135.

²¹ Grahn-Farley, n.15 above, at 927.

²² See Ladan Askari, 'Girls' Rights Under International Law: An Argument for Establishing Gender Equality as a *Jus Cogens*' (1998) 8 *Southern California Review of Law and Women's Studies* 3 at 4, where she explains that 'often the discrimination girls suffer leads to subsequent violations of women's human rights.' Further, Askari points out that, 'as women's inferiority to men is mainly established from infancy, efforts to combat discrimination must begin during childhood.'

position at the margins, relative to everyone else, does not change; they just get older. Even where slight attention is paid to those on the margins, the focus is usually on adult females, and the girl-child is left to linger on the outer fringes.

This relegation of females (girls and women) to the margins or fringes of society²³ identifies them as being outside the sphere of power. The realm of power prevails not just over the economic, social and cultural aspects of society, but also specifically over human rights. For example,

issues at the core of human rights predominantly pertain to male (white, Western and liberal) concerns and experiences since men dominate the national and international legal orders and political structures. Girls' and women's issues in turn are marginalized, rendering the effective protection of their rights tentative.²⁴

In order for this to change, a realignment of human rights and other priorities is necessary. Such a realignment is possible once there has been a change in the position that the girl-child holds in society. In the following section, the cultural practices of Trokosi (sexual slavery) and female infanticide are discussed as examples of the way in which the marginalized position of the girl-child is maintained.

5. Cultural Practices that Prey on the Girl-child's Marginalized Status

‘Ten fine girls are not equal to one crippled boy’
-- Old Chinese Proverb²⁵

At the root of many of the traditional practices that prey on the marginalization and vulnerability of the girl-child is the belief that girls are not as valuable as boys.²⁶ Until a new belief of the true, inherent equality of all is incorporated into the ideologies of all societies and cultures, there is very little hope for the girl-child. Practices such as ‘female excision, bride burning, female infanticide, sex slavery and tourism, and servile marriage all affect the female child because she is female and because she is a child - both of which are characteristics which virtually ensure positions of vulnerability in many societies.’²⁷

The discussion here will focus on the practice of Trokosi (sexual slavery), and female infanticide. The reason for this focus is to offer insight into the (lack of) value of the girl-child in two different cultural contexts, and, in the course of doing so, to emphasize the universal nature of the marginalization, exploitation and neglect of the girl-child.

²³ Adrienne Katherine Wing comments on the universality of female marginalization and the societal factors that contribute to this. She states: ‘External forces such as globalization and underdevelopment further compound the situation of African women within their culture. Although they constitute a plurality of the global population, women of color are consistently situated economically, socially, and politically at the bottom of each society, regardless of what country they live in’. See Adrienne Katherine Wing and Tyler Murray Smith, n.16, at 37. The grounding of Wing’s comment in Africa reflects the heightened vulnerability that the African girl-child may face. This is interesting in light of the special consideration that is given to cultural and traditional practices as outlined in African human rights instruments such as the African Charter on Human and Peoples’ Rights and the African Charter on the Rights and Welfare of the Child. It should also be noted that female marginalization is not unique to Africa. This is indeed a global phenomenon.

²⁴ Ladan Askari, n. 22 above, at 12.

²⁵ Barbara R. Hauser, ‘Born A Eunuch? Harmful Inheritance Practices and Human Rights’, (2003) 21 *Law and Inequality Journal* 1 at 49.

²⁶ See Katherine Newell et al., *Discrimination Against the Girl-Child: Female Infanticide, Female Genital Cutting and Honor Killing* (Youth Advocate Program International, 2000) at 1.

²⁷ Kirsten M. Backstrom, ‘The International Rights of the Child: Do They Protect the Female Child?’ (1996-7) 31 *George Washington Journal of International Law and Economics* 541 at 541-2. See also, Amy Small Bilyeu, ‘Trokosi – The Practice of Sexual Slavery in Ghana: Religious and Cultural Freedoms vs. Human Rights’ (1999) *Indian International and Comparative Law Review* 457 at 462.

5.1 *Trokosi*

In the Volta Region of northern Ghana²⁸, among the Ewe, there exists a traditional practice that subjects the girl-child to servitude and sexual slavery, ostensibly under the guise of meeting the cultural demands of justice. The slavery and religious elements of the practice stem from its name – ‘Tro’ meaning god, and ‘Kosi’ which can be translated as virgin, slave or wife.²⁹ Young girls are given by their families to ‘priests’ as offerings to compensate for the sins of family members,³⁰ such as stealing or improper sexual relations.³¹ The girl-children who are sent as offerings are ‘kept as unpaid servants and sex slaves by the [priests] to pay for the sins of their families against traditional gods and spirits’.³²

The girl-child offering is intended to appease the gods, thus preventing their wrath and vengeance from being unleashed on the family. ‘Originally, the families offered cattle, money or liquor, but the priests began to demand virgin girls in their place, which may have been cheaper for the families anyway.’³³ The value of the girl-child is considered not only to be less than that of the boy-child, but even less than the family’s cattle. Cattle are readily seen as a source of food and income for a family. It is clear that in the eyes of the family, the girl-child offers no such comparable value, and if she can be used to appease the gods for past crimes, or as a sacrifice to procure the blessings of the gods, only then is the girl-child seen to be of some use. The practice has been reported to involve

tens of thousands of teenaged and pre-teenaged girls [who] are indentured as sex slaves and unpaid servants by voodoo priests to atone for the sins of their families against traditional African spirits.... ‘Reports indicate that there are “at least 4,000 girls and women bound to various shrines in the Trokosi system” in Ghana. Additionally, there are an estimated 16,000 children of the slaves. In some places more than 2,000 girls and women are enslaved to a single shrine.’ Many times, the girls offered were not even born when the offense was originally committed. Reliance on international conventions banning all forms of slavery, as well as the Ghana Constitution, which also flatly bans slavery, has not resulted in ending Trokosi. This is due in part to Ghana’s reluctance to impinge on religious and cultural practice. Trokosi exemplifies the treatment of African women as chattel property—‘young female virgins are given away’ as ‘gifts’ to gods and priests to atone ‘for offenses allegedly committed by other members of the girls’ families.’³⁴ [footnotes omitted]

The low value³⁵ attached to the girl-child enables her to be offered up as sacrifice for a crime she did not commit. Essentially, the girl-child is an expendable commodity whose slavery can buy forgiveness and a clear conscience for family members. In some instances, the Trokosi system demands that more than one girl-child be sent as an offering. This could result in several generations of girl-children being sent to atone for the sins of others.³⁶

²⁸ Some research indicates that the Trokosi practice has historically occurred in Benin, Togo and Nigeria as well. However, the practice is most notable in the Volta Region of Ghana. See Small Bilyeu, n. 27 above, at 457

²⁹ Small Bilyeu, n. 27 above, at 466.

³⁰ See Hauser, n. 25 above, 46-7.

³¹ Small Bilyeu, n. 27 above, at 470.

³² Hauser, n. 25 above, at 46.

³³ *Ibid.*

³⁴ Wing and Murray Smith, n. 16 above, at 47. See also Small Bilyeu, n. 27 above, 457-8.

³⁵ Wing and Murray Smith, n. 16 above, at 47. See also Small Bilyeu, n. 27 above, 457-8.

³⁶ As Hauser explains, this use of a girl-child to pay for alleged sins by her family is a practice that can be ‘inherited’ generation after generation: ‘Sometimes, even lifelong servitude may not settle the debt to the gods. Occasionally, the family must offer another female virgin if the Trokosi dies while at the shrine. If the Trokosi is not replaced, it is alleged that the refusal “will lead to a recurrence of calamities in the family of the wrongdoer”. It can go on for generations... Today, there are some women bound to shrines who “represent the fifth successive generation to pay for a [single] crime.” In addition, if the priest to whom the young girl belongs dies, she is inherited by his successor’. Hauser, n. 25 above, at 46.

The arbitrariness³⁷ with which the length of a Trokosi's stay at the shrine is determined, along with the family's attitude of absolving themselves of responsibility for the girl-child once she has been 'offered', all but ensure the continuation of the practice. This is reflected in the fact that 'after the girls have been branded as Trokosi slaves, their families refuse to take them back and they may become outcasts.'³⁸ The priests are certainly not about to give up their ready supply of sexual slaves, and family members are unlikely to give up their spiritual 'get out of jail free card', which enables them to engage in wrong-doing with impunity since the burden of their acts (or more specifically their punishment) is borne by the girl-child.³⁹

The burden of this weight of punishment impacts upon the quality of life that the girl-child is subjected to, once she has been offered as a Trokosi. The forced engagement in servitude and sexual slavery is one thing, but add to this the denial of food, health care and education, and the gamut of human rights abuses that flow from the Trokosi practice is disturbingly clear. Yet, despite the clear violations of human rights and equality that are embedded within the Trokosi practice, 'some view the banning of the Trokosi as the equivalent of banning their culture', and so any legal effort to alleviate the practice must also compete against religious and superstitious beliefs about the need for the practice to continue. Furthermore, part of the stronghold of the practice lies in the fact that the Trokosi are not recruited or captured. They are sent to the shrines by people who fear that something bad will happen to them if they do not atone in this way. This will continue to be true for a time regardless of the law.⁴⁰

The issue here is not simply the rooting of a practice in culture, but in the intermingling of religion and culture. This intermingling is also justified as reflecting some form of justice, since 'Trokosi is a belief that things do not happen without a cause.'⁴¹ It is not that the girls are randomly subjected to a life of servitude and sexual slavery, but rather that they are fulfilling their cultural role in the community – where someone else sins, the girl-child must bear the responsibility of punishment.⁴² However, the magnitude

³⁷ Note that the tradition demands the girls be virgins when they are sent as Trokosi (this brings to mind the notion of a 'sacrificial virgin'), so this usually means that girls are between 8 and 15 when they are offered by their families. Once they are at the shrine, the priest is the only one who can decide when the girls have atoned for the sin and free them. See Small Bilyeu, n. 27 above, at 472. Compare this with Robert Kwame Ameh who explains that ideally, Trokosis are only to serve a term of three years. However, their release must be accompanied by a liberation rite performed by their families. Since most families do not keep in contact with the girls after they have been sent to the shrine, they are also reluctant to perform these liberation rites. See Robert Kwame Ameh, 'Reconciling Human Rights and Traditional Practices: The Anti-Trokosi Campaign in Ghana' (2004) 19 *Canadian Journal of Law and Society* 51 at 52.

³⁸ Small Bilyeu, n. 27 above, 473-4.

³⁹ The weight of this burden is particularized in the fact that most Trokosi 'are condemned to a lifetime of hard labour, sexual servitude and perpetual childbearing at the service of the village priest'. The girls work domestically for the priest by cooking, cleaning, and working the fields. The priests get all of the profits, but they are not obligated to provide 'food, medical care or education for the girls or for the children they bear'. The families of the Trokosi are expected to provide food for the girls and their children and, eventually, to pay for the Trokosi's burial. 'Although the girls' families must provide for their needs ... most are unable to do so' or simply ignore the obligation. In theory, the Trokosi marry the gods, but because the priest stands in place of the gods, the girls are his wives. Unlike other wives in Ghana, the Trokosi have no rights, no assets, and cannot leave when they choose. See Small Bilyeu, n. 27 above, 472-3.

⁴⁰ Hauser, n. 25 above, at 47.

⁴¹ Small Bilyeu, n. 27 above, at 469.

⁴² Bilyeu explains that the practice of Trokosi began as a system to 'search for truth and knowledge' but now serves primarily as a device to punish wrongdoers. Ghanaians believe 'the practice stems from a philosophy that sees justice and punishment as communal; an individual with no connection to a crime may be punished to spare others. Similarly, when one person's offence goes unpunished, vengeance may be wreaked upon the entire community.' The young girls 'are offered at a shrine after a run of bad luck,

of this responsibility should not be mistaken with endowing the girl-child with any formal position of respect, for it is clear that she has none. Even though the negative aspects of the Trokosi practice can be acknowledged by those who support it, they would still opt to maintain it on the grounds that 'it deters wrongdoing'.⁴³ Whatever deterrent value Trokosi may have does not change the fact that 'the cost to women and girls who are enslaved to shrines is too high a price to pay'.⁴⁴

The Trokosi practice, as presented here, is an example of how strong adherence to cultural practice can disadvantage the girl-child. The proposed solution lies not in a wholesale rejection of the practice because of its discriminatory effect on the girl-child. Although this may certainly be the desired result from the perspective of human rights activists from both within and outside the culture, this result is best obtained after an analytical exercise, such as the one proposed by Berta Esperanza Hernández-Truyol in Part 2. above.⁴⁵ Such an analytical approach will cause a re-examination of the practice in the context of changes in time and social context, and provides an opportunity for an embrace of rights instead of blind adherence to a practice that is harmful to the girl-child.

5.2 Female Infanticide

Female infanticide is the killing of female babies. Unlike Trokosi, which is confined to a particular area in West Africa, female infanticide is far more wide-spread, occurring in China, South Asia (Bangladesh, India, Nepal, Pakistan), and parts of Africa (Cameroon, Liberia, Madagascar, Senegal).⁴⁶ The vulnerable position of the girl-child is magnified by the targeting of female babies. This is evidenced by the fact that 'there are very few cases of preferential male infanticide, as a universal social practice, female infanticide is a reflection of the deadly consequences of the cross-cultural domination of patriarchal values and culture'.⁴⁷

The girl-child's position of heightened vulnerability is premised upon her location within a cultural context that has little consideration for her age or her gender, not to mention the intersection of the two. In some societies where it is an acceptable (or at least common) practice to murder girl-children, 'girls are not killed outright after their birth. Instead, they die more subtly during the first few years of life as a result of cultural practices that discriminate against them and increase their risk of death'.⁴⁸ This slow-death of the girl-child, caused by starvation and pure neglect, implies that she is not valued enough to be saved the agony of a slow, painful demise. It is almost as though the effort to quickly take her life is simply not worthwhile.

In other instances of female infanticide, the girl-child does not even get to take her first breath, as medical technology facilitates the sex-selective abortion of female foetuses. Sex-selective abortions are highly prevalent in China, where the government's One Child Policy, combined with the high social value placed on boys, presents parents with the opportunity to render girl-children non-existent before they even come to

disease, or a series of deaths in a clan' or to prevent similar events in the future. See Small Bilyeu, n. 27 above, 470-1.

⁴³ Small Bilyeu, n. 27 above, at 502.

⁴⁴ *Ibid.*

⁴⁵ See Hernández-Truyol, n. 10 above, 672-3.

⁴⁶ See Katherine Newell et al., n. 26 above, 4-5. Newell had included the Middle East in her list, but the level of incidence is low compared to other regions, as the outlawing of female infanticide is thought to be one of the greatest benefits that Islam brought to the world. See John L. Esposito, *The Oxford Dictionary of Islam* (New York: Oxford University Press, 2003) at 138.

⁴⁷ Sharon K. Hom, 'Female Infanticide in China: The Human Rights Specter and Thoughts Towards (An) Other Vision' (1992) 23 *Columbia Human Rights Law Review* 249 at 254-5.

⁴⁸ Backstrom, n. 27 above, at 544.

exist.⁴⁹ Obviously, this practice will skew population ratios, and the effects are already quite noticeable.⁵⁰ Female infanticide is an egregious human rights violation as it denies the girl-child the fundamental right to life. Without life, equality is certainly an empty vessel.

5.3 Cultural Practices Promoting Discrimination

Female infanticide and *Trokösi* have in common the fact that girls are selectively removed from society purely on the basis of their gender. In this regard, Hom eloquently refers to female infanticide as a 'gender based discriminatory judgment about who will survive'.⁵¹ The low value attached to the girl-child makes it easy for these cultural practices to annihilate her completely. Such blatant efforts to diminish the female population will obviously have an impact on the females, both girls and women, who have so far managed to stay alive.

Societies that practice female infanticide seek to justify the practice on the basis of culture.⁵² The low cultural value placed on girls compared to boys⁵³ may be because parents see the greater potential in boy-children being educated, gaining employment and caring for the parents in their old age. This is the perception, although in reality, regardless of culture or economic status, it is the female offspring who are more likely to take up the responsibility of caring for elderly parents. Further, for religious and superstitious reasons, boys are simply thought to bring luck, and girls not so. The list of cultural justifications for the killing of girls goes on.⁵⁴ However, 'culture by itself is not an adequate defense to killing a child.'⁵⁵ An infant girl really has no basis on which to lay claim to a particular culture and the bundle of cultural practices that go along with it. Even though children all over the world are subjected to the cultural beliefs and practices of

⁴⁹ Note that: 'In the 1970s the Chinese government imposed a single-child family policy in most areas of the country, believing itself faced with a threatening population explosion, and hoping to foster political stability by raising the standard of living. Parents were pressured to limit their families to only one child. They were offered economic incentives to comply and penalized if they did not. This policy, coupled with a strong son preference, is believed to have caused a wave of female infanticide and selective abortion.' See Katherine Newell et al., n. 26, at 5.

⁵⁰For a full discussion of China's birth control policies, and the impact of public implementation, see Hom, n. 47 above, 266-68. See also Katherine Newell et al., n. 26 above, at 8, as stating that India's latest census figures show a population ratio of 93.4 females to every 100 males. According to the latest census figures from China, its ratio is 93.6 females to every 100 males. These ratios contrast with other countries where these abuses are not practiced and the female population is slightly larger than the male population. For instance, the report also contrasts these figures in India and China with Brazil, South Africa and the United States, where for every 100 females, there are 97, 98 and 96 males, respectively.

⁵¹ Hom, n. 47above, at 258. See also Newell et al., n. 26 above, at 6.

⁵² Newell et al., n. 26 above, 7-8.

⁵³ Consider that: 'A common basis for sexual discrimination is the preference for male children which continues to affect the status of the girl-child as it permeates interactions that she has with either her family or the community. It is common to find that sons are given a superior position in their families. For example,...among certain communities in Zambia the opinions of boys are given more weight than those of girls, with the result that girls are not assertive and are unable to openly give their opinions in matters that affect them. Another example is seen in the eating habits and nutritional taboos which require that women and girl-children are denied certain nutritious foods such as meat, eggs or chicken which are reserved for the men and boys in the family. Another example is where it is believed that educating a girl is not important and is a waste of time and resources because upon her marriage someone else will reap the benefits of her successful education.' Kabeneri-Macharia, n. 18 above, 49-50.

⁵⁴ Hernández-Truyol further explores the notion of cultural justification for harm to females in stating: 'Culture is, or can be, used both to perpetuate women's subordination in the name of tradition, or to subordinate non-dominant cultures in the name of law. Culture can be but a smoke screen to prevent dealing with and recognizing historic oppression of women and their subjection to the prevailing normative culture.' Hernández-Truyol, n. 10 above, at 654.

⁵⁵ Michele Wen Chen Wu, 'Culture is no Defence for Infanticide' (2003) 11 *American University Journal of Gender, Social Policy and the Law* 975 at 977.

their parents, there must come a point where it is realized that 'the child's right to live should be the foremost consideration because it is unjust to subject the child to the parent's cultural background when the child's life is directly in danger.'⁵⁶

At the root of female infanticide are cultural and societal beliefs and perspectives about the value or lack of value that attaches to girl-children. This notion of a societal or cultural perspective is not offered as a justification, but rather to demonstrate how deeply disregard for girl-children is woven into the cultural fabric. In Hom's analysis,

If viewed as a form of social femicide which occurs as a result of the existence of spheres of violence against women, female infanticide would be viewed as more than a crime committed by individuals. Within a 'spheres of violence conceptualization', female infanticide, the forced abortion of fetuses against the consent of the pregnant woman, the abortion of supernumerary children, the abuse of wives who 'fail' to bear sons, suicides by despondent women, and malnutrition of female versus male children are all forms of the devaluation of female life.⁵⁷

Hom's reference to 'spheres of violence conceptualization' ominously suggests that the attitudes towards harming the girl-child are prevalent, persistent and far-reaching. But there is hope. International law includes a series of contracts between the countries of the world to, among other things, protect and promote the human rights of all – including the girl-child. Nevertheless, despite the intention of these agreements, the plight of the girl-child remains appallingly dismal.

6. Protecting the Girl-child

The current interpretation and application of international human rights instruments is simply not enough to protect the girl-child from marginalization. To the existing international law tools must be added a theory of intersectionality. Only when the girl-child is considered as a composite of her individual identities as well as by their intersection will she be less vulnerable to the harmful human rights violations that are often embedded in cultural practices.

In the battle between culture and human rights there are two basic positions that one can take: a.) that of the universalist⁵⁸ or b.) that of the cultural relativist.⁵⁹ Both positions have relevance here, and elements of both will be reflected in the analysis. The notion that the girl-child is vulnerable and subject to harm is informed by the universalist position that all human beings are entitled to the same standard of rights. The caution that is exercised in judging cultural practices that may objectively cause harm to the girl-child is a result of the cultural relativist position that criticism from outside the culture may be tainted with its own set of cultural biases. In recognizing that an aspect of the girl-child's identity is based upon her culture, its values and beliefs, it follows that it does not do the girl-child any good to condemn her culture from the outside, for this condemnation would also represent an attack on one aspect of the girl-child's identity.

⁵⁶ Ibid.

⁵⁷ Hom, n. 47 above, 260-61.

⁵⁸ The universalist position holds that 'all members of the human family share the same inalienable rights. This means that the international community has the right to judge, by reference to international standards, the way states treat their own citizens and that states must reform their constitutions and laws where necessary to bring these into conformity with international norms.' See Ann Elizabeth Mayer, 'Cultural Particularism as a Bar to Women's Rights: Reflections on the Middle Eastern Experience' in Julie Peters and Andrea Wolper, eds., *Women's Rights, Human Rights: International Feminist Perspectives*. (New York: Routledge, 1995) at 176.

⁵⁹ Ibid. Cultural relativists argue that members of one society may not legitimately condemn the practices of societies with different traditions, denying that there can be valid external critiques of culturally-based practices and claiming that no legitimate cross-cultural standards for evaluating the treatment of rights issues exist.

It is important to stress an intersectional analysis, as opposed to a layered or successive analysis, of the age, gender, race, class or other forms of oppression experienced by the girl-child, because it is rare, if at all, that the girl-child experiences oppression or discrimination on only one of these grounds at any given time. Even if it can be said that a particular act or practice is aimed at only the age, or gender or class of the girl-child, it cannot be said that this practice impacts only upon that one targeted aspect of identity. Thus, any method of analysis to assess and reduce the discriminatory impact experienced by the girl-child must include a consideration of intersectionality.

6.1 Existing Tools for Protecting the Rights of the Girl-child

6.1.1 Convention on the Rights of the Child

Arguably, the strongest tool that the girl-child has to secure her rights and diminish her vulnerability is the Convention on the Rights of the Child. The CRC is also the largest obstacle to the girl-child receiving equal treatment and respect in the face of culture and traditional practices. Despite the fact that the CRC has more state signatories than any other international convention, the failure to take the intersecting identity of the girl-child into account diminishes its efficacy. The CRC does not apply to girls and boys equally⁶⁰ because it does not give due consideration to particularly harmful situations that may be specific to either girls or boys.⁶¹

Although subsection 24(3) of the CRC provides that: ‘State parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children’, there is no explicit prohibition against what has become the most ‘popular’ cause for the movement to abolish traditional practices that are harmful to the health of children – namely, Female Genital Mutilation (FGM).⁶² Such a gap reveals discrimination against the girl-child in the sense that the reality of her situation is not taken into account or specifically addressed by legislative remedy.⁶³ The use of gender-neutral language throughout the CRC may have been intended to promote equality and the inclusiveness that was lacking when the language of human rights was written solely

⁶⁰ Askari, n. 20 above, at 124.

⁶¹ This point is illuminated by Askari, who explains that although the CRC was ‘designed to be gender blind’, violations that primarily affect boys (i.e., child soldiers) are covered under CRC Art. 38. The same consideration is not given to violations predominantly affecting girls with child marriage. See Askari, n. 20 above, at 124. Although the issue of child soldiers may at times impact upon the girl-child, the primary target of concern is the boy-child. Similarly, even though the issue of child marriage is of greater concern for girls, it could also apply to boys. But the failure of the CRC to protect the girl-child against a particular practice that is primarily of concern to her is unfair in light of the fact that special consideration is given to an issue where boys are particularly vulnerable.

⁶² FGM is also known as female circumcision, female cutting or female surgery. The use of each term is supported by the ideological arguments of its proponents. For the sake of clarity, the letters FGM will be used here. The author has intentionally chosen not to focus on FGM as an example of a cultural practice that harms the girl-child and exploits her position of cultural vulnerability. There is no doubt that FGM does all of these things. However, it was felt that the ‘popularity’ of FGM in the international human rights (and specifically women’s rights) arena has caused much to be written about this subject, whereas relatively little has been written, and thus little analysis has been offered, about *Trokosi* and female infanticide, two cultural practices whose harm to the girl-child is certainly comparable to that of FGM. For a discussion of FGM and culture, see Hope Lewis, ‘Between Irua and “Female Genital Mutilation”: Feminist Human Rights Discourse and the Cultural Divide’, (1995) 8 *Harvard Human Rights Journal* 1; Catherine Harries, ‘Daughters of Our Peoples: International Feminism Meets Ugandan Law and Custom’ (1994) 25 *Columbia Human Rights Law Review* 493; Berta Esperanza Hernández-Truyol, ‘Sex, Culture and Rights: A Re/Conceptualization of Violence for the Twenty-First Century’, (1997) 60 *Albany Law Review* 607 at 622-3; and Funder, n. 8 above, at 417.

⁶³ It should be emphasized that this gender gap exists in the interpretation and application of the provisions of the CRC, since the language of the provisions themselves is gender neutral.

from a male perspective.⁶⁴ However, the inclusion of gender-neutral language on its own is also not an ideal final solution. The failure to make specific reference to the girl-child and conditions that exacerbate her vulnerability is itself a form of discrimination against her. As Askari explains,

the gender-neutral language of international law is detrimental to the development of girls because it does not decisively specify the victimized group nor the particular abuses distinctive to that group. As a result, in matters of nurture, play, schooling, leisure time, classroom attention, parental investment, girls are typically disadvantaged compared to boys.⁶⁵

It is not enough that the language simply be gender-neutral, but where there are specific gendered human rights abuses, then these must be directly addressed.⁶⁶

Even though subsection 24(3) of the CRC can be interpreted as securing protection for the girl-child against harmful traditional practices, this protection does not go far enough. Given the broad range of identities possessed by the girl-child, as well as the depth of issues that fall under the umbrella of culture, health is only one aspect. Although it can be given a broad interpretation to include physical, mental, emotional and even spiritual health, there are many aspects of the girl-child's interaction with culture that do not fall under the scope of health. To emphasize this, Backstrom argues that 'while cultural abuses may oppress the female child in her daily life and violate her human rights, they do not always implicate a health risk.'⁶⁷ Further, Backstrom continues her argument to state that the CRC may in fact do more harm than good. The CRC

stresses the need for the development of the child within the context of cultural identity and community practices. Furthermore, the provisions emphasize the need to strengthen the family unit, perhaps even to the subordination of children's rights. Together these two factors make it practically impossible for the female child to assert human-rights abuses based on cultural tradition or bias. Even if she is able to demonstrate abuse, however, the UNCRC provision for treatment and follow-up programs for abused children does not permit separation from the family. Thus, the UNCRC

⁶⁴ Askari extends this point to say that the 'male dominated international community does not fully acknowledge that the child's gender can detrimentally affect the realization of his or her human rights. Consequently, no special provisions or protections exist to address the special or specific needs of the girl-child. This omission renders the CRC less effective in its protection of girls' human rights.' As it stands, the CRC is in many ways a milestone in child and human rights. Consideration of gender-specific needs will help to enforce the strength of this milestone. See Ladan Askari, n. 22 above, at 16.

⁶⁵ Ladan Askari, n. 22 above, at 14.

⁶⁶ Although it will not be fully discussed here, it should be mentioned that Askari's solution to the CRC's failure to thoroughly consider gender-specific rights violations is to have the concept of gender equality established as *jus cogens* or a peremptory norm. Her reasoning is that if such a peremptory norm were established, then the provisions of the CRC would be interpreted and applied in such a way as to promote gender equality. In this way then, it is not the language that is important, but rather the perspective and interpretation that one brings to the text. As Askari states: 'The problem of placing girls under the general category of "child" is alleviated if gender equality is recognized as a peremptory, and therefore non-derogable, norm. Because it is gender-neutral, the term "child", as used in the CRC, avoids certain additional violations that are specific to girls only. Thus, girls sometimes fail to be completely protected under the provisions of the CRC. By identifying gender equality as a *jus cogens* norm, the gender-neutral language of the CRC will no longer detrimentally effect girls' human rights. Instead, girls' rights will be protected irrespective of whether the treaty provisions are specific or general since gender equality will be the standard against which violations will be measured. For example, harmful cultural practices such as son preference and discriminatory food distribution, whether specifically mentioned in treaty provisions or not, will constitute violations of the peremptory norm against gender discrimination.' Askari, n. 22 above, at 15. This paper does not further explore Askari's position because her argument is based solely on advancing gender equality. It has been the contention of this paper that gender equality is not enough. In order to assist the girl-child in her battle against harmful cultural practices, the approach must be one that considers an interesting analysis. Since neither culture nor the girl-child is identified by a single concept at any one time, the only workable solution is one that simultaneously considers the various components of the girl-child's identity vis-à-vis the various components of the culture and cultural practice at issue.

⁶⁷ Backstrom, n. 27 above, at 578.

allows for the possible justification of cultural abuses against the female child on the basis of social identity, as well as continuation of such abuses if they occur within the confines of the family.⁶⁸

This paper is not intended as an attack on culture. What is being criticized is the shortsightedness of culture and fanatical cultural proponents who have not considered the harm that certain cultural practices cause to the girl-child.⁶⁹ Where the girl-child is raised within a culture of harm, in the end this cannot be good for anyone. The key is to find a balance between giving due consideration to the intersecting identities of the girl-child and preserving the cultural ideologies that characterize a people.

Apart from the reference to child soldiers,⁷⁰ the CRC is open to criticism for its failure to mention gender-specific concerns.⁷¹ Although the specific banning of harmful cultural practices, such as FGM, sexual slavery and female infanticide, would have been of tremendous support to the girl-child in her battle against harmful cultural practices, it can be argued that Article 36⁷² is broad enough to cast a wide net of protection over the girl-child. The issue is whether Article 36 is too broad to be of any significant help. In addition to this section being overly broad, its effectiveness may be diminished further by the fact that terms such as 'exploitation', 'prejudicial' and 'welfare' may be subject to cultural interpretations that may not necessarily operate in the best interest of the girl-child. Article 36 places the burden on the girl-child to demonstrate the nature of the exploitation to which a particular cultural practice has subjected her, whereas a clear prohibition against a certain practice would operate from the position of assuming the harm or exploitation exists, and the girl-child need only demonstrate that she was a victim of the practice, without elaborating upon the nature of the harm it inflicted upon her.

6.1.2. African Charter on the Rights and Welfare of the Child

The African Charter on the Rights and Welfare of the Child represents a concerted attempt to balance child rights against cultural interests. Given the over-arching importance of culture and tradition to the peoples of the African continent, as well as the various roles and identities taken on by all peoples, including children, this is a logical place to begin to apply the theory of acknowledging intersecting identities.

The African Charter on the Rights and Welfare of the Child is notable for its recognition of the impact that culture has on the enjoyment of rights. Moreover, the African Child Charter is cognizant of the vulnerable position occupied by children in African society. The breadth of the recognition it gives to the impact that childhood and culture have on the attainment of rights is interesting in light of the fact that the African continent is

⁶⁸ Ibid.

⁶⁹ Even though states may agree to international treaties which could actually reduce the harm caused by traditional practices, they fail to fully consider the cultural context that is at the root of the harm. Consider, 'When African states adopt and ratify international conventions and declarations that promise to protect women's rights--protections which are sometimes even mirrored in the states' own constitutions--the conventions and declarations fail to penetrate the deeply rooted patriarchal and predominantly patrilineal African cultures. Thus, in spite of the numerous instruments in effect in many African states that promise to protect women's rights, there are cultural barriers at every legal juncture that prevent their enforcement. Wing and Tyler Murray Smith, n. 16 above, at 38.

⁷⁰ See CRC Art. 38.

⁷¹ And even then it cannot be said that child soldiers are strictly a matter that only affects boys. For instance, the UN Secretary General's Report on Discrimination and Violence Against the Girl-child (2007) makes specific reference to the conscription and forced abduction of young girls into civil conflicts, and how this places them in a position of heightened vulnerability vis-à-vis boy-child soldiers.

⁷² The text of Art. 36 reads: 'States Parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare.'

notorious for cultural practices that violate human rights.⁷³ In the balance between enjoyment of rights and the preservation of culture, one should not be favoured over the other. However, because there is more likely to be international agreement on core human rights, as compared with practices, Article 1(3) may be read as slightly favouring rights over culture. Article 1(3) provides that cultural practices that are inconsistent with human rights are to be discouraged to the extent of the inconsistency.⁷⁴ However, this does not say that cultural practices that violate human rights are to be abandoned, or even altered, but merely 'discouraged'. This discouragement does not seem to offer much help to the girl-child.

Article 21 acknowledges the harm caused by cultural practices and provides an assurance to eliminate harmful practices. The provision also draws attention to harmful practices that discriminate on the basis of sex. In this regard, paragraph 21(1)(b) provides the girl-child with the best international law defence in her battle against culture. The provision is significant enough to repeat here:

Article 21: Protection Against Harmful Social and Cultural Practices

1. States Parties to the present Charter shall take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular:

- a) Those customs and practices prejudicial to the health or life of the child; and
- b) Those customs and practices discriminatory to the child on the grounds of sex or other status

2. Child marriage and the betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be 18 years and make registration of all marriages in an official registry compulsory

This provision clearly demonstrates that it is not a recognition of the harms done by some cultural practices that is lacking, but rather, the application of this recognition (which must include an intersectionality analysis) in such a way as to offer meaningful assistance to the girl-child – the kind of assistance that can lead to significant change in her current position of marginalization and vulnerability. Paragraph 21(1)(b) makes reference to cultural practices that are seen to discriminate on the basis of sex, and subsection 21(2) cites child marriage as an example of this. This acknowledges the prevalence of the practice of child marriage, as well as the harm that results from the differential treatment of girls and boys within the context of child marriage. Although child marriage is referred to specifically, it is not the only traditional practice that is susceptible to gender discrimination.

In comparing the varying emphases on rights and culture that appear in Article 1(3) and Article 21, it seems that Article 1(3) is reticent about calling for an abolition of cultural practices that might be inconsistent with a broad spectrum of rights. However, in the case of specific rights mentioned in Article 21, namely 'the welfare, dignity, normal growth and development of the child', States Parties are said to bear an obligation to 'eliminate' cultural practices that affect these rights. This may be interpreted as preferential ordering of rights, in which welfare, dignity and growth and development are seen to take priority over everything else. These rights are also seen to be the ones most at stake in a failure to fully consider the intersecting identities of the girl-child.

The intersectionality approach seeks to identify the aspects of identity that impact on the level of human rights enjoyment and to reinterpret these in a way that results in increased enjoyment of human rights. The approach seeks to create equality in the way

⁷³ Examples of these practices include child marriages, FGM, and sexual slavery. See Wing and Murray Smith, n. 16 above, 39-40. See also Hauser, n. 25 above, at 46. See also, Small Bilyeu, n. 27 above, at 486.

⁷⁴ The full text of Art. 1(3) reads: 'Any custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations contained in the present Charter shall to the extent of such inconsistency, be discouraged.'

in which human rights are enjoyed by community members. However, this notion of equality seems to be at odds with cultural traditions, as Funder remarks, 'if implemented, systems which aim to uphold civil and political human rights would ostensibly give women the same rights as men, therefore they fundamentally challenge custom, tradition, and cultural autonomy.'⁷⁵

This challenge to custom and tradition should be seen as a positive, constructive force, rather than a negative, destructive one. Although there may be changes in the interpretation and application of cultural traditions, this change is aimed at the actual form of the practice and not the values underlying it. Despite differences in culture, the values that are at the root of international human rights are evident in all cultures. It is this universality that has led to agreement among human rights instruments, including the CRC. Although some African traditional practices may be harmful, the cultural values at the root of these practices are not premised upon harm. As Ncube explains,

African culture values the integrity and dignity of children and hence is at one with the principle values of participation, protection from harm and harmonious rounded growth and development enshrined in the international instruments on children's rights. The philosophy underlying children's rights is as much Western as it is African. The methods and processes to secure the rights of children may vary quite considerably from one culture to another and from region to region, but the underlying values and philosophy forming the foundation of human dignity and integrity are largely cross-cultural and universal and hence the ability of the international community to reach normative consensus on the rights of the child as enshrined in the Convention.⁷⁶

If the argument can be made that there is more commonality amongst humans than there are differences (in culture), then it can also be said that there is a global interest in and desire for promoting equality and access to human rights. This promotion should extend to the girl-child.

The fact that international conventions, particularly the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child, have not been able to stem the tide of violence and neglect that is being perpetrated against the girl-child, has less to do with the weight or seriousness of the language in these documents and more to do with the failure of the international community to consider the girl-child in her totality – that is, in light of the intersection of her age and gender. Since it is the intersection of these characteristics that has disadvantaged the girl-child, the solution to empowering her and rescuing her from her position of vulnerability and continued human rights abuse must also lie in a thorough analysis of intersectionality.

7. Conclusion

Although the need for special recognition of child rights has been identified and implemented by the international community (as evidenced by the CRC and the African Charter on the Rights and Welfare of the Child), this action has not gone far enough to adequately protect the girl-child against harmful traditional practices. The inadequacy of existing international protection for the girl-child is rooted in the failure to address her intersecting identities. Because the girl-child at all times experiences the world on the basis of her age, gender, race, class and other characteristics, the intersection of these identities must be considered in any law or policy involving her. The need for an intersectionality approach is heightened by the fact that the support accorded to cultural and traditional practices is what enables the harm against the girl-child to be perpetuated, without offering any opportunity to examine the girl-child within the parameters of the same cultural context that may be harmful to her. The recommended approach is not so much a re-drafting or creation of new international provisions. Rather, the solution to

⁷⁵ Funder, n. 8 above, 439-440.

⁷⁶ Ncube, n. 13 above, 8-9.

assisting the girl-child lies in applying an intersectionality analysis – that considers the various components of the identity of the girl-child and their intersection.

It is only through such an intersecting analysis that the girl-child can be fully known and understood. In the context of the practice of Trokosi, Ameh⁷⁷ indicates that the key to eradicating the practices lies not in legislative reform, but rather in concerted, sincere dialogue between proponents and opponents of the practice regarding how best to promote and protect human rights and culture, and not one at the expense of the other. A critical component of the dialogue is an understanding of the person at the centre of the discussion. This is of course, the girl-child. Or more specifically, GRACE, as I have come to call her, recognizing that a full appreciation of the intersection of gender, race, age, culture and the impact that they have on her experience of the world are vital to securing human rights and equality for GRACE.

⁷⁷ See Ameh, n. 37 above, at 55.

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