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# Eliminating Child Labour:

A Case Study of South Africa.

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# Summary

Child labour is born out of poverty, and it leads to more poverty. Those that work from a young age often have no possibility of going to school, and can only perform manual work as adults, which often pays little. Many children face considerable risks in their place of employment. Some of them suffer from short-term health problems, but others develop cancers and other serious diseases as a result of working when they were children.

Society is also affected by child labour. It keeps the population in poverty, since their future aspects are affected by having worked when young. In some countries, where the practice is widespread, there might even be a shortage of people who are able to perform qualified jobs in future.

HIV/AIDS has had a large impact on child labour, mostly due to the many orphans, who have to work in order to survive. The disease has had a large impact on South African society. Many have died from AIDS, others are ill and dying. Many children have no living parents, leaving extended families as their only safe refuge. They are often discriminated against, and additional protection for children affected by AIDS is urgently needed.

Despite the effects on both society and working children, some still argue that child labour should be allowed. Those arguing in favour of the practice emphasize that these children are dependent on the income generated by employment. By attempting to abolish child labour, it is driven underground, and the right of these children to work and free association is violated.

International law provides prohibition of child labour in several instruments, both from the UN, ILO and regional instruments. The implementation of these instruments into South African law is good, when the legislation is examined. The legislation is not followed as closely in practice, and there is very little *de facto* enjoyment of the right.

South Africa has taken both preventative measures, such as compulsory education, social security and labour inspection, in order to ensure *de facto* implementation of international law. However, a lack of funding, combined with the fact that the problem is very widespread, often renders these methods without much of an effect.

The Government has also taken repressive measures. Those that hire child labour should, according to law, be sentenced to prison for several years. The Courts have established a different practice, with the result that the violators have not received the punishment national law stipulates.

In the end, child labour is still very common in South Africa, despite the efforts made to eliminate it. Additional measures are needed to put an end to the practice.

# Sammanfattning

Barnarbete beror ofta på fattigdom, men det leder till värre fattigdom. De som arbetar som unga har ofta inte möjligheten att gå i skolan, och kan normalt enbart arbeta i manuella yrken som vuxna, vilka oftast är lågavlönade. Många barn utsätts för stora risker på sina arbetsplatser. Vissa av dem får kortsiktiga hälsoproblem, medan andra senare får cancer och andra allvarliga sjukdomar som följd av att de arbetade som barn.

Samhället i stort påverkas också av barnarbete. Befolkningen förblir fattig, då deras framtidsutsikter påverkas av att de har arbetat som unga. I vissa länder, där det är vanligt med barnarbete, kan det leda till en framtida brist på kvalificerad arbetskraft.

HIV/AIDS har haft en stor effekt på antalet barnarbetare, mestadels p.g.a. det stora antalet föräldralösa barn, som måste arbeta för att överleva. Sjukdomen har haft stor påverkan på det sydafrikanska samhället. Många har dött av sjukdomen, och andra är sjuka och döende. Många barn har blivit föräldralösa, och storfamiljerna är de som får ta hand om dem. Barn som påverkas av AIDS upplever mycket diskriminering, och de behöver ytterligare skydd i lagstiftningen.

Trots att både samhället och barnarbetare påverkas, så påstår vissa att barnarbete borde tillåtas. De understryker att barnen är beroende av sin arbetsinkomst. Genom att förbjuda barnarbete så resulterar det bara i att det sker i det fördolda och att barnens rättigheter att arbeta och till föreningsfrihet inkräktas på.

Internationell rätt innehåller ett förbud av barnarbete i instrument från FN, ILO och regionala organisationer. Den internationella rätten har transformerats till sydafrikansk lag på ett noggrant sätt. Men den nationella lagen följs inte i praxis, vilket resulterar i att rättigheten inte kan åtnjutas de facto.

Regeringen har också vidtagit repressiva åtgärder för att förhindra barnarbete. De som använder sig av barnarbetare skall, enligt lag, dömas till flera års fängelse. Rätterna har etablerat en annan praxis, som resulterar i att de dömda inte får det straff de ska ha enligt lag.

Sammanfattningsvis så är barnarbete fortfarande väldigt vanligt i Sydafrika, trots alla försök att få bukt på problemet. Ytterligare åtgärder behövs för att barnarbete ska kunna anses vara ett avslutat kapitel.

# Preface

For my mother, who I know is watching over me still.

First of all, I would like to thank some of my closest friends, Natasa, Cigdem, Shannon, Armando, Josephine, Maria and Daniela for the support they have given me during the writing process. Without their wonderful company, the writing process would have been a lot harder.

I would also like to thank my family, especially my two aunts, Inger and Anita, for being my extra mums when I needed them.

Last, but definitely not least, I want to thank my supervisor, Andreas Inghammar, for guiding me through the process of writing my first thesis. I could not have done it without his help, thoughtful suggestions, and enthusiasm.

# Abbreviations

|        |  |
|--------|--|
| AIDS   | Acquired Immune Deficiency Syndrome                            |
| CRC    | The United Nations Convention on the Rights of the Child       |
| ECOSOC | Economic and Social Council                                    |
| HIV    | Human Immunodeficiency virus                                   |
| ICCPR  | International Covenant on Civil and Political Rights           |
| ICESCR | International Covenant on Economic, Social and Cultural Rights |
| IPEC   | International Programme on the Elimination of Child Labour     |
| ILO    | International Labour Organisation                              |
| PEPFAR | The US President's Emergency Plan for AIDS Relief              |
| UDHR   | Universal Declaration of Human Rights                          |
| UN     | United Nations   |
| UNAIDS | Joint United Nations Programme on HIV/AIDS                     |
| UNICEF | The United Nations Children's Fund                             |
| VCLT   | Vienna Convention on the Law of Treaties                       |
| WHO    | World Health Organization                                      |

# 1 Introduction

## 1.1 Background to the Problem

When Josefina was nine, her mother died of AIDS. She moved in with her aunt and uncle. At her relatives' house her cousins taunted her, and asked her why she ate their food. After all, they had not killed her mother. She had to do a lot of housework, and was beaten by her uncle. Even though her cousins attended school, and her uncle was a head teacher, she was not allowed to study. At the age of fourteen she took up prostitution in order to make a living. She lived with a woman, who provided her with customers. The woman beat her if she did not comply with the requests of her customers, regardless of the nature of these. Two years later, when she was just 16, she was diagnosed with HIV.<sup>1</sup>

Unfortunately Josefina's case is not unique. There are many children like her. Without anyone to look after them, they have to resort to becoming child labourers, in order to survive. Orphans are not the only children that work. Many do so to provide their family with an extra income.

Child labour is not a new phenomenon. However, in the last century the attitude towards working children has changed. Whereas it was once accepted, it is now considered to be a hazard to the development of the child. The ILO has had a policy of trying to eliminate child labour for a long time, and adopted its first minimum age convention in 1919.<sup>2</sup> The main methods of combating the problem have been to create instruments regulating minimum age for employment. In the later years, a Convention on the worst forms of child labour. Despite this, there are still many children working. These children are more at risk of dropping out of school. The lack of education will in turn make it more likely that they will be poor as adults. The U.S. Department of Labor describes the problem very accurately: "While poverty is the reason most often given for why children work, child labor also perpetuates poverty, since children who must begin work at an early age often compromise their future earnings potential".<sup>3</sup>

According to an ILO report from 2006, child labour was on the decline in most parts of the world at the time. The exception was sub-Saharan Africa. However, while there were more African children working, the percentage of working children in the region had decreased.<sup>4</sup> In other words, the increase of child labourers was partly due to a larger population.

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<sup>1</sup> Human Rights Watch, *Letting Them Fail: Government Neglect and the Right to Education for Children Affected by AIDS*, Human Rights Watch, vol. 17, no. 13(a), New York (2005), p. 32, < <http://www.hrw.org/reports/2005/africa1005/africa1005.pdf>>, visited on 26 March 2009.

<sup>2</sup> The Minimum Age (Industry) Convention, (No. 5), 1919.

<sup>3</sup> U.S. Department of Labor, *By the Sweat and Toil of Children: Efforts to Eliminate Child Labor*, Vol V (1998), available from <[www.dol.gov/ilab/media/reports/iclp/sweat5/](http://www.dol.gov/ilab/media/reports/iclp/sweat5/)>, visited on 6 April 2009.

<sup>4</sup> ILO, *The end of child labour: Within reach. Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work*, International Labour Office, Geneva (2006), p. 6.

The report also states that a lot of the child labour in the region had a connection to HIV/AIDS.<sup>5</sup> It is difficult to know how accurate these numbers are, since these are estimated. Many children work in unregulated sectors, and are therefore difficult to find. It is one of the main obstacles in any effort to establish the number of children that are employed.

South Africa is one of the countries that still have many child labourers. The AIDS epidemic is making this problem even more pronounced. In just 7 years, from 2001 to 2008, the number of AIDS orphans in South Africa rose dramatically. It went from 400 000 to 1 400 000 orphans.<sup>6</sup> Many of the children that work have lost one, or both of their parents to AIDS. Of course, this is not a problem that is specific to South Africa. Many countries where large populations are infected with the virus report a rise in child labourers. The AIDS and child labour connection is a subject that is on the agenda of many human rights organisations.

There are several reasons why AIDS has such an effect on child labour. AIDS is the illness most likely to turn children into double orphans, since one parent carrying the virus generally infects the other.<sup>7</sup> Once the parents are dead, the children are dependent on extended families to look after them, if there are any. Most of the AIDS orphans are taken care of by close relatives.<sup>8</sup> However, as the epidemic creates more orphans, the tendency is that the resources of the households left to care for the orphans are depleting, and stretched to the limit. Providing food for everyone becomes more difficult as there are more and more mouths to feed. The need for the children to work becomes more acute, in order to bring in some money to the family and to avoid starvation. If the family cannot afford food, it is unlikely that they have enough money to send the children to school. Education in South Africa is not free, but school fees can be exempted. However, it often involves additional costs, such as school uniforms and books that the families simply cannot afford.

For children that are left without anyone to care for them, the situation is even more desperate. There are instances where an older sibling is left with the responsibility of providing for younger brothers and sisters.<sup>9</sup> Going to school to get an education is suddenly out of the question, as the child has to work in order to support himself, and his remaining family.

AIDS victims and their families are often discriminated against, making their situation even more difficult. It might be harder for them to

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<sup>5</sup> *Ibid*, p. 61.

<sup>6</sup> WHO, 2008 *Update South Africa: Epidemiological Fact Sheet on HIV and AIDS - Core data on epidemiology and response*, UNAIDS, Geneva (2008), p. 6, <[www.who.int/globalatlas/predefinedReports/EFS2008/full/EFS2008\\_ZA.pdf](http://www.who.int/globalatlas/predefinedReports/EFS2008/full/EFS2008_ZA.pdf)>, visited on 11 May 2009 (while these numbers vary, these numbers present an estimation that is somewhere in the middle).

<sup>7</sup> UNAIDS, *Children on the Brink, A Joint Report of New Orphan Estimates and a Framework for Action*, New York (2004), p. 11, <[www.unicef.org/media/files/cob\\_layout6-013.pdf](http://www.unicef.org/media/files/cob_layout6-013.pdf)>, visited on 15 April 2009.

<sup>8</sup> UNICEF, *Africa's Orphaned and Vulnerable Generations: Children Affected by AIDS*, New York (2006), p. 17, <[www.unicef.org/publications/files/Africas\\_Orphaned\\_and\\_Vulnerable\\_Generations\\_Children\\_Affected\\_by\\_AIDS.pdf](http://www.unicef.org/publications/files/Africas_Orphaned_and_Vulnerable_Generations_Children_Affected_by_AIDS.pdf)>, visited on 20 March 2009.

<sup>9</sup> *Ibid*, p. 17.

find decent work, which could explain that AIDS orphans are more likely to be working in jobs that are included in the worst forms of child labour.<sup>10</sup> Sometimes the people chosen to take care of these orphans when their parents die discriminate against them. This can be seen in the numbers showing how many children go to school. In an article focusing on ten different sub-Saharan African countries (but not South Africa), it was found that a general trend is that orphans are less likely to attend school than their non-orphan peers.<sup>11</sup> The authors found that economic factors are not enough to explain this phenomenon, since the school attendance differs between orphans and non-orphans living in the same family.<sup>12</sup> This example clearly shows that these children do not always enjoy equal opportunities, even in their family life.<sup>13</sup>

For children orphaned by AIDS, the problems rarely start with the parents' deaths. While the parents are still alive, the economic situation of the family is likely to worsen. A study of Côte d'Ivoire families shows that the medical expenses will increase significantly, in order to care for the sick person. At the same time, the parent affected by the disease is unable to work.<sup>14</sup> This combination of increased expenses and decreased income might make it necessary for the children of the family to find employment. It is reasonable to assume that the situation is similar, not just in South Africa, but in sub-Saharan Africa as a whole.

Many international organisations, such as the UN and the ILO, have been working towards eliminating child labour. However, the AIDS orphans present a major obstacle in reaching this goal. Eliminating child labour is an admirable goal. However, the alternative for children suddenly out of work, is often starvation. At the same time, the children that are forced to work do not have the same prospects in their future. They are also more likely to get infected by the HIV virus than the children who received an education.

In order to really eliminate child labour, a new approach is needed. There must be a change of social policy, to remove the need for children to work, and encourage them to stay in school. There must be better education about the dangers and effects of child labour.

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<sup>10</sup> The worst forms of child labour will be discussed in Chapter 3. *See also* ILO, *Report of the Committee of Experts on the Application of Conventions and Recommendations: (articles 19, 22 and 35 of the Constitution): third item on the agenda: Information and reports on the application of Conventions and Recommendations*, International Labour Organization, Geneva (2008), p. 281, and FAO Newsroom, *Agriculture accounts for 70 percent of child labour*, <[www.fao.org/newsroom/en/news/2006/1000394/index.html](http://www.fao.org/newsroom/en/news/2006/1000394/index.html)>, visited on 8 April 2009.

<sup>11</sup> This trend can also be seen in South Africa.

<sup>12</sup> A. Case *et al* (2004) 'Orphans in Africa: Parental Death, Poverty and School Enrollment', p. 5, <[www.princeton.edu/rpds/papers/pdfs/case\\_paxson\\_orphansafrica.pdf](http://www.princeton.edu/rpds/papers/pdfs/case_paxson_orphansafrica.pdf)>, visited on 20 March 2009.

<sup>13</sup> While this study did not relate specifically to AIDS orphans, these are the most numerous in sub-Saharan Africa, where the study was conducted.

<sup>14</sup> N. Béchu, 'The impact of AIDS on the Economy of Families in Côte d'Ivoire: Changes in consumption among AIDS affected households', in M. Ainsworth, L. Fransen and M. Over (eds.), *Confronting AIDS: Evidence from the Developing World*, (European Commission, Brussels, 1998), pp. 342–343, available from <[www.cepel.org/cdrom/orphelins\\_sida\\_2006/pdf/confront\\_aids\\_chapter\\_16.pdf](http://www.cepel.org/cdrom/orphelins_sida_2006/pdf/confront_aids_chapter_16.pdf)>, visited on 2 April 2009.

## 1.2 Purpose

In order for international human rights to be enjoyed fully, it is not enough to implement them in national law. There has to be a *de facto* enjoyment of the right. For this to be realised there must be effective enforcement of the rights. In other words, not just rights on paper, but rights in reality.

The purpose of this thesis is to examine child labour in several different aspects. More specifically, how it affects society as a whole, especially economically, but also the effects on the working child. I will look at the health aspects of child labour, as well as how it affects other rights the child has, such as the right to education and development.

I will briefly discuss the relation between HIV/AIDS and child labour, both in the amount of child labourers it creates, and in the special situation they face. HIV/AIDS is a disease that often kills both parents, leaving the children without somebody to look after them. They also face discrimination, due to their connection with the illness.

It is also useful to know the problems facing those trying to eliminate child labour today. The arguments in favour of child labour often highlight this very clearly, and can therefore be examined to see the problem from several angles. Child labour is often poverty-related, and the elimination of child labour is both costly and time consuming. At the same time, the countries where economic exploitation of children is common are often poor, and cannot create solutions on their own. The implementation of international law in national legislation is just a beginning.

To determine how well South African laws comply with international instruments, I will analyze both the international and national legislation. However, true compliance can only follow if the practice is in accordance with international law. Therefore, I will look at some of the methods used to combat child labour by the South African Government, in order to determine if these measures are enough to comply with international law. I will also suggest additional, complementary methods, which could help towards the elimination of child labour.

In the essay, I limited myself to the situation in South Africa. This is due to several reasons. English is an official language, and therefore, it was possible to access information in a language I could understand. Most of the information is also available online, so it was possible for me to access Government publications and other sources I needed in my research. But more importantly, South Africa is part of sub-Saharan Africa, where the AIDS situation is the most serious. However, it is more developed than most of its neighbours, giving it a better possibility of overcoming the difficulties it is currently facing.

Adding to this, the South African situation is unique. After decades of Apartheid, the country had to completely rebuild when the new system of Government was introduced in the 1990's.

While the country was in deep political turmoil, the AIDS epidemic was not of major concern. However, this time of turbulence coincided with the period when the amount of newly infected suddenly started rising at an

alarming speed.<sup>15</sup> One of the major, and most serious impacts of AIDS, is that life expectancy in southern Africa has decreased in the last ten years, from over 60 years to less than 50.<sup>16</sup>

### 1.3 Method and terminology

For my thesis, I have used the traditional legal method. I have researched the main international instruments that to some extent contain prohibitions on some form of child labour, as well as the regional African Charter for children's rights, and International Labour Standards. Other sources used in the research are the writings of jurists and scholars, as well as internet sources. In the analysis of the South African law, I compared the national and international law, to see to what extent the national legislator followed the international Conventions. Because the ILO Conventions are more specialized than the UN or regional instruments regarding child labour, I have compared the ILO legislation to the national law, in order to see if these, more detailed definitions have a counterpart in the South African law.

For the purpose of this essay, the definition of a child is a person under 18 years of age. The use of the term child labour is referring to the non-desirable types of child labour, as defined by international law, especially ILO labour standards. It is not meant to refer to any kind of work performed by a child, since this can sometimes be beneficial.

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<sup>15</sup> R. Dorrington *et al*, *The Demographic Impact of HIV/AIDS in South Africa: National and Provincial Indicators for 2006*, Centre for Actuarial Research, South African Medical Research Council and Actuarial Society of South Africa, Cape Town, pp. 2, <[www.mrc.ac.za/bod/DemographicImpactHIVIndicators.pdf](http://www.mrc.ac.za/bod/DemographicImpactHIVIndicators.pdf)>, visited on 6 March 2009.

<sup>16</sup> UNAIDS, *Report on the Global AIDS Epidemic 2008*, p. 45, available from <[www.unaids.org/en/KnowledgeCentre/HIVData/GlobalReport/2008/2008\\_Global\\_report.asp](http://www.unaids.org/en/KnowledgeCentre/HIVData/GlobalReport/2008/2008_Global_report.asp)>, visited on 4 May 2009. Specific numbers for South Africa can be found in UNAIDS, *Report on the Global AIDS Epidemic 2006*, p. 81, available from <[www.unaids.org/en/KnowledgeCentre/HIVData/GlobalReport/2006/default.asp](http://www.unaids.org/en/KnowledgeCentre/HIVData/GlobalReport/2006/default.asp)>, visited on 4 May 2009.

## 2 Delimitation of the Elimination of Child Labour

### 2.1 The Impact of Child Labour on Society

The cliché that children are the future is, in reality, in indisputable fact. They will take over when we are no longer around. They will one day be the lawyers, architects, teachers and politicians. Their childhood, upbringing and education will affect the prospects of the world, and these factors will determine the prospects of the different States. This is one of the reasons that child labour is so tragic. It not only affects the future of the individual in question, but the whole country as a whole.

Keeping this in mind, it is therefore quite ironic, and terrible, that the need for child labour is often born out of poverty, since it leads to more poverty. A child that has worked instead of obtaining an education, is often unable to improve its prospects in the future. The only jobs available will be low-paid manual work, which does not require schooling. In turn, once the child labourers grow up they will also be likely to rely on their own children to help provide for the family. These children, in turn, will face the same lack of prospects when they grow up. In effect, the problem will be transferred from one generation to the next.

Another paradox surrounding the phenomenon of using child workers is that it will make it more difficult for adults to support their families. First of all, if many child labourers are used, there will simply be fewer jobs for the adults. Secondly, if the use of cheap child labour is common, employers may be more reluctant to hire adults, simply because they are more expensive. If the parents cannot work to support their children, but the children are able to find jobs, the need for these children to support the family will be greater. It is a vicious circle.

This effect for the individual also stretches to society as a whole. In countries where a large part of the children are working instead of going to school, there will be a lack of well-educated people when these children grow up. They will only be able to perform manual work. This in turn will hinder the economic development of the country as a whole, since a mostly uneducated generation will not provide as many people able to take on qualified work. This is especially true in today's society, where qualified work requires many years of education.

Most children labour in informal economic sectors, such as agriculture.<sup>17</sup> They are not as likely to be employed in export sectors, and therefore their work impacts the local economy more than international

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<sup>17</sup> ILO, *A Future Without Child Labour: Global Report Under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work*, International Labour Conference 90th Session 2002, Report I(B), Geneva (2002), pp. 22 - 24.

economy.<sup>18</sup> These sectors are unlikely to be regulated by labour laws, since they are informal. Where regulation exists, they are rarely enforced. There are also very large difficulties enforcing laws in these sectors, since there is often considerable physical distance between the labour inspectors and, for example, the plantation using child labour.

The main problem with lack of enforcement (or legislation) is that it increases the likelihood of exploitation. If child workers have no legal rights, they are unlikely to be paid a fair wage, work under decent conditions, or have limited working hours. As a result, children are often injured while working, for many different reasons. The use of tools that are not made to be handled by children, pesticides, and heavy lifting are some of the dangers children face in agricultural work. In some cases, the injuries sustained will leave them with permanent health problems. They might also develop cancer as adults, due to their working conditions.<sup>19</sup> This will, of course, have an impact on society later on. First of all, the State might have to spend more money on health care and social help to provide for those who got injured as children. Secondly, if these children become unable to work for the rest of their life, there might not be enough healthy workers to fill the need for unskilled labour. There will always be a need for unskilled labourers in society. However, children should be given an education, so that they can have the option of becoming skilled labourers as adults. This risk is especially great in countries where child labour is very widespread, such as India.<sup>20</sup>

It is more and more common that certain vulnerable groups are given special protection in human rights law. Children have been given special protection in international law, because their status often leaves them defenceless. Young people are more vulnerable because they are still developing, both physically and mentally. They are also still learning about the world around them. The very young are also completely dependent on somebody to look after them, since they cannot even walk themselves. It is therefore vital that these children are adequately protected, not just by international law, but by national law, and society.

Considering the impact both on the individuals involved, and on society as a whole, child labour does seem like a problem, which should be eradicated as soon as possible. But of course, it is not that simple. These children work because they need to work. Given a choice between starvation or working, they choose to work. There is no real alternative for them, and some scholars have used this to argue for child labour, rather than against it.

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<sup>18</sup> Child labour in export industries is not unheard of. A few years ago, the Persian rug industry was largely dependent on child workers. However, as international pressure grew to stop this practice, carpet producers were encouraged to hire adults instead.

<sup>19</sup> WHO, *Hazardous child labour*, <[http://www.who.int/occupational\\_health/topics/childlabour/en/](http://www.who.int/occupational_health/topics/childlabour/en/)>, visited on 4 March 2009.

<sup>20</sup> India has one of the highest rates of child labour in the world. For background reading on the Indian situation and the problem of knowing the true extent of the problem, see M. Weiner, *The child and the state in India: child labor and education policy in comparative perspective*, Princeton University Press, Princeton (1990), pp. 20 - 21.

## 2.2 The Impact of Child Labour on Working Children

The ones most directly affected by any child labour regulations are the working children themselves. Any positive or negative effect of child labour will be directly experienced by them. Therefore, it is important to look at the effects that child labour has, not just in the short term, but in the long term as well.

First of all, it is important to keep in mind that there is a gender difference, most likely for cultural reasons. Boys are more likely to be economically active, and therefore run a higher risk of working in a hazardous job.<sup>21</sup> Girls are not as economically active, but often perform a vast amount of household chores, for many hours each week.<sup>22</sup> However, despite the heavy burden placed on girls in the home, this is not counted as child labour. Girls are also more likely to drop out of school in order to look after her brothers and sisters.<sup>23</sup> This is probably more likely when the parents are becoming ill from their HIV infection, and can no longer care for their children.

Child labour has both short-term and long-term effects. These will likely vary depending on the type of work done, the stresses put on the body, the working environment and how long the working hours are. Children generally work in agricultural enterprises, domestic work, or small factories.<sup>24</sup>

Children can be more at risk to dangers in the workplace than adults, for several reasons. First of all, they are physically and mentally different from adults, and might therefore, for example, be more inclined to develop a disease from a chemical used.<sup>25</sup> Secondly, children often perform different tasks than adults.<sup>26</sup> Their work can consist of cleaning the tools the adults use. This results in an increased exposure to dangerous cleaning chemicals, simply because they have different responsibilities at work. The amount of exposure allowed in the workplace is also adapted to safety levels of grown-ups, rather than children.<sup>27</sup> Some chemicals even have a higher accumulation rate in the bodies of young people.<sup>28</sup> According to a WHO report, some countries oppose studies of the effects of industrial chemicals

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<sup>21</sup> ILO, *supra* note 4, p. 7.

<sup>22</sup> D. Zapata, *Counting invisible workers: Girls in domestic activities within their homes*, p. 4, <[www.un.org/womenwatch/daw/egm/elim-disc-viol-girlchild/ExpertPapers/EP.9%20Zapata.pdf](http://www.un.org/womenwatch/daw/egm/elim-disc-viol-girlchild/ExpertPapers/EP.9%20Zapata.pdf)>, visited on 29 April 2009.

<sup>23</sup> A. Mturi and N. Nzimande, *HIV AIDS and child labour in South Africa: A rapid assessment*, International Labour Organization, Geneva (2003), p. 7.

<sup>24</sup> V. Forastieri, *Children at work: health and safety risks*, 2nd edition, International Labour Office, Geneva (2002), p. 22.

<sup>25</sup> *Ibid*, pp. 22 - 23.

<sup>26</sup> ILO, *Child Labour: Targeting the Intolerable, Report VI(1), Sixth item on the agenda, International Labour Conference, 86th Session, 1998*, Geneva (1998), p. 10.

<sup>27</sup> Forastieri (2002), *supra* note 24, p. 23.

<sup>28</sup> *Ibid*, pp. 24 - 25.

on children, because they are not supposed to handle these materials.<sup>29</sup> The true effects could take many years to show, since the consequence could be inner organs that do not work properly.<sup>30</sup> However, because the damage is not immediately visible, it is therefore likely to be ignored. There are claims that children often perform their tasks unsupervised, and might not have the appropriate training or safety equipment to perform their duties safely.<sup>31</sup> Children often find that available safety equipment does not fit them, so they have to work without it.<sup>32</sup>

Of the different sectors that children work in, the one that results in the most injuries is the agricultural sector.<sup>33</sup> The children are at risk from dangerous machinery, pesticides and other chemicals, dust and heavy lifting when working at farms and plantations. In the short term, the children suffered mostly from respiratory diseases, and skin problems. However, the long-term effects are more serious. There is an increased risk of cancer and abnormalities in the immune system as well as other serious health problems.<sup>34</sup>

Domestic work carries specific risks, mostly due to the fact that it is a 'hidden' and non-visible situation for the worker. Labour inspectors are not allowed to inspect working conditions in most countries, because it is taking place in a private home. As a result, there is only a limited amount of information available regarding domestic workers. The child domestic workers tend to have to work long hours.<sup>35</sup> Some numbers suggest that 90 percent of children working as domestic help are girls.<sup>36</sup> They face an especially high risk of sexual abuse, as well as other physical and mental maltreatment. This is considered to be common.<sup>37</sup>

In general, work accidents tend to have more serious consequences for children than it does for adults.<sup>38</sup> This could partly be due to the fact that children might not fully realize the danger of the situation, due to lack of experience and training.<sup>39</sup> For the same reasons, they might be unable to stop an already dangerous situation from becoming an accident, because they are unable to recognize early warning signs. It is also important to remember that most tools and machinery are not designed with children in mind. The most common reason for this is that the equipment is considered dangerous, and therefore should not be handled by young persons. There are also substantial difficulties taking children into account while designing

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<sup>29</sup> WHO, *Children at Work: Special Health Risks, Report of a WHO study group*, WHO Technical Report Series 756, World Health Organization, Geneva (1987), p. 23, <[http://whqlibdoc.who.int/trs/WHO\\_TRS\\_756.pdf](http://whqlibdoc.who.int/trs/WHO_TRS_756.pdf)>, visited on 14 April 2009.

<sup>30</sup> Forastieri (2002), *supra* note 24, p. 62.

<sup>31</sup> *Ibid*, p. 23.

<sup>32</sup> WHO (1987), *supra* note 28, p. 28.

<sup>33</sup> Forastieri (2002), *supra* note 24, p. 31.

<sup>34</sup> *Ibid*, p. 33.

<sup>35</sup> ILO (1998), *supra* note 26, p. 13.

<sup>36</sup> C. Flores-Oebanda, *Addressing vulnerability and exploitation of child domestic workers: An open challenge to end a hidden shame*, p. 2, <[www.un.org/womenwatch/daw/egm/elim-disc-viol-girlchild/ExpertPapers/EP.10%20%20Flores%20Oebanda.pdf](http://www.un.org/womenwatch/daw/egm/elim-disc-viol-girlchild/ExpertPapers/EP.10%20%20Flores%20Oebanda.pdf)>, visited on 4 May 2009.

<sup>37</sup> Forastieri (2002), *supra* note 24, p. 46.

<sup>38</sup> ILO (1998), *supra* note 26, pp. 10 - 11.

<sup>39</sup> Forastieri (2002), *supra* note 24, p. 56.

workplace machinery and tools, since all children are at such different levels of development.<sup>40</sup> Sometimes the tools are too heavy, and using them results in bodily strains, which an adult would not experience. Strain injuries and back problems could result, with both long- and short-term consequences. If children carry heavy loads, it can result in skeletal damage, because their skeleton has not been developed properly.<sup>41</sup>

These are not the only physical risks that working children face. If children work, they expend a large part of their energy on this, instead of growing. Because children have a higher metabolism than adults, they need to be properly fed, in order not to be malnourished when they work.<sup>42</sup> While malnourished labouring children are common, there are exceptions. Studies have shown that where children receive adequate food rations at work, they weigh more, and are taller than their non-working counterparts.<sup>43</sup>

Labour can also have a psychological and social impact on the working child. This impact varies with the type of work the child performs, the views on labouring children in the society, and how they are valued.<sup>44</sup> However, it is important to remember that regardless whether or not the child feels proud of working, young people are more at risk at their place of employment. They are relatively uneducated, and do not always know their rights, and if they do, might be powerless to exercise them. They are also more easily abused. All of this can have a very negative psychosocial impact on the child.<sup>45</sup> According to an ILO report, children could be much more likely to suffer emotional damage from mental abuse than adults.<sup>46</sup> Girl children are more prone to sexual abuse. Sexual abuse can put the girl child at great risk of becoming a social outcast in cultures where this is considered to bring dishonour to the family.<sup>47</sup> For their part, boy children may not be as inclined to report or complain about any maltreatment, since they are supposed to be 'strong'.<sup>48</sup>

One of the more traumatic situations is when a child is removed from his or her home and family to work as a domestic servant at a young age. The upheaval can make the child feel less secure, as they have to adjust to a new environment, people and sometimes culture.<sup>49</sup> In this particular sector the children are often quite isolated from friends and relatives, adding to the distress.

The physical aspects of their working conditions can also psychosocially affect children. The handling of dangerous chemicals can lead to a less developed nervous system, which can have an effect on the psychosocial abilities of the child. As discussed above, children are also

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<sup>40</sup> WHO (1987), *supra* note 28, p. 28.

<sup>41</sup> Forastieri (2002), *supra* note 24, p. 58.

<sup>42</sup> *Ibid*, pp. 58 - 59.

<sup>43</sup> WHO (1987), *supra* note 28, p. 18.

<sup>44</sup> M. Woodhead, 'Psychosocial Impacts of Child Work: A Framework for Research, Monitoring and Intervention', vol. 12, *The International Journal of Children's Rights*, (2004), pp. 331 - 332.

<sup>45</sup> *Ibid*, p. 332.

<sup>46</sup> ILO (1998), *supra* note 26, p. 9.

<sup>47</sup> Woodhead (2004), *supra* note 44, p. 342.

<sup>48</sup> *Ibid*, p. 341.

<sup>49</sup> Woodhead (2004), *supra* note 44, p. 337.

more accident prone than adults. Because of their undeveloped physical skills, there is an increased risk of suffering trauma because of a work accident.<sup>50</sup> This trauma can have long-term effects for the child, and it is unlikely that he or she will receive counselling to overcome this.

## 2.3 The Right to Work in Dignity v the Elimination of Child Labour

The view that child labour should be abolished is not a universal one. In fact, some writers argue quite forcefully in favour of keeping the practice. In order to properly understand the problem, and the difficulties in combating it, it is very useful to examine the arguments that both sides present. This also clearly shows the paradox of the phenomenon of child labour, the problems facing those trying to abolish it, and the dangers of keeping the system.

### 2.3.1 The Arguments in Favour of Child Labour

There are those that argue in favour of child labour. The main argument is often that child labour is so common, that the best thing to do is not to stop it, but to create better conditions for working children.

Pro child-labour arguments use the fact that it is a widespread phenomenon as a justification for keeping up the practice. They also argue that the young workers often rely on their wages for food and shelter. If these children cannot work, their lives will be a lot more difficult. Those wanting to eliminate child labour do not properly consider these children's genuine need to work, and their dependence on bringing home a wage.<sup>51</sup> The current age limits of the Minimum Age Convention are too restrictive, and do not let children under the age of 13 work for their living.

According to some writers, the prohibition of child labour will only drive child labour underground.<sup>52</sup> The children will lose the possibility of working in regulated jobs, and will instead only be able to work in unregulated, dangerous and often illegal professions. They will not be hired in any sectors regulated by labour law, since any work done by children will not be acceptable.<sup>53</sup> The prohibition of child labour actually increases the risk that children end up working in what can only be considered worst forms of child labour. By not prohibiting child labour outright, and regulating it instead, these children will have a chance at a decent job, with decent wages and decent working conditions.<sup>54</sup>

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<sup>50</sup> *Ibid*, pp. 343 - 344.

<sup>51</sup> K. Hanson and A. Vandaele, 'Working children and international labour law: a critical analysis', vol. 11, *The International Journal of Children's Rights* (2003), p. 120.

<sup>52</sup> *Have we asked the children? Discussion Paper*, International Working Group on Child Labour, Bangalore/Amsterdam, 1997, p. 9.

<sup>53</sup> Hanson and Vandaele, *supra* note 51, p. 121.

<sup>54</sup> *Ibid*, pp. 125 - 126.

An example of what happens when child labourers are removed from their place of employment without a thought for the consequences, is very telling. After pressure from the United States, factories in Bangladesh dismissed about 50 000 child labourers. However, no measures were taken to improve their situation, and many of these children had to go on to work in much more dangerous and low-paid jobs. Some even had to resort to prostitution in order to survive.<sup>55</sup> Prostitution is considered as being one of the worst forms of child labour, and is something that the ILO works very hard to combat. It also greatly increases the risk that these children will contract HIV, and eventually become the victims of AIDS.

There are other arguments used, based on human rights instruments, and labour rights especially, in the pro-child labour articles. Some labour rights are considered to be fundamental in a democratic society. By not giving these rights to children, their rights are violated. In the UDHR there is a general right of everyone to work (article 6 ICESCR). Part of this right is the ability to earn a living through employment. Exactly what this means is further specified in article 7, which provides more rights in work. There has to be equal remuneration and safe working conditions for all workers, regardless of age or sex. The rights found in Articles 6 and 7 are to be enjoyed by “everyone”. It does not specify that only adults can enjoy this right fully. Instead, it is emphasised as a fundamental right of every human being. However, due to the vulnerability of children, there has to be a certain amount of regulation of what children can do.<sup>56</sup>

Freedom of association (article 8 ICESCR) is also another fundamental labour right. This is a right mostly used by workers to organize in unions, in order to create a more balanced employer-employee relationship. This right is to be enjoyed by all “workers and employers, without any distinction whatsoever”.<sup>57</sup> The discrimination based on age that children face, is in other words, not allowed according to one of the most important ILO instruments. Full enjoyment of the freedom of association could mean a big difference. If child workers could organize, they could ensure that they have full enjoyment of their workers’ rights, such as equal pay for equal work, and better working conditions and annual holidays. It would also give them an opportunity to improve working hours, giving them enough time off to attend school, in order to get at least a basic education. They would also be able to work with a registered employment contract, and find employment in more official sectors of the economy. Because of attempts to eliminate child labour, they are unable to enjoy these basic rights.

The ILO has decent work for all as one of its main objectives.<sup>58</sup> A part of decent work is an inherent dignity in work. Non-decent work does not have dignity in work. Instead, decent and dignified work is fair and equal.

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<sup>55</sup> D. Green, ‘Child workers of the Americas’, Volume: 32. Issue: 4, *NACLA Report on the Americas* (1999), p. 26.

<sup>56</sup> *Ibid*, p. 92.

<sup>57</sup> ILO Convention on the Freedom of Association and Protection of the Right to organise (1948), art. 2.

<sup>58</sup> ILO, *Decent work for all*,

[http://www.ilo.org/global/About\\_the\\_ILO/Mainpillars/WhatIsDecentWork/lang-en/index.htm](http://www.ilo.org/global/About_the_ILO/Mainpillars/WhatIsDecentWork/lang-en/index.htm), visited on 23 March 2009.

There is no dignity in exploitation of children. According to Hanson and Vandaele, if children can have a legally approved occupation, they can demand better conditions of work.<sup>59</sup> By legalising and regulating child labour, the demand for dignity in work can also be made, both by children and the legislator. Working children will also be more useful in society, contributing to the survival of their families, and learning a skill at the same time. This will give them dignity in society as well, and not just in work.

### 2.3.2 The Arguments Against Child Labour

Some arguments against child labour, mostly poverty and consequence related, have already been discussed above and will not be repeated here.<sup>60</sup> There are still further arguments against child labour, in answer to the pro-stance above.

While it is true that child labour is not a new phenomenon, and is still very widespread, it should not be used as an excuse to not make an effort to eliminate it. The use of slaves was once very widespread, and many considered the economy dependent on this practice. Despite this, it was possible to substantially reduce the practice in many parts of the world.<sup>61</sup> The use of child labour is a sign of a wider problem in society, mostly a lack of social security and education. By addressing and removing these underlying issues, the need for child labour would largely be eliminated as well. Many of the children that work today, and that are campaigning in order to receive rights in work, do not have any alternative means of survival. Either their family needs the extra income, or they are alone, without any close relations. As discussed above, the situation of these children, and the current method to solve it, creates a vicious circle of poverty.<sup>62</sup> If education was a realistic choice for them, they might well prefer to go to school.

The pro articles also put the argument that prohibition of child labour drives it underground forward. This can be compared to arguing that drugs should be made legal, because the current legislation them drives the manufacturing, sales, and import underground. Prohibition does, to some extent, have this effect, but it cannot be used as justification to let the practice continue. Besides, child labour is not a new phenomenon, which has emerged due to the prohibition of child labour. Children have been exploited for a very long time. By prohibiting these activities, children have instead been provided with a legal remedy, which was not previously available to them. Neither the ILO nor the UN seeks to punish the children for working. Quite the opposite, it is the employers that are violating the

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<sup>59</sup>Hanson and Vandaele, *supra* note 51, pp. 92 - 93.

<sup>60</sup> See, for example, chapter 2.1 and 2.2 above.

<sup>61</sup> Slavery still exists, both in its traditional form and in more modern versions, but neither are considered acceptable, regardless of national economic dependence on the phenomenon.

<sup>62</sup> Chapter 2.1.

prohibition of child labour.<sup>63</sup> In a society without prohibition of child labour, it is the adults that are protected, not the children.

While children still have to work, they should be given the same rights as adults, because there should not be any discrimination between workers. The ultimate goal is to fight child labour by removing the social causes leading to it, not to make the situation of the working child more desperate. When a child is removed from child labour, it is not enough to just remove that child from its place of employment. These children have to be given somewhere to go, and a chance of survival without working.<sup>64</sup> This is a very important aspect in the work to eliminate child labour. The Bangladeshi example cited above, where 50 000 children were turned away from their relatively safe working environment in the factories, is a situation where the correct measures to help these children were not taken. The children should not have been removed from their jobs without appropriate action to support them in other ways. The best alternative would have been for the State to provide schooling, a place to live, food and clothing for the affected workers.

It is important to remember that not all work done by children is considered undesirable. Quite the contrary, child work can be very beneficial, and benefit the child's development. There is an important difference between child work and child labour, and these two terms should not be confused. International organisations, such as the ILO, do not intend to eliminate child work, only child labour. The ILO emphasises the difference between child labour and child work: "Child labour does not include activities such as helping out, after school is over and schoolwork has been done, with light household or garden chores, childcare or other light work".<sup>65</sup> However, it is important that the right to work does not infringe on all the other rights that the child has, such as the right to education, or that the child's development is impaired. These rights are just as important as the right to work. The rights to work and freedom of association cannot be put in such a favourable position, as to cancel out the other rights. The elimination of child labour is to ensure that the child can be entitled to all children's rights, not just one or two specific ones.

If child labour is not eliminated, the ultimate result will be that these children, sink deeper into poverty, and will be physically worn out before their time. The society they live in will also become poorer as a result. The argument that the prohibitionist approach leads to the exploitation of children disregards the fact that children have been exploited in factories and mines for hundreds of years, even before this practice was considered unacceptable.

### **2.3.3 Conclusion Regarding the Elimination of**

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<sup>63</sup> UN General Assembly, *Use of children in the illicit traffic in narcotic drugs and rehabilitation of drug-addicted minors*, (Resolution 43/121) preamble, UN General Assembly, *Instrumental use of children in criminal activities*, (Resolution 45/115), para. 1(c), and ILO (2002), *supra* note 17, p. 106.

<sup>64</sup> ILO R190, para. 2(b).

<sup>65</sup> ILO (2002), *supra* note 17, p. 9.

## Child Labour

While both sides present important arguments, there seems to be a certain amount of miscommunication between them. The abolitionist and pro-child labour views are not necessarily that different from each other. Those arguing in favour of child labour wants children to be able to pursue an education, therefore limiting the working hours substantially. This is also the approach of those trying to abolish child labour.

There also seems to be a misunderstanding regarding what exactly the end result of abolishing child labour is. Those in favour of letting children work seem to regard the ILO policies as trying to eliminate child work, as well as child labour. This is not the case, and the ILO has stated that child work can indeed be very beneficial, both as a way of learning skills, and a way of finding a place in society.

Where they seem to differ the most is regarding the views of the right to work and association. However, the same conclusion can to some extent be reached here. Children of a certain age have a right to work according to the ILO, but not to labour. These children also need to be protected from exploitation.<sup>66</sup> What seems to upset those in favour of child labour is the fact that children under a certain age cannot work. However, their argumentation is perhaps too accepting of the current situation of children. Instead of arguing for the right of a five-year old to work, perhaps the society in which such young children *need* to work should be questioned. The physical and mental dangers for working children are considerable, but this aspect is not taken into proper consideration by the pro-arguments.

Child labour carries a very large risk for the children in question. To argue that they should continue facing that risk on the grounds that many children are exploited already, and that they have a right to work, is to ignore all the other rights violated by hiring child labour. Removing child labour without further endangering the children is a difficult process that sometimes requires a fair amount of funding. Nonetheless, the larger costs of keeping this practice should not, and cannot be ignored.

## 2.4 The Links Between Child Labour and Other Children's Rights

The elimination of child labour is interconnected with the enjoyment of other children's rights. The exploitation of children for economic purposes will often interfere with a very wide number of rights. The main reason this practice continues is economical. When forced to choose between having an adequate income for the whole family and ensuring that their child can go to school, most parents in a desperate situation will choose to send their young ones to work. But which rights are generally most affected by this choice?

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<sup>66</sup> The difference between child labour and child work is the kind of work acceptable according to the C138 and C182.

When looking at the content of the other entitlements of the child, it is most useful to discuss the provisions of the CRC, since this instrument contains both civil and political, as well as economic, social and cultural rights. It is also a Convention designed specifically with the needs of children in mind.

The right most commonly associated with child labour is the right to education, found in article 28 of the CRC. The right to education tends to be the one most affected by child labour, since the children cannot find the time to attend school, or are too tired to concentrate during class. Primary education should be free and compulsory, according to article 28(1)(a). Secondary education should also be encouraged, and be made accessible, but it does not have to be provided for free. Article 28(1)(b) states that measures making this possible, such as scholarships for children that are economically disadvantaged, should be made available. It is also important that children are encouraged to stay in school, and States should try to reduce drop-out rates, according to article 28(1)(e).

Children also have a right to express their opinions. This right is also closely related to the right to education. An opinion is more likely to be considered by others if it is based on accurate information and is well reasoned. It is always easier to form and express opinions if you are able to read, and can critically analyze the information given to you.

Children have a right to the highest attainable standard of health, which is found in article 24 of the CRC. It is closely connected to the right to life, survival and development, which will be discussed below. The provision obliges the ratifying States to provide certain health benefits to their citizens, such as health care services, education and malnutrition prevention. The definition of the term 'health' becomes quite important, in order to know how to interpret the right. The WHO has defined health as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity".<sup>67</sup> It is, in other words, not enough to just provide health care services, efforts also need to be made to prevent illnesses. While the WHO is not directly connected to the CRC, their definition could still be authoritative. The WHO is a part of the UN structure, and their views can be taken into account during the interpretation and implementation of the CRC, if the subject matter at hand falls within the "scope of their mandate".<sup>68</sup> According to the WHO the CRC has a holistic approach to health, which is "an affirmation of its policies".<sup>69</sup>

The right to health is not given such a wide interpretation in UN instruments, such as the ICESCR. However, the definition is still very wide, and can also be used for interpretation of the right in the CRC. In the ICESCR General Comment No. 14, the Committee states that:

“... the right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health, such as food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working

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<sup>67</sup> WHO Constitution Preamble.

<sup>68</sup> Art. 45 CRC.

<sup>69</sup> S. Detrick, *A Commentary on the United Nations Convention on the Rights of the Child*, Kluwer Law International, The Hague (1999), p. 400.

conditions, and a healthy environment”.<sup>70</sup>

Many child labourers have to lift heavy loads and work long hours in bad conditions. Needless to say, this is not beneficial to their health. The wear and tear on their bodies can be so bad, or the working conditions so dangerous, that by the time they reach adulthood, they have permanent injuries or illnesses. Even if the damage is not permanent, child labour can still have an adverse effect on the working child’s wellbeing.

Children have the right to life, survival and development. This right can be found in article 6 CRC. It is considered as the most fundamental of all human rights.<sup>71</sup> During the drafting of the ICCPR, it was even argued that no exception to the rule should be made in the instrument, not even for executions. However, the drafters decided to include this option, on the grounds that the instrument had to be realistic.<sup>72</sup> According to Detrick, the *travaux préparatoires* of the CRC show that the right to life found in the Convention is meant to reflect the enjoyment of the right in other international instruments, such as the ICCPR and UDHR.<sup>73</sup> It is therefore possible to use the General Comments to the ICCPR in the interpretation of the contents of the right in the CRC. This means that the right to life cannot be interpreted narrowly.<sup>74</sup> In General Comment no. 6 to the ICCPR, the Committee emphasises that the State should take measures to reduce infant mortality, and to prolong life expectancy.<sup>75</sup> From this it is possible to conclude that child labour could well be a violation of the right to life. Many children die in workplace accidents, due to working with dangerous machinery that should not be operated by young persons. Working with dangerous substances will also often significantly reduce the life expectancy of the child handling them. The right to life also has a horizontal effect, meaning that the State should take measures to ensure that private actors do not violate it.<sup>76</sup>

The right to survival and development are perhaps more closely connected to child labour. These two rights should be implemented to the ‘maximum extent possible’. Unlike the right to life, the enjoyment of the rights to survival and development are dependent on the resources of the State. The “physical, mental, spiritual, moral, psychological and social” aspects of the child’s progress are all important.<sup>77</sup> This closely corresponds to the list of different aspects of the child’s growth that, if affected during work, is considered to make the occupation hazardous. Child labour can

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<sup>70</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, 11 August 2000, E/C.12/2000/4

<sup>71</sup> M. J. Bossuyt, *Guide to the "Travaux Préparatoires of the International Covenant on Civil and Political Rights*, Martinus Nijhoff Publishers, Dordrecht (1987), p. 115.

<sup>72</sup> *Ibid*, p. 115.

<sup>73</sup> Detrick (1999), *supra* note 69, p. 127.

<sup>74</sup> Human Rights Committee, CCPR General Comment No. 6, *The Right to Life*, 1982, para. 1.

<sup>75</sup> *Ibid*, para. 5.

<sup>76</sup> Bossuyt (1987), *supra* note 71, p. 120

<sup>77</sup> Committee on the Rights of the Child, *General guidelines regarding the form and contents of periodic reports to be submitted by States parties under article 44, paragraph 8(b), of the Convention*, UN Doc. CRC/C/58, 1996, para. 40.

affect the child's development in several aspects, depending on the environment and the type of work done.

In article 31 of the CRC there is a right for children to rest and leisure. The article also contains a right for them to play and to participate in the cultural life of society. It is closely related to the right to development, since children benefit enormously from play. It is a way for them to understand the world they live in, and develop skills that are useful later in life, and is essential for the wellbeing of young persons. There is a difference between rest and leisure. Rest is defined in other instruments as the time for recovery between work shifts, for example overnight. Leisure is also time away from duties, but unlike rest, it is not time in which to recover from work. Instead, it is a chance to pursue interests and hobbies.<sup>78</sup> The child's right to rest and leisure must be slightly different from an adult's, since the child is not supposed to work. Instead it is a right in its own, connected to the right to play and participation in cultural society.<sup>79</sup> It could also mean that school hours have to be limited to a certain extent. Article 31 is often violated due to long working hours, leaving little or no time for rest or play.

There is a right to adequate standard of living and development in the CRC. This is found in article 27. The standard of living has to be adequate for the child's development. The main responsibility to provide for the standard of living is given to the parents. The rule is meant to protect the family from unnecessary interference from the State, but at the same time, it does not absolve States of responsibility to fulfil the right. If the parents are unable to provide for an adequate standard of living, the State has to provide it.<sup>80</sup> The State has to offer assistance to families as far as possible. It is not an absolute right, its enjoyment is dependent on the economy of the State in question.<sup>81</sup>

The right to benefit from social security is important in the efforts to eliminate child labour. The provision is found in article 26 of the CRC. If a child, or its family is unable to support itself, it is vital that the State provides economical assistance, so that they have an adequate income. Many children work because the alternative is to starve. If they received money from the government, they would not have to make this choice.

The State is not required to give money to everyone, and does not have to provide all poor families with the same amount of help. The State can take into account the economic situation and needs of the child or family, in order to determine just how much social benefits should be paid.<sup>82</sup> The right does not necessarily mean that it is the child itself that has the right to social security. It has the right to benefit from it, but mostly this is likely to be indirectly, through its parents. A child could also directly benefit from social security. This is more likely when the child is an orphan, and providing for itself.

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<sup>78</sup> Detrick (1999), *supra* note 69, p. 549.

<sup>79</sup> *Ibid*, p. 549.

<sup>80</sup> D. McGoldrick, 'The United Nations Convention on the Rights of the Child', vol. 5, *International Journal of Law and the Family* (1991), p. 143.

<sup>81</sup> *Supra* note 68, art. 27(3).

<sup>82</sup> *Supra* note 68, art. 26(2).

The elimination of child labour will help reduce the violations of other children's rights. They are all interconnected, and the enjoyment of one right will affect other aspects of the child's life. In order to fully implement the CRC, it is necessary to eliminate child labour. However, this process cannot go ahead without taking appropriate measures to rehabilitate and reintegrate the child into society. The children removed from their places of work should have the opportunity to a decent life, through education, and, if necessary, income supplements and other measures necessary for him or her to survive. The child should not have to resort to ever more desperate methods to support himself or herself.

It is unlikely that any States with many child labourers will have the necessary resources to implement all of these measures. Therefore, the elimination of child labour has to be a gradual process. The children in the most dangerous forms of child labour should be helped first. International cooperation, and assistance from international organizations, such as the ILO, could speed up the process. The lack of resources does present a very large obstacle in the elimination of child labour. However, it cannot be used as an excuse for the States to remain passive, since there is an obligation to ensure the rights as much as they can.

# 3 International Law Regarding Child Labour

## 3.1 United Nations Conventions

There are several UN instruments in place that provide protection from child labour. Some of these are specifically aimed at giving general human rights to children, not necessarily only from child labour. Others contain protection that applies to everybody, including children. Often the latter category of Conventions has one or two articles giving specific rights to children.

It is possible for ratifying States to make reservations against the UN instruments, and the provisions for how to do so can generally be found in the particular Convention itself. However, these reservations cannot be incompatible with the object and purpose of the convention.<sup>83</sup>

The complaints mechanisms are different, depending on the Convention. The procedure can be found in the instrument itself, for example in article 41 ICCPR.

### 3.1.1 The ICCPR

The ICCPR was adopted at the same time as the ICESCR. It is a relic from the times when the civil and political rights were considered separate from their economic, cultural and social rights.<sup>84</sup> The Covenant contains general civil and political rights that are to be enjoyed by everybody. Children also receive special protection, in article 24 ICCPR. Their rights should be safeguarded through any “measures of protection as are required by his status as a minor, on the part of his family, society and the State”.<sup>85</sup> However, this does not mean that all the provisions in the Covenant apply to young persons. While the civil rights can be enjoyed fully, entitlements of a political nature, such as the right to vote, can be restricted for minors.<sup>86</sup> General comment no. 17 also emphasises that economic, social and cultural rights are to some extent protected by ICCPR article 24.<sup>87</sup>

The ICCPR does not contain any specific provisions on child labour. However, article 8 of the ICCPR prohibits slavery and similar practices, this

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<sup>83</sup> See, for example, *supra* note 68, art. 51, and art. 28 CEDAW, but also VCLT art. 19.

<sup>84</sup> R. K. M. Smith, *Textbook on International Human Rights*, 3<sup>rd</sup> Edition, Oxford University Press, Oxford (2007), pp. 41 - 42.

<sup>85</sup> Art. 24(1) ICCPR.

<sup>86</sup> UN Human Rights Committee (HRC), *CCPR General Comment No. 17: Article 24 (Rights of the Child)*, 7 April 1989, para. 2. See also art. 2 ICCPR, which states that the rights in the Covenant should be enjoyed “without distinction of any kind...”.

<sup>87</sup> HRC, *ibid*, para. 3.

applies to children as well.<sup>88</sup> Slavery in its modern forms is not necessarily related to the old notion of slavery, even though it still exists. Modern forms of slavery are particularly evident in areas like human trafficking and sex tourism.<sup>89</sup> Unlike other serious crimes against people, such as torture, which is often practiced by the States themselves in order to protect their interests, holding people as slaves is practiced by private individuals for their own economic and personal gain.<sup>90</sup>

The prohibition of slavery and the holding of people in servitude are both non-derogable.<sup>91</sup> There are simply no conditions when these practices are acceptable. The prohibition of forced and compulsory labour may have exceptions, but only in extreme circumstances (article 4(1)).

The difference in definitions of slavery, servitude and forced and compulsory labour therefore becomes very important. They are very closely related, but it is vital to know where exceptions can be made.

Slavery should be interpreted in a very limited way. Its distinctive feature is the ownership status of the slave, and the “destruction of the juridical personality”.<sup>92</sup> Servitude, on the other hand, is more general, but the person is still dominated and probably also degraded by another.<sup>93</sup> Practices similar to slavery, but which do not fall under the definition of slavery, will fall under the definition of servitude in article 8(2). Many of the modern day occurrences, such as trafficking, will fall into this category.<sup>94</sup>

Forced or compulsory labour is also forbidden.<sup>95</sup> However, as discussed above, unlike the prohibition of slavery and servitude, it is not absolute. Firstly, the use of the word ‘forced’ means that voluntary labour is permitted, even if it is extremely hard. Slavery and servitude are not allowed, regardless of whether or not it is voluntary.<sup>96</sup> Secondly, according to article 4(2), it is possible to derogate from the prohibition.

A useful tool for interpretation regarding the exact contents of the term forced labour can be found in the ILO Convention Concerning Forced or Compulsory Labour, No. 29.<sup>97</sup> There are two main requirements that need to be fulfilled, according to the ILO definition. The first is that the work is extracted due to *threats of repercussions*.<sup>98</sup> The additional requirement is that the worker *has not offered his services voluntarily*.<sup>99</sup> The term is supposed to have a wide interpretation.<sup>100</sup> However, the mere threat

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<sup>88</sup> M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, 2nd revised edition, N.P. Engel Verlag, Kehl (2005), p. 548. He does however, count the prohibition of economic exploitation as one of the rights protected for children as well.

<sup>89</sup> *Ibid.*, p. 195.

<sup>90</sup> Nowak (2005), *supra* note 88, p. 196.

<sup>91</sup> *Supra* note 85, art. 4(2).

<sup>92</sup> Bossuyt (1987), *supra* note 71, p. 167.

<sup>93</sup> Nowak (2005), *supra* note 88, p. 199.

<sup>94</sup> *Ibid.*, pp. 200 - 201.

<sup>95</sup> *Supra* note 85, art. 8(3).

<sup>96</sup> Nowak (2005), *supra* note 88, p. 201, with further references.

<sup>97</sup> Joseph *et al.*, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, 2nd edition, Oxford University Press, Oxford (2004), p. 295.

<sup>98</sup> ILO Convention No. 29, art. 2.

<sup>99</sup> *Ibid.*

<sup>100</sup> Nowak (2005), *supra* note 88, p. 201.

that unemployment benefits will lapse unless the worker accepts a job is not enough to violate the provision.<sup>101</sup>

There are exceptions to article 8(3), which can be found directly in the text itself. Hard labour can be used as punishment for a crime already committed. The sentence has to be given by a competent court, and one would have to assume that the trial would have to be fair, since that is a right found in the ICCPR as well.<sup>102</sup> The hard labour has to be specifically specified by the Court as part of the punishment.<sup>103</sup> It is also required that the labour is the punishment for a crime, rather than, for example, a misdemeanour. However, it is up to the individual States to decide what is considered to be a crime, and what is a misdemeanour.

Other exceptions to the rule are routine work in detention, military service, or work of a similar character, and work demanded in a case of emergency.<sup>104</sup>

The Ratifying States can make a declaration according to article 41 that they recognise the competence of the Committee of Experts to deal with Inter-State complaints regarding their conduct. Both the complaining and violating State have to have made such declarations. To date, no such complaints have been made.<sup>105</sup>

There is also an opportunity for individuals to make complaints. This cannot be found in the Covenant itself, but in an Optional Protocol. If a State has not ratified the protocol, there is no possibility for individual claims against that State. There are certain admissibility requirements that need to be fulfilled in order for the Committee of Experts to consider the case. For example, all domestic remedies have to be exhausted in order for the case to be admissible (article 2 of the Optional Protocol). The decision is based on written information, and not oral hearings.<sup>106</sup> The Committee will then give its 'views' on the matter to the individual and the State.<sup>107</sup> While the view itself might not be strictly legally binding, the ICCPR does give a right to an effective remedy to any violations of the Covenant.<sup>108</sup> According to Ulfstein *et al*, a follow-up procedure is in place. It consists of one of the Committee members exchanging written communications with the State to see what has been done to implement the Committee's views.<sup>109</sup>

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<sup>101</sup> Nowak (2005), *supra* note 88, p. 202.

<sup>102</sup> The provision is not valid until the person has been sentenced, see Joseph *et al* (2004), *supra* note 97, p. 295.

<sup>103</sup> Bossuyt (1987), *supra* note 71, p. 172.

<sup>104</sup> *Supra* note 85, art. 8(c)(i)-(iv).

<sup>105</sup> Geir Ulfstein *et al*, *Making Treaties Work*, Cambridge University Press, Cambridge (2007), p. 51.

<sup>106</sup> The procedure is listed in the Protocol, and involves only written communications. According to art. 5 of the Optional Protocol "The Committee shall consider communications received under the present Protocol in the light of all *written* information made available to it by the individual and by the State Party concerned." (emphasis added).

<sup>107</sup> Optional Protocol art. 5(4).

<sup>108</sup> *Supra* note 85, art. 2(3)(a).

<sup>109</sup> Ulfstein *et al* (2007), *supra* note 105, p. 52.

### 3.1.2 The ICESCR

The ICESCR is the second of the simultaneously adopted Covenants. One of the main differences between the ICCPR and the ICESCR is that the economic, social and cultural rights are to be implemented progressively by the States, to the “maximum of its available resources”.<sup>110</sup> No such provision exists in the ICCPR.<sup>111</sup> The ICESCR provides specific protection for children from economic exploitation, in article 10(3) of the ICESCR. There is, however, no closer description of the term in the Covenant. Employment in what the ILO would term hazardous work (*see* definition of hazardous work in article 3 C138) should be prohibited in national law. Note that the ICESCR only refers to hazardous employment, which suggests that there needs to be a formal employment relationship in order for the Covenant to apply. The Member States are also required to implement laws giving an age limitation for workers. The Ratifying States need to create appropriate penalties to enforce these laws.

Other rights in the ICESCR are indirectly connected to child labour, in the sense that they are all interconnected to provide protection of the child, so that it does not have to work. One such right is the right to education, found in article 13 ICESCR. There is a clear link between education and child labour.<sup>112</sup> Education should be provided free of charge, and be compulsory.<sup>113</sup> Most child labourers work instead of attending school. By allowing them to attend class, they would be unable to work particularly long hours.

There is an added benefit to learning. Youth that are educated are more likely to improve their living situation in future. Through education they have an opportunity to get a job that does not involve manual labour, which often tends to be badly paid. Because their income will be higher, they will be less likely to have to rely on their children in turn to provide for them when their own income is not enough. This is one of the reasons why primary education is considered important in the eradication of child labour.<sup>114</sup> It also seems to serve as a “social vaccine” against HIV/AIDS. Those that have finished school are less likely to contract the virus than those without education.<sup>115</sup>

Article 9 of the Covenant gives the right to social security. This can work in conjunction with article 11, the right to an adequate standard of living. Article 9 includes the right to adequate food, clothing and housing. Adequate social assistance and standard of living are both needed to combat child labour. A realistic level of social security payments would eliminate

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<sup>110</sup> ICESCR art. 2(1).

<sup>111</sup> Compare the wording art. 2 ICCPR to art. 2 ICESCR.

<sup>112</sup> U.S. Department of Labor (1998), *supra* note 3.

<sup>113</sup> *Supra* note 110, art. 13.

<sup>114</sup> The ILO considers work that interferes with education as unacceptable, C138 art. 3.

<sup>115</sup> J. Vandemoortele and E. Delamonica, ‘The “Education Vaccine” Against HIV’, Vol.

3(1), *Current Issues in Comparative Education* (2002), pp. 6 - 7 and WHO, *Education: the social vaccine to HIV/AIDS*,

<<http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:20129871~menuPK:34457~pagePK:34370~piPK:34424~theSitePK:4607,00.html>>, visited on 30 March 2009, for further discussion.

the need for children to work in order to support their family. Having said that, social aid in the form of pure money payments does not necessarily have the desired effect. Money that could be used for schoolbooks and uniforms might be used by the family to pay off debt, and may not improve the situation for the child as such.

To enforce the Covenant, the States are asked to provide regular reports on the measures they have adopted in order to comply with the obligations found in the ICESCR. The ECOSOC then considers the report, and makes recommendations.

At the moment there is no procedure for interstate or individual complaints. However, recent developments have provided for a future complaints procedure. A new Optional Protocol to the ICESCR will provide for individual, interstate and an inquiry procedure. It is not in force yet, but it was adopted by consensus at the end of 2008.<sup>116</sup> The process will be just like the one used in the ICCPR, i.e. written (article 8 of the Draft Optional Protocol), and the findings of the Committee published in views.<sup>117</sup> According to article 9, the responding State has to give 'due consideration' to the views, and report back on any measures taken to remedy the situation within six months. It remains to see when this Protocol will enter into force, and how many States ratify it in the beginning. Therefore, it is too early to make any statements regarding the effectiveness of the procedure.

### 3.1.3 The CRC

The CRC entered into force in 1990, and is the main international instrument regarding children's rights. It was developed from the 1959 UN Declaration of the Rights of the Child.<sup>118</sup> The CRC was created at a time when the opinion that both kinds of rights were indivisible.<sup>119</sup> Unlike the Covenants, it contains both civil and political rights, as well as economic, social and cultural entitlements. Nearly all States in the world, except for Somalia and the United States of America, have ratified the CRC.<sup>120</sup>

A child is defined as a person under 18 years of age, unless a different age of majority is provided for in national law.<sup>121</sup> The most relevant provision with regards to the elimination of child labour is article 32. States have to protect children from being economically exploited, doing dangerous work or work that interferes with schooling, or will damage the

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<sup>116</sup> Human Rights Nexus, *Optional Protocol to ICESCR Adopted*, <[http://humanrightsnexus.org/index.php?option=com\\_content&task=view&id=49&Itemid=66](http://humanrightsnexus.org/index.php?option=com_content&task=view&id=49&Itemid=66)>, visited on 30 March 2009.

<sup>117</sup> Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, art. 9.

<sup>118</sup> *Supra* note 68, preamble. For more on the history of the drafting of the Convention, see Detrick (1999), *supra* note 69, pp. 13 - 18.

<sup>119</sup> The ICCPR and the ICESCR were created as separate instruments during the Cold War, because of the difference of opinion between East and West about the importance of these rights.

<sup>120</sup> Status of ratification of the Convention on the Rights of the Child <[www.unhchr.ch/html/menu2/6/crc/treaties/status-crc.htm](http://www.unhchr.ch/html/menu2/6/crc/treaties/status-crc.htm)>, visited on 3 March 2009.

<sup>121</sup> *Supra* note 68, art. 1.

health and certain aspects of the development of the child.<sup>122</sup> States have to provide for protection in law, through social and educational policies, and other measures that might be necessary to achieve the full enjoyment of the rights in the CRC, including article 32.<sup>123</sup> A minimum age should be determined in the national legislation. In addition, there needs to be specifications of the hours and conditions of work. Sanctions need to be provided to ensure that the right is not violated (article 32(2)).

Not all work performed by children is considered as economic exploitation. This can be deduced from the use of the word ‘and’ in article 32.<sup>124</sup> Furthermore, not all work done by children is undesirable. Children are only protected from work that is harmful to the child. Legal scholars support this interpretation.<sup>125</sup>

There are other provisions that are also relevant for the elimination of child labour. Article 33 provides protection for children from working in the manufacturing and trafficking of drugs, and other similar substances. The UN General Assembly has in several Resolutions expressed concern regarding the increased use of children in this kind of activities, and has requested that these crimes carry severe penalties for the adults involved.<sup>126</sup> The General Assembly also asks that the children are not recipients of the sanctions, since they are victims of crime, not criminals.<sup>127</sup>

Article 34 obliges State parties to stop sexual exploitation and abuse of children, especially in prostitution, unlawful sexual activities and exploitative use of children in pornography. This list is not to be considered exhaustive.<sup>128</sup> The use of the word *exploitative* has been debated, but was included to show that the intent of the article was to stop illegal and exploitative practices, not to regulate the sexual lives of children.<sup>129</sup> Article 34 should be read in conjunction with article 35 of the CRC, which covers the sale, trafficking and abduction of children. It is also relevant for article 32, since children can be trafficked for economic, as well as sexual exploitation. The original intent of the drafters was that this provision would be part of article 34, but several delegations opposed this.<sup>130</sup> According to

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<sup>122</sup> More specifically, the physical, mental, spiritual, moral or social development of the child.

<sup>123</sup> *Supra* note 68, arts. 4 and 32(2).

<sup>124</sup> *Supra* note 68, art. 32 states that “protected from economic exploitation *and* from performing any work that is likely to be hazardous” (emphasis added).

<sup>125</sup> Detrick (1999), *supra* note 69, p. 563.

<sup>126</sup> UN, *supra* note 63.

<sup>127</sup> *Ibid.*

<sup>128</sup> V. Muntarhorn, ‘Art. 34: Sexual Exploitation and Sexual Abuse of Children’, in: a. Alen *et al* (eds.), *A Commentary on the United Nations Convention on the Rights of the Child*, Martinus Nijhoff Publishers, Leiden (2007), p. 4.

<sup>129</sup> Sharon Detrick, *The United Nations Convention on the Rights of the Child: A Guide to the “Travaux Préparatoires”*, Martinus Nijhoff Publishers, Dordrecht (1992), pp. 433-434. However, it is a controversial view, and delegations were opposed to this wording, see: *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.4/1985/25 para. 85.

<sup>130</sup> *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.4/1985/25 para. 72.

the article, State parties have to take “appropriate national, bilateral and multilateral measures to prevent...” the problem.<sup>131</sup>

The enforcement mechanism for the CRC is the same as for the other international instruments. When the CRC entered into force, a Committee on the Rights of the Child was established.<sup>132</sup> According to article 44 CRC, one of the main functions of the Committee is to examine State reports. These reports should contain information on any measures taken to give effect to the CRC, as well as stating difficulties in fulfilling the rights in the Convention. There is no possibility for individual or inter-State complaints.

In addition to the CRC, there are two optional protocols, one on the use of children in armed conflicts, and one on the use of children in prostitution and pornography. South Africa has signed, but not ratified the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict. South Africa has acceded to the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography.

The first optional protocol, on the use of children in armed conflict (hereafter OP 1), was created with the not only goal of ending the use of child soldiers, but also to publicly condemn the fact that children are often used as specific strategic targets in war.<sup>133</sup> This type of child work definitely falls under the worst forms of child labour, since it can be very harmful to the health, according to the definition found in article 3(d) of the C182. Children below the age of 18 should not partake in hostilities, and not be the subjected to compulsory army training. This provision can be found in articles 1 and 2 of OP 1. A minimum age for voluntary army recruitment has to be specified in national law. However, this age can be below 18. If this is the case, measures have to be taken to ensure that the recruitment is not forced in any way, and that any new recruits are fully aware of what is expected of them. Guardians must also have given their informed consent.<sup>134</sup> The minimum age of 18 also applies to armed groups that are not part of the State forces, according to article 4 of OP 1.

The State has to adopt all necessary measures in order to ensure the rights in the Protocol. This includes demobilizing or releasing any children used in hostilities (article 6). The Protocol is implemented through State reports.<sup>135</sup>

The second optional protocol, on the sale of children, child prostitution and child pornography (hereafter OP 2) provides additional protection, and more precise regulation compared to the CRC itself. Technical developments, such as the internet, made child pornography more easily available. This worrying trend is mentioned specifically in the preamble, as one of the reasons for drafting the OP. It further states that a holistic approach, such as addressing the socio-economic factors that contribute to this problem, is needed.

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<sup>131</sup> *Supra* note 68, art. 35.

<sup>132</sup> *Supra* note 68, art. 43(1).

<sup>133</sup> Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts, preamble.

<sup>134</sup> *Ibid*, art. 3(3).

<sup>135</sup> *Supra* note 133, art. 8.

The sale, prostitution and pornographic performances of children are forbidden, article 1 of the Protocol. Sale can include such things as kidnapping and stealing of children, the relevant factor is that there is a transaction or illicit transfer of some kind.<sup>136</sup> Another aspect of the sale, according to another definition, is that the sale is conducted with the purpose of exploiting the child sexually.<sup>137</sup> Child prostitution includes the element of illegality in the use of children for sexual commercial purposes.<sup>138</sup> Regarding child pornography, the main aspect is the depiction of children “for a sexual purpose”.<sup>139</sup>

States have to ensure effective implementation of the Protocol, mainly through the provision of national legislation, criminalizing the above-mentioned practices, and providing “appropriate penalties”.<sup>140</sup> International assistance is also needed in order to combat the problem that the child sex industry poses, article 6 and 10.

## 3.2 ILO Conventions

Due to the tripartite structure of the ILO, their conventions are developed in close cooperation with workers’ and employers’ organizations. These organizations also have 50 per cent of the votes when deciding whether or not the instrument in question will be adapted.<sup>141</sup> It is interesting to note that the ILO adopted the Minimum Age (Industry) Convention, C5, as early as 1919. Preventing the exploitation of children is, in other words, a goal that the ILO has pursued for some time.

The supervisory system is also tripartite. Enforcement is mainly through State reports. However, a copy of this has to be sent to national workers’ and employers’ organizations. They then have the opportunity to forward their own comments on the report. If the State does not fulfil its reporting duties, they can report in its place. To ensure the best possible compliance with International Labour Standards, the ILO uses a system of technical cooperation, in order to effectively remove any obstacles in ensuring that these rights are enjoyed.<sup>142</sup> The ILO utilizes different methods of aiding the governments in their quest to meet their international labour rights obligations. The ILO sometimes has officials assigned to the country or region in question. There might also be a so called direct contact, where an expert will provide assistance to the government, discussing policies, and

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<sup>136</sup> Detrick (1999), *supra* note 69, p. 723.

<sup>137</sup> *Ibid*, p. 723.

<sup>138</sup> Detrick (1999), *supra* note 69, pp. 723 - 724.

<sup>139</sup> *Ibid*, p. 724.

<sup>140</sup> The second optional protocol, on the sale of children, child prostitution and child pornography, art. 3.

<sup>141</sup> ILO Constitution art. 3(1). The voting is usually a simple majority vote, art. 17(2) of the Constitution.

<sup>142</sup> ILO, *Improving the Impact of International Labour Standards through Technical Cooperation – A Practice Guide*, <[www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---normes/documents/publication/wcms\\_100381.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_100381.pdf)>, visited on 2 April 2009.

what needs to be done in order to comply with the ratified ILO Conventions.<sup>143</sup>

A fundamental difference between ILO and UN instruments is that it is not possible for Member States to make reservations against any of the provisions in a ratified ILO treaty.

The Declaration on Fundamental Principles and Rights at Work sets out fundamental principles, which should be promoted by the Member States. This means that regardless of ratification of the 8 basic ILO Conventions, all ILO Member States have to promote and realize the basic principles found therein.<sup>144</sup> The fundamental instruments regarding child labour are the C138 and C182.<sup>145</sup>

### 3.2.1 The Minimum Age Convention, C138

The C138 was created in order to replace several minimum age Conventions, which were limited to specific economic sectors.<sup>146</sup> The Convention was intended to be “a dynamic one, aimed at encouraging the progressive improvement of standards and of promoting sustained action to attain the objectives”.<sup>147</sup> The aim is not, in other words, to combat child labour through using purely prescriptive methods, but also through the use of programmatic means, although it is debatable whether this actually comes across in the Convention itself. This is especially problematic when you consider that States are not required to use any methods other than the ones specified in the instrument in order to fulfil their obligations.<sup>148</sup>

The Convention applies regardless of whether or not there is a formal employment relationship between the child and the employer. This is apparent from the wording of article 1. It covers both employment *and* work.<sup>149</sup> The broad definition means that self-employed children are included in the scope of the C138.<sup>150</sup> According to the same provision, any ratifying member States have to pursue a national policy with the aim of eliminating child labour. A minimum age for workers has to be specified in national law. This minimum age can, and should be, raised over time. The age provided for by law cannot be lower than the “completion of

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<sup>143</sup> H. B. de la Cruz *et al*, *The International Labour Organization: the International Standards System and Basic Human Rights*, Westview Press, Oxford, 1996, pp. 85 - 88.

<sup>144</sup> Art. 2 of the Declaration on Fundamental Principles and Rights at Work.

<sup>145</sup> *Effective abolition of child labour*,

<[www.ilo.org/declaration/principles/abolitionofchildlabour/lang--en/index.htm](http://www.ilo.org/declaration/principles/abolitionofchildlabour/lang--en/index.htm)>, visited on 2 April 2009.

<sup>146</sup> M. Borzaga, ‘Limiting the Minimum Age: Convention 138 and the Origin of ILO’s Action in the Field of Child Labour’, in G. Nesi *et al* (eds.), *Child Labour in a Globalized World: A Legal Analysis of ILO Action*, Ashgate Publishing Ltd, Aldershot, 2008, p. 40.

<sup>147</sup> *Ibid*, p. 46, with further references.

<sup>148</sup> Borzaga (2008), *supra* note 146, pp. 46 – 47, with further references.

<sup>149</sup> L. Swepton, ‘The Convention on the Rights of the Child and the ILO’, Vol. 61, *Nordic Journal of International Law* (1994), p. 10.

<sup>150</sup> Borzaga (2008), *supra* note 146, p. 48.

compulsory schooling”<sup>151</sup>, and must not be lower than 15 years, even if compulsory schooling ends before this age.<sup>152</sup>

Article 3 of the Convention requires the ratifying States to set a minimum age for hazardous work. This cannot be below 18 years. Hazardous work is defined as “any type of employment of work which by its nature or the circumstances in which it is carried out is likely to jeopardise the health, safety or morals of young persons”.<sup>153</sup> However, according to C138 article 3(2) the Convention leaves it to the different States to define what is to be considered hazardous work in their national legislation. This has to be done in consultation with national tripartite organizations.

In a comparison between the CRC and the C138, it is interesting to note that children technically could be working as prostitutes, or be used in pornography, under the CRC, if the act is voluntary.<sup>154</sup> This is not possible under the C138, which totally prohibits work that could jeopardize the health, or morals of the child.<sup>155</sup>

The rules above are not absolute. Developing countries have the option of setting the minimum age at 14 years, after consulting with trade unions. The age should be raised to the required standard of 15 or over as soon as possible.<sup>156</sup> The same is true for the age limitation on hazardous work. According to C138 article 3(3), this can be lowered to 16 years. Such measures can only be taken in co-operation with employer’s and worker’s organisations, and only if it can be shown that the child enjoys full protection of its health, safety and morals, and that specific training to perform the duties is given. It is interesting to note that, unlike the previous exception, there is no requirement for the State to be developing. C138 article 4(1) gives the ratifying States can also exclude certain limited categories of jobs, such as family agricultural undertakings on a small scale (i.e. no hired workers), if it finds that it would face large obstacles in applying the Convention to these specific professions. According to C138 article 4(3), hazardous work cannot be excluded. There can also be an initial omission of limited sectors for developing countries.<sup>157</sup> However, certain sectors cannot be excluded. These are listed in article 5(3) of the Convention, and include manufacturing, mining and quarrying, construction, plantations and large-scale commercial agriculture.

Borzaga is very critical of the limitations that the ILO has put into article 4. The new Member State needs to provide a list of excluded job categories within their first year. He argues that this makes the Convention more stagnant, since the Member States cannot adapt these lists according to

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<sup>151</sup> *Supra* note 151, art. 2(3).

<sup>152</sup> *Ibid.*

<sup>153</sup> *Supra* note 151, art. 3(1).

<sup>154</sup> The use of the word “exploitative” does, according to some, imply that not all child prostitution is exploitative.

<sup>155</sup> For a further discussion on the topic of child prostitution, see G. Van Bueren, *The International Law on the Rights of the Child*, Kluwer Law International, The Hague (1998), p. 277.

<sup>156</sup> *Supra* note 151, art. 2(4).

<sup>157</sup> *Ibid.*, art. 5

new economic or social developments.<sup>158</sup> In his article “Combating Child Labour: The Role of International Labour Standards”, B. Creighton even goes so far as to say that the system might be counterproductive, since States might safeguard themselves by providing a larger list of exceptions than is actually needed.<sup>159</sup> Both writers also find that article 5 is very imprecise, and that it can be difficult to know its exact content, especially what is a permissible limitation of the scope of the Convention.<sup>160</sup> Professor Smolin is also critical to the effects the provisions could have, although his main concern is different. He states that the possibility to exclude certain economic sectors could lead to the increased use of child labour in unregulated areas of work, making the problem more difficult to eradicate.<sup>161</sup> To demonstrate his point, he uses the example of the regulation that prohibits children to work in large-scale agriculture. This is not allowed, even if the conditions of work are otherwise acceptable, and the children go to school full time. However, the children are able to work in unregulated, small-scale agricultural undertakings, even if this prevents them from getting an education.<sup>162</sup>

If the Member State avails itself of the exceptions in the Convention, it has to specify the reasons for doing so in the first country report to the ILO regarding the implementation of the Convention. There also needs to be a declaration that these reasons still subsist in subsequent reports. Article 2(5) of the C138 obliges the State to provide a date from when the minimum age will be raised, if the reason for having it no longer is valid.

The ILO does not seem to consider whether the reasons for a lower age exception are valid. Instead, the Committee of Experts looks at how the Convention has been ratified in national law, and whether or not the implementation is satisfactory.<sup>163</sup> This will be discussed further below.

There are several situations where the C138 does not apply. These exceptions are listed in articles 6-8. The kind of work described in these articles is, in other words, permitted. These exceptions are light work, artistic performances and work done for education and training.

Vocational training at technical, educational schools and other similar institutes is allowed, as long as the child is at least 14, and it is performed under regulated conditions, after tripartite consultation, if possible, according to C138 article 6. It is essential that the training is managed in a certain way, either by a school, approved undertaking or a programme put in place to improve chances of future employment or education. The Minimum Age Recommendation, No. 146 (hereafter R146) emphasises that the Member States need to ensure that the vocational training programmes are not a way to disguise child labour.<sup>164</sup>

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<sup>158</sup> Borzaga (2008), *supra* note 146, p. 49.

<sup>159</sup> B. Creighton, ‘Combating Child Labour: The Role of International Labour Standards’, Vol. 18, *Comparative Labour Law Journal* (1997), p. 375.

<sup>160</sup> Borzaga (2008), *supra* note 146, pp. 49 - 50 and Creighton (1997), *Ibid.* p. 376.

<sup>161</sup> D. M. Smolin, ‘Strategic Choices in the International Campaign Against Child Labour’, Vol. 22, *Human Rights Quarterly* (2000), p. 961.

<sup>162</sup> *Ibid.*, p. 968.

<sup>163</sup> After a long search through Comments by the Committee of Experts, I have not been able to find any questions regarding the validity of the use of a lower age limit.

<sup>164</sup> *Supra* note 164, para. 12(2).

Article 7 of the Convention provides for the possibility for 13-15 year olds to perform light work. Light work is defined as “(a) not likely to be harmful to their health or development; and (b) not such as to prejudice their attendance at school, their participation in vocational orientation or training programmes approved by the competent authority or their capacity to benefit from the instruction received”.<sup>165</sup> According to article 7(3) of the C138, the ratifying State determines which activities fall under this description. There is also a provision in article 7(2) of the Convention, which makes it possible for persons of 15 years or over, that have not completed compulsory schooling, to perform light work. According to the R146 the working hours should be restricted, so that the child performing the tasks has an opportunity to go to school, do his or her homework, and rest. These are just recommendations, and not legally binding, but they are authoritative for the interpretation of the Conventions. Creighton notes that according to a General Survey, that there are few countries that do not permit children younger than provided for in the Convention to perform light work. The Committee of Experts has stated that this is a violation of the Convention. He does think that this statement could be a reason why the Convention is not widely ratified.<sup>166</sup>

Children can also be given *individual* exceptions in order to participate in artistic performances. The hours and conditions of work need to be regulated in the work permit.<sup>167</sup> The Member States that have taken specific measures to control the artistic performances of children have very varying degrees of protection. However, many of the ratifying States have not reported using any particular enforcement methods.<sup>168</sup>

The implementation of the C138 is the same as for the other ILO treaties, through regular State reports. These should contain information on what measures of compliance have been taken both in the national law and State practice. The information must also be shared with the workers’ and employers’ associations in the country in question. They are free to make comments, either in the report, or to the ILO itself. If the State should neglect to send in the report as required, the same organizations can send one in its place.

The reports are examined by the Committee of Experts, and finally sent to the Labour Conference for assessment, together with the recommendations made from the Committee of Experts. The Government of the State in question can, and often is, invited to answer any inquiries the Conference might have on the national implementation of international labour law.

The Committee of Experts has naturally found problems with the implementation of the minimum ages for quite a few States. Malaysia, for example, did not specify a minimum age lower than 15 when ratifying the C138. Despite this, the Committee of Experts on the Application of Conventions and Recommendations noted in their 2008 observations that Malaysia had not changed their national laws, which had kept the old age

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<sup>165</sup> *Supra* note 151, arts. 7(1)(a) and (b).

<sup>166</sup> Creighton (1997), *supra* note 159, p. 378.

<sup>167</sup> *Supra* note 151, art. 4(3).

<sup>168</sup> Creighton (1997), *supra* note 159, p. 379.

limit of 14, to comply with the Convention. The Committee also notes that Malaysia's implementation problem is a recurring one.<sup>169</sup>

The Central African Republic is one of the developing countries that has availed itself of the lower age limit, according to article 2(4). However, in its report it still shows a large number of children working, some of them as young as 6 years old. Girls were considered to be especially vulnerable, since they were often self-employed, and not covered by any child labour legislation.<sup>170</sup>

For a long time, the C138 suffered from a very low level of ratifications. In 1996, none of the Asian countries were parties to the Convention.<sup>171</sup> This was not the only worrying aspect of the instrument. The ILO itself also seemed to find problems with the C138, in that it does not give any indication as to which kind of actions should be prioritised while implementing national strategies, or if there are national policies that are more effective than others. Another approach, to complement the Minimum Age Convention was clearly needed.<sup>172</sup>

### 3.2.2 Worst Forms of Child Labour Convention, C182

The C182 is the newest ILO Convention that addresses child labour. One of the main differences between the C182 and the C138 is the approach the Conventions use. The C138 is an attempt to eliminate child labour through pure labour policy. The C182 is more rights based, like the CRC. The C182 also sets very clear priorities regarding which kinds of child labour should be eliminated first. The Convention is also the instrument, which made the elimination of child labour a central goal of the ILO.<sup>173</sup>

The C182 covers all sectors of economic activity, and applies equally to all ratifying States, regardless of level of development. According to article 1 of the C182, the ultimate aim with the Convention is to eliminate the worst forms of child labour as soon as possible. Unlike the C138, it is not possible for developing countries to have a lower age limit. Article 2 of C182 provides that the Convention applies to all children under the age of 18. It is not possible for a Member State to create a loophole by having a lower age of majority than 18 in national law, which is possible in the

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<sup>169</sup> Report of the Committee of Experts on the Application of Conventions and Recommendations, *Observation, Minimum Age Convention (No. 138), Malaysia*, <<http://webfusion.ilo.org/public/db/standards/normes/appl/appl-displaycomment.cfm?hdroff=1&ctry=0820&year=2008&type=O&conv=C138&lang=EN>>, visited on 30 March 2009.

<sup>170</sup> Report of the Committee of Experts on the Application of Conventions and Recommendations, *Observation, Minimum Age Convention (No. 138), Central African Republic*, <<http://webfusion.ilo.org/public/db/standards/normes/appl/appl-displaycomment.cfm?hdroff=1&ctry=2590&year=2008&type=R&conv=C138&lang=EN>>, visited on 30 March 2009.

<sup>171</sup> Smolin (2000), *supra* note 161, p. 945

<sup>172</sup> Creighton (1997), *supra* note 159, pp. 390 - 391, with further references.

<sup>173</sup> Smolin (2000), *supra* note 161, pp. 945 - 946.

CRC.<sup>174</sup> David Smolin is quite critical of this approach. He considers the rigidity of the provision problematic, since it is common in many countries to have a lower age of majority. The effect of this is that people could well be finished with their formal education, and even be allowed to marry, but not perform the kind of labour forbidden by the Convention. He continues by stating that this might reduce the effectiveness of the C182, since they are not considered to be children in national law.<sup>175</sup>

Article 3 of the C182 contains the closest definition given by the ILO of what the worst forms of child labour are. The definition is fairly general, and can be interpreted to include a lot of practices. Slavery and similar practices, for example trafficking and the use of child soldiers is considered to fall under this. Other areas are child prostitution and pornography, so called illicit activities (especially drugs related activities), and other types of labour, which is likely to cause harm, either physically or mentally (so called hazardous work).

The exact content of hazardous work is then supposed to be defined more clearly in national law, after tripartite consultation. During this process, special consideration should be taken of international instruments, and specific situations, that are especially harmful.<sup>176</sup> The findings of these consultations should be re-evaluated regularly.<sup>177</sup> It is also possible to lower the age of hazardous work, although this is not said explicitly in the Convention itself. Work in an “unhealthy environment” can be conducted by children from 16 years of age. However, this is only possible after tripartite consultation, and that the health and safety of the child is “fully protected”.<sup>178</sup>

The three first categories of work in C182 article 3 are “unconditional worst forms” of child labour (i.e. slavery, prostitution and illicit activities). These are so abhorrent as to be totally prohibited at all times, for anyone under the age of 18. As Noguchi correctly observes, the unconditional worst forms of child labour are crimes in most countries.<sup>179</sup> The ILO also stresses the fact that first and foremost, these are to be regarded as crimes. However, because they can be a way to exploit children economically, they are considered part of the worst forms of child labour.<sup>180</sup> The hazardous kinds of work, i.e. the fourth category, might well be legitimate professions, but damaging nonetheless, perhaps due to the environment the work is carried out in.<sup>181</sup> This is why Member States are given a certain margin of appreciation in deciding what hazardous labour is defined as in national law.

Because the C182 covers several areas of child labour, it can be connected not only to article 32 of the CRC, but other provisions as well, such as the drugs trafficking prohibition (article 33 CRC). In addition, both

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<sup>174</sup> Y. Noguchi, ‘ILO Convention No. 182 on the worst forms of child labour and the Convention on the Rights of the Child’, vol. 10, *The International Journal of Children’s Rights* (2002), p. 357.

<sup>175</sup> Smolin (2000), *supra* note 161, p. 977.

<sup>176</sup> C182 art. 4 and *supra* note 64, para. 3.

<sup>177</sup> C 182 art. 4(3).

<sup>178</sup> *Supra* note 64, para. 4.

<sup>179</sup> Noguchi (2002), *supra* note 174, p. 358.

<sup>180</sup> ILO (1998), *supra* note 26, p. 31.

<sup>181</sup> ILO (2002), *supra* note 17, para. 31.

the Additional Protocols to the CRC have a strong connection to the C182.<sup>182</sup> However, the level of protection offered by the different instruments is different.<sup>183</sup>

The State parties have to ensure the enforcement of the Convention in several ways. According to article 5, suitable monitoring mechanisms have to be established. Adding to this, the State has to create programmes of action, again after tripartite consultation (article 6). These programmes of action should consist of protective and informative measures, taking into account the most vulnerable groups of children, such as girls. The Government should also officially condemn these forms of labour.<sup>184</sup> The Convention further emphasises that ratifying States have to take “all necessary measures to ensure the effective implementation and enforcement of the provisions giving effect to this Convention including the provision and application of penal sanctions or, as appropriate, other sanctions”.<sup>185</sup> There are specific measures that are especially important if child labour is to be effectively eliminated. These are listed in article 7(2) of the C182. First of all, methods to prevent children from becoming victims of the worst forms of child labour have to be put in place. Ratifying States also have to take direct measures to remove children from such conditions, and to provide them with a free basic education. It is also important that Governments identify particularly vulnerable groups, especially girls.<sup>186</sup>

In his article, Smolin also criticizes that the ILO did not include work that interferes with education, and work of particularly young children as part of the worst forms of child labour.<sup>187</sup> In other ILO Conventions, the link between child labour and education has been prominent, but this is not the case in the C182. The only provision regarding education can be found in article 7(2), mentioned above. He thinks the most likely explanation for this is the fact that many developing nations simply do not have the funds to provide comprehensive educational systems, and that the ILO, in order to encourage States to ratify the instrument, left such a provision out. He also considers that the Convention would have been more effective, and beneficial, if the main priority had been the education of all children.<sup>188</sup>

Article 8 calls for international cooperation in order to eliminate the worst forms of child labour. Such cooperation can consist of support for social development and similar measures. Any methods used should complement the ones already taken at the national level.<sup>189</sup>

The ILO report “Targeting the Intolerable”, which is part of the *travaux préparatoires* of the C182, discusses certain problems of implementation of the Convention. One of the most challenging aspects of the elimination of child labour is simply to find the affected children. The report states that “Since most working children are found in agriculture,

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<sup>182</sup> This can clearly be seen in the preambles of both Optional Protocols, which refer to the C182.

<sup>183</sup> For further discussion, see Noguchi (2002), *supra* note 174, p. 359.

<sup>184</sup> *Supra* note 64, para. 2.

<sup>185</sup> *Supra* note 177, art. 7(1).

<sup>186</sup> *Ibid*, art. 7(2).

<sup>187</sup> Smolin (2000), *supra* note 161, p. 947.

<sup>188</sup> *Ibid*, pp. 978 - 979.

<sup>189</sup> *Supra* note 64, para. 16.

domestic service and the informal sector, most of them work where child labour law enforcement is virtually absent”.<sup>190</sup> The report also points to social factors as being decisive in how effectively the Convention is implemented. First of all, the children often lack knowledge about their rights. Second, the families tend to be dependent on the extra income generated by the child. The labour inspectors might also be aware of this, and so they could be less inclined to report the violation. Adding to this, in many countries, the labour inspectors are overworked, and simply cannot investigate all violations properly.<sup>191</sup>

One of the main strengths of the C182 is the near universal ratification.<sup>192</sup> It was also adapted unanimously, together with the R190.<sup>193</sup> This is evidence that the worst forms of child labour create a problem that the Member States wish to solve. The contents of the instruments could also be considered to be *opinio juris*, and be used as guiding principles, even for the few States that have not ratified them.

### 3.3 African Charter on the Rights and Welfare of the Child

The African Charter on the Rights and Welfare of the Child, hereafter the African Charter, is the regional children’s rights instrument in Africa. It was developed with the CRC in mind, but tailored specifically to fit the African continent.<sup>194</sup> Therefore, this chapter will highlight the differences and similarities between the two instruments.

One of the most progressive parts of the African Charter is that it gives a duty to everyone, not just the Member States, to ensure the enjoyment of the rights found in the Charter. Specific parental duties are listed in article 20. Article 31 of the African Charter even gives children responsibilities, towards both its family and society in general.

Member States have both a obligation to recognize the rights found in the African Charter, and take any measures they find necessary to ensure the enjoyment of these rights. Traditions that are contrary to, or violate, the Charter are to be “discouraged”, according to article 1(3) of the African Charter. This is further developed in article 21. Just like in the other international instruments regarding children, the definition of a child is a person under the age of 18.<sup>195</sup>

The African Charter has a provision on child labour, which in parts is similar to the one found in the CRC, but also has differences. For example, the African Charter provision does not expressly forbid child labour that

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<sup>190</sup> ILO (1998), *supra* note 26, p. 44.

<sup>191</sup> *Ibid*, pp. 44 - 49.

<sup>192</sup> To date, 169 States have ratified the C182. For ratification information online, visit <[www.ilo.org/ilolex/english/convdisp1.htm](http://www.ilo.org/ilolex/english/convdisp1.htm)>, visited on 23 March 2009.

<sup>193</sup> Noguchi (2002), *supra* note 174, p. 355.

<sup>194</sup> The African Charter on the Rights and Welfare of the Child, preamble.

<sup>195</sup> *Ibid*, art. 2.

interferes with the child's education, which the CRC does. However, just like the CRC, any work performed by a minor is not allowed to "interfere with the child's physical, mental, spiritual, moral or social development".<sup>196</sup> The African Charter also misses the CRC provision that the work is not allowed to be harmful to the child's *health*, it only includes development. However, a lack of health and education could both have a large impact on development, so it is possible to interpret the content from the CRC into the African Charter.

Another interesting difference between the CRC and the African Charter is that the Charter expressly states that the article regarding prohibition of child labour applies to both formal and informal sectors of the economy. While implementing the article attention has to be paid to the ILO instruments regarding child labour. Both instruments then name different methods that State parties should avail themselves of, in order to ensure the enjoyment of these rights. The first three requirements, i.e. the provision of a minimum age for working children in national law, working hours and conditions, and making complaints mechanisms available, are the same in both Conventions. The African Charter then adds a fourth, the need to provide information on the dangers of child labour to all parts of society, in article 15 (d) of the Charter. This is, according to Chirwa, an essential part of promoting human rights in Africa, since many are not aware of their rights.<sup>197</sup>

There are other relevant articles regarding child labour that are very similar in both the CRC and the African Charter. These are the types of jobs that the ILO refers to as the worst forms of child labour, listed in article 3 of the C182. Any form of slavery, such as trafficking, is forbidden in both the CRC and the African Charter. However, the Charter gives additional protection to the rights of children, compared to the CRC, by adding that the abduction, trafficking or sale of children is forbidden even if this is done by the parent of the child.<sup>198</sup> The African Charter also strictly forbids the use of children in any kind of begging (article 29(b)). This is unique in international human rights law.

The other category of worst forms of child labour is child prostitution or the use of children in pornography. This is, again, covered by both the CRC (article 35) and the African Charter (article 27). The provisions are very similar, with some additions found in the Charter. The lowest requirement of coercing children into sexual activity of any kind, found in the CRC, has been further developed in the Charter, where encouraging a child to perform such acts is forbidden. There is also no need for the sexual activity to be illegal or exploitative in the Charter. This is not just with regards to children taking part in sexual activities, but also with regards to prostitution and pornography. The requirement of the use of children in pornography to be exploitative and illegal can seem somewhat strange, since

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<sup>196</sup> *Supra* note 194, art. 15(1) *in fine*, and *supra* note 68, art. 32(1) *in fine*. This wording is identical in both instruments.

<sup>197</sup> D. M. Chirwa, 'The merits and demerits of the African Charter on the Rights and Welfare of the Child', vol. 10, *The International Journal of Children's Rights* (2002), p. 165.

<sup>198</sup> Compare *supra* note 194, art. 29(a) and *supra* note 68, art. 35.

it is in the nature of these activities to be exploitative and illegal anyway. Chirwa also sees the fact that these terms have been left out in the African Charter as a positive step.<sup>199</sup>

The use of children in ‘illicit activities’, regulated in article 3(c) of the C182, is to some extent covered by the CRC and the African Charter, mostly with regards to the use, sale and trafficking of drugs. These provisions are very similar in content in both instruments, but the wording is slightly different. The African Charter does seem to suppose that all production and trafficking of drugs is illegal, whereas it is specified in the CRC that only illicit activities of such a nature need to be prevented.<sup>200</sup>

The final category of worst forms of child labour is “work, which by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children”.<sup>201</sup> This is covered in the general prohibition of child labour found in both the CRC and the African Charter. The implementation process is the same as for other international instruments. States provide the African Committee of Experts on the Rights and Welfare of the Child with regular reports about the measures they have taken in order to comply with the Charter (article 43). The Committee of Experts is also able to receive individual or group communications regarding the rights found in the Charter (article 44).

### **3.4 The Relationship Between the International, Regional and Labour instruments**

There is a close relation to the ILO, UN and regional Conventions with regards to child labour. But where the UN and regional instruments tend to give a general right in one or two articles, this right will have its own, specific, and detailed ILO Convention (sometimes several, as is the case of child labour). The two most important instruments, that specifically cover the subject, are Convention 138 on Minimum Age (hereafter C138) and Convention 182 on the Worst Forms of Child Labour (hereafter C182). A common method used by the ILO is to provide very specific rules, but have special ‘flexibility clauses’, giving developing countries a chance to implement slightly relaxed standards, in order to provide some initial protection, and then fully comply with the Convention when they are able to do so.

The interconnection between the UN and ILO can be seen very clearly in the case of child labour. In fact, C182 was developed with the CRC in mind.<sup>202</sup> This can give an alternative system of reparations for any violations of the rights found in the Conventions and Covenants.

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<sup>199</sup> Chirwa (2002), *supra* note 197, p. 166.

<sup>200</sup> *Supra* note 194, art. 28 and *supra* note 68, art. 33.

<sup>201</sup> *Supra* note 177, art. 3(d).

<sup>202</sup> ILO (1998), *supra* note 26, which often refers to the CRC. The preamble to the finished Convention also mentions the CRC.

The main difference lies in the level of detail of the regulations, but also in the enforcement and ratification of the instruments. At the time of writing, the CRC has been ratified by all States, except for the U.S. and Somalia.<sup>203</sup> The C138 has been ratified by 151 States. Most of those ratifications are from the late 1990's and onwards.<sup>204</sup> The creation of the C182 seems to have had an effect on the ratification rate of the C138 as well, since many countries have ratified both these instruments together, or in close conjunction. The C182 has 169 State parties to date. It is common that UN Conventions have a higher number of Member States than the ILO instruments. The enforcement systems of the two organisations are similar, but only to a certain extent. This is mostly due to the different structures of the ILO and the UN. States only report on the implementation of the CRC, whereas workers' and employers' organisations can comment on the State report sent to the ILO, and even write their own, if the State does not fulfil its reporting duty on time. This is, first of all, an incentive for the State to send its report, in order to have some control of what the contents of the document are. There is also less possibility to hide any bad practices, since these can be reported through the tripartite counterparts if the State does not do so. The ILO has a system of technical cooperation with any State that cannot live up to its international obligations. Methods of technical cooperation can be measures such as experts going through national law and practice with Government representatives, letting them know what needs to be done in order to comply with the Conventions.<sup>205</sup> The assistance that the ILO can offer is clearly visible in the National Child Labour Action Programme for South Africa. The ILO offered to provide the initial funds to start the Government programme to eliminate child labour.<sup>206</sup>

The African Charter took CRC rights into account during the drafting process.<sup>207</sup> The CRC should also be a "source of inspiration" to the Charter (article 46 of the Charter). The main difference between the two instruments is that during the drafting of the Charter, the very unique problems facing African children were taken into account, in order to provide them with adequate protection. Despite this close relationship between the instruments, the African Charter took a long time to enter into force, due to a lack of ratification.<sup>208</sup> It was drafted in 1990, but did not enter into force until the end of 1999. The time delay is remarkable, considering that the Charter only requires the ratification of 15 States to enter into force. Lloyd thinks that this shows a need for children's rights to be taken into account to a larger

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<sup>203</sup> *Supra* note 120.

<sup>204</sup> For Convention ratification information from the ILO website, where you can see ratifications according to Convention or country:

<[www.ilo.org/ilolex/english/newratframeE.htm](http://www.ilo.org/ilolex/english/newratframeE.htm)>, visited on 3 March 2009.

<sup>205</sup> H. B. de la Cruz *et al* (1996), *supra* note 143, pp. 85 - 87.

<sup>206</sup> The National Child Labour Action Programme for South Africa, *Final Draft for consideration by government departments and other stakeholders*, Draft 4.10, October 2003, p 3, available to download from <[www.labour.gov.za/documents/useful-documents/basic-conditions-of-employment/useful-documents](http://www.labour.gov.za/documents/useful-documents/basic-conditions-of-employment/useful-documents)>, visited on 4 April 2009.

<sup>207</sup> *Supra* note 194, preamble.

<sup>208</sup> A. Lloyd, 'Evolution of the African Charter on the Rights and Welfare of the child and the African Committee of Experts: Raising the gauntlet', vol. 10, *The International Journal of Children's Rights* (2002), p. 180.

degree, and information regarding the benefits of these rights needs to be more widely available.<sup>209</sup> The fact that the African Charter takes children's rights further than the CRC is a likely explanation as to why nearly all of the African States have ratified the CRC, but not their own regional instrument. The regional implementation system is also likely to be more effective than the international one, and so the demands on the State to abide by its international obligations would be higher.<sup>210</sup> Despite the Charter's promise to protect children's rights in a manner suited to Africa, the instrument has not fully realized its potential.

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<sup>209</sup> *Ibid*, p. 181.

<sup>210</sup> Lloyd (2002), *supra* note 208, p. 182.

## 4 Corresponding South African Provisions Relating to the Problem of Child Labour

South Africa has ratified all of the international instruments above. It is interesting to note that the C138, which was adopted by the International Labour Conference in 1973, and came into force three years later, was not ratified by South Africa until 2000, at the same time as it ratified the C182. In the last few years the South African laws have been changed in order to bring the national laws into compliance with South Africa's international obligations. Most notable is the adoption of the Children's Act, and its amendment.

South Africa has not made any reservations against any of the provisions found in the ICCPR, ICESCR or the CRC. As mentioned, it is not possible to make reservations to any of the provisions found in the ILO instruments.

Since child labour is so interconnected to the right to education and the right to social services it could be useful to briefly look into the protection South African law provides for these as well.

### 4.1.1 The Constitution

The Constitution of South Africa is from 1997. In its preamble it specifically mentions the injustice of the old apartheid system, and that the new South Africa is a diverse country. The Republic is built on the values of human dignity and equality between the sexes and races.<sup>211</sup> The Constitution takes precedence over ordinary law according to Section 2.

Section 28 of the Constitution gives special rights to children. The aforementioned provision specifies the right for children to not be exploited, and prohibits hazardous labour for children. The definition of hazardous labour is very similar to the definition found in the Children's Act. However, the definition in the Constitution is more narrow than the one found in the Children's Act, since the latter forbids work that is not just inappropriate, but hazardous and exploitative. It also takes children's emotional development into account.

The rights set out for children in the Constitution are not absolute. According to Section 37 of the Constitution, children over the age of 15 can be directly used in armed conflicts, if there is a state of emergency. Other rights, that are not labour related, such as the right to social services, are also derogable. The Committee of Experts has criticized this in their Direct Request. The use of child soldiers is listed as one of the worst forms of child labour, but this is not the only international Convention to condemn the practice. The CRC has an additional protocol dedicated to the use of

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<sup>211</sup> Constitution of South Africa, Section 1.

children in armed conflicts, and it is considered a practice, which needs to be eliminated immediately.<sup>212</sup>

## 4.1.2 The Basic Conditions of Employment Act

One of the purposes with the Basic Conditions of Employment Act, No. 75 of 1997 (hereafter Act No. 75), is to ensure that national legislation is in compliance with South Africa's international obligations, according to Section 2(b). South Africa is a member of the ILO, and has ratified the ILO Conventions discussed above. However, in 1997, the year the Act became national law, South Africa had not ratified the C138. The other main Convention on child labour, the C182 had not yet been drafted. Therefore, the Act was written to comply with the State's international obligations at that time. An analysis of how well the law complies with the international child labour standards can still be useful, in order to determine precisely which rights were not in compliance with international child labour law, and therefore needed to be updated when the child labour instruments were ratified. A comparison between the C138, C182 and the act both before and after the amendment, will therefore follow.

Chapter six of the Act covers different aspects of the prohibition of child labour. Children under 15 years, or under the minimum school-leaving age, may not work (Section 43(1) of Act No. 75).<sup>213</sup> A child is defined as a person under 18 years of age.<sup>214</sup>

Section 43(2) of Act No. 75 prohibits any employer from hiring a child for work that is inappropriate for that age, or places the child's wellbeing, education, physical or mental health or spiritual, moral or social development at risk. It is possible for the Minister of Labour to set up terms and conditions protecting children older than 15 from labour conditions described in Section 43(2).<sup>215</sup>

At first glance, the South African law seems to only prohibit child labour in formal employment relationships (the wording in the ILO instruments, i.e. "employment and work", was included in order to cover both formal and informal employment relationships). However, the definition of employment is wider in the South African law, and includes both formal and informal working relationships.<sup>216</sup> There is room for improvement, though, since the law does not cover self-employed persons.

The legal age of 15 for child labour is in accordance with the C138. However, there is no definite prohibition of hazardous labour for children under the age of 18 in the Basic Conditions for Employment Act. The Labour Minister can put such regulations into force, but unless this is done

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<sup>212</sup> *Supra* note 177, art. 1, which calls for "immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency".

<sup>213</sup> Compulsory schooling ends at the last day of the school year that finishes at the age of 15, or at the end of the ninth grade, whichever comes first, *see* section 3 of the South African Schools Act, No. 84 of 1996.

<sup>214</sup> The Basic Conditions of Employment Act, No. 75 of 1997, Section 1. The same definition can also be found in the Children's Act Section 1.

<sup>215</sup> The Basic Conditions of Employment Act, no. 75 of 1997, section 44.

<sup>216</sup> *Ibid*, Section 1.

there is no protection in the law. The South African legislation does, however, give a broader definition of hazardous work than the C138.<sup>217</sup> In the Direct Request, the Committee of Experts inquires about the lack of provisions regarding the possibility to lower the age for hazardous work to 16, which can be found in article 3(3). The Committee expresses two concerns. First of all, the age limit in the national law is problematic, since the Department of Labour at the time was drafting recommendations regarding hazardous work for children aged 15-17 years.<sup>218</sup> Secondly, it is also uncertain whether these regulations take the requirements of article 3(3) into account during the drafting. This is a precondition for allowing hazardous work for anyone under 18.<sup>219</sup>

According to Section 45 of the Basic Conditions of Employment Act, the Labour Minister can also provide regulation for medical examinations of working children. These are confidential.<sup>220</sup>

According to international law, ratifying States should take all measures needed to implement the Conventions effectively. The Conventions discussed above also requires that the use of child labour be punishable by law.<sup>221</sup> This has also been implemented in South African law. Section 43(3) states that letting children work in conditions that violate 43(1) and (2), is punishable. It does not give further details, such as the severity of the punishment. If the Labour Minister has set up terms and conditions according to Section 44, and these are violated, it is also an offence.<sup>222</sup> Section 46(a) of Act No. 75 provides that assisting someone to commit these offences is also punishable by law. It is very interesting to note that the South African legislation, in Section 46(b) of the Act, also makes it an offence to discriminate against someone who refuses to allow a child to work in contradiction of the law.

Chapter six of the Act contains procedural rules as well. Should the age of an employee be relevant to the case, and there is not enough proof to establish the actual age of the employee, it is for the party that alleges that the prohibition of child labour has not been violated that has the burden of proof. This person has to show that it was reasonable for him or her to believe that the employee was of the required age.<sup>223</sup> According to Section 83A of the Act there is sometimes an assumption that a person is an employee, unless the contrary can be proved. In the drafting of the National Child Labour Programme of Action, it was suggested that this should apply to children as well. The same paper also highlights that the main enforcement mechanism of the act is through labour inspection.<sup>224</sup>

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<sup>217</sup> Compare *supra* note 151, art. 3 and *supra* note 215, Section 43(2).

<sup>218</sup> CEACR: *Individual Direct Request concerning Minimum Age Convention, 1973 (No. 138) South Africa*, submitted 2008, p. 2, <[www.ilo.org/ilolex/cgi-lex/pdconv.pl?host=status01&textbase=iloeng&document=21650&chapter=9&query=South+Africa%40ref&highlight=&querytype=bool&context=0](http://www.ilo.org/ilolex/cgi-lex/pdconv.pl?host=status01&textbase=iloeng&document=21650&chapter=9&query=South+Africa%40ref&highlight=&querytype=bool&context=0)>, visited on 28 April 2009.

<sup>219</sup> *Ibid.*

<sup>220</sup> *Supra* note 215, Section 90(3).

<sup>221</sup> See, for example, *supra* note 151, art. 9.

<sup>222</sup> *Supra* note 215, Section 44(2).

<sup>223</sup> *Ibid.*, Section 47.

<sup>224</sup> *White Paper (draft) on a National Child Labour Action Programme for South Africa, Draft for consideration by government departments and other stakeholders*, Draft 3.1, July

Lastly, Chapter six of the Act prohibits forced labour subject to the Constitution. There is no definition of forced labour in the Act, or in the Constitution.

There is also a requirement in Section 30 of the Act that employers keep their workers informed of their rights in work. According to Section 31 of Act No. 75 they also need to keep records of employees. These should include the date of birth, actual working hours and wages, as well as other information that is needed.<sup>225</sup> However, this does not apply to employers who have less than five employees, or for domestic workers.<sup>226</sup> According to article 9(3) of the C138 employers have to keep such records. There is no limitation to this duty in the ILO instrument.

The Act has been amended since it first came into force in 1997. Additional legislation, designed to comply with international standards, was introduced. Despite this, the law does not give complete protection. The Committee of Experts for the ILO has correctly pointed out that the South African labour law still does not cover self-employment.<sup>227</sup> Such an omission can create a loophole in the national law, and provide no protection for self-employed, working children. The Committee has asked South Africa to provide legislation to protect this group of workers as well. As mentioned above, the prohibition of hazardous work for anyone under 18, found in article 3 of the C138, has no corresponding legal protection in the Basic Conditions of Employment Act. The Children's Act has been amended to provide such protection. The amendment will be discussed below, in chapter 4.2.

The Basic Conditions for Employment Act has had other Sections amended. The provision that some employers are exempted from certain requirements, such as recordkeeping, has been changed. It no longer applies to those who have domestic help. However, the legislation has not changed regarding employers that have less than five workers. These employers are still not required to keep records of their employees. The Committee of Experts also noted this in their Direct Request.<sup>228</sup> The South African Government stated that small businesses were regulated by the Sectoral Determination on the small business sector. However, there were no indications from the Government as to whether or not they in turn had such demands on small businesses.<sup>229</sup>

The Committee has further concerns about the implementation of the C138 by South Africa. There are no provisions allowing children under the age of 15 to perform light work, yet there are many children under the legal working age that are employed. The Committee recommended that such legislation be drafted.<sup>230</sup>

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2003, p. 6, available at <[www.info.gov.za/view/DownloadFileAction?id=68775](http://www.info.gov.za/view/DownloadFileAction?id=68775)>, visited on 15 April 2009.

<sup>225</sup> *Supra* note 215, Section 31.

<sup>226</sup> *Ibid*, Section 28.

<sup>227</sup> CEACR (2008), *supra* note 218.

<sup>228</sup> *Ibid*.

<sup>229</sup> CEACR (2008), *supra* note 218, discussion regarding art. 9.

<sup>230</sup> CEACR (2008), *supra* note 218.

### 4.1.3 Children's Act

The Children's Act was drafted to give better effect to the rights given to children in article 28 of the Constitution. The Act provides legislation for different areas, from early intervention programmes to childhood development. The Act has been amended, and a new provision regarding child labour was added. The amendment includes a slightly different definition of the worst forms of child labour, than the one found in article 3 of the C182.

The Act prohibits slavery, and practices similar to slavery, the use of children in commercial sexual exploitation, trafficking, and the involvement of children in certain crimes. It is forbidden to use, procure or offer a child for these services.<sup>231</sup> Slavery has a more narrow definition in South African law, if you look at the definitions as such. Neither the C182 nor the Children's Act has an exhaustive list of what is included in the definition of slavery, but the South African law highlights this fact better. However, the South African law lacks adequate protection for children in armed conflicts. This has been discussed above, in the analysis of the Constitution.

The prostitution and pornography prohibition in the C182 is very different from the Act. The national legislation prohibits anyone to use, procure, offer or employ children "for purposes of commercial sexual exploitation".<sup>232</sup> It is also a part of the worst forms of child labour to use a child in illicit activities, such as drugs manufacturing and trafficking, which is found in article 3(c) of the C182. There is no reference whatsoever in the South African law to illicit activities. It just refers to trafficking. This is further defined in the list of definition at the beginning of the Act. There is nothing in the definition of illicit trafficking, which brings the provision closer to the ILO definition.<sup>233</sup> However, despite this the Committee of Experts has accepted the phrasing of the provision as being in accordance with the Convention.<sup>234</sup> The use of a child for certain crimes is also prohibited. These crimes, are, among others, murder, treason, and rape.<sup>235</sup>

According to Section 141(e) of the Act, the use of child labour is also forbidden. A child is defined as anyone under the age of 18.<sup>236</sup> Child labour is defined as: "(a) exploitative, hazardous or otherwise inappropriate for a person of that age; and (b) places at risk the child's well-being, education, physical or mental health, or spiritual, moral emotional or social development".<sup>237</sup> This definition is not exactly consistent with the ILO definition of hazardous labour, but all the elements of the C138 definition can be interpreted into the South African law. The national legislation also adds additional aspects of hazardous labour.<sup>238</sup> Exploitation is also defined in the beginning of the Act. Exploitation has more in common with the

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<sup>231</sup> Children's Act No. 38 of 2005, Section 141(1)(a)-(d).

<sup>232</sup> *Ibid*, Section 141(1)(b).

<sup>233</sup> *Supra* note 231, Section 1.

<sup>234</sup> CEACR: *Individual Direct Request concerning Worst Forms of Child Labour Convention*, 1999, (No. 182) South Africa, Submitted: 2008.

<sup>235</sup> Criminal Procedure Act no. 51 of 1977, Schedule 1 and 2.

<sup>236</sup> *Supra* note 231, Section 1.

<sup>237</sup> *Ibid*, Section 1 (emphasis added).

<sup>238</sup> Compare *supra* note 151, art. 3(1) and the definition in the Children's Act.

worst forms of child labour than minimum age, since it includes slavery in any form, forced labour, sexual exploitation and servitude, as well as any practices forbidden by section 141 of the Act.<sup>239</sup> The definitions do to a large extent correspond to article 3 of the C182.

Section 110 of the Act lists several categories of professionals that upon noticing a child in need of help, have a duty to report this to the authorities. The definition of a so-called vulnerable child can be found in Section 150. An orphan that has no ‘visible means of support’ is a child who is entitled to special protection.<sup>240</sup> A child labourer may be considered to be a child in need of help, but is not counted as such automatically. The same is true for those living in a child headed household.<sup>241</sup> In order to determine whether a child is vulnerable in these circumstances, it should be investigated by a social worker.<sup>242</sup>

If a child is in need of care and protection from the State, the child might in some instances be removed from the home. There are several options available. For example, a child can be placed in temporary safe care. To put the child into temporary safe care, a court order is needed, according to the Children’s Act, Section 151. However, this is not necessary if there are “reasonable grounds for believing” that the need to be removed is immediate, and obtaining a court order could be a danger to the child, due to the delay this would cause.<sup>243</sup> In the same Section, there is a requirement that the removal of the child is the best way of keeping him or her safe.

If a child is vulnerable, the court can issue any order that it considers to be in the best interests of the child.<sup>244</sup> There is a non-exhaustive list of measures that the court can take in these cases. Before the court reaches this decision, it has to take into account reports about the current situation of the child, and the best way of ensuring that the child’s life is stable.<sup>245</sup>

#### **4.1.4 Social Assistance Act**

There is a right for certain categories of persons to receive social assistance. The different grants available are listed in the Social Assistance Act, No. 13 of 2004. These include foster care, war veterans, and child support grants.<sup>246</sup> There is no specific grant for child headed households, or especially vulnerable children. Instead, their right to social assistance can be found in the Constitution. There is a specific right for children to social assistance listed in the special children’s rights listed in Section 28 of the Constitution. There is also a general right to social assistance, which is found in Section 27.

There might be some indication that the situation of especially vulnerable children should be taken into account when the extent of the right

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<sup>239</sup> *Supra* note 231, Section 1.

<sup>240</sup> *Ibid*, Section 150(1)(a).

<sup>241</sup> *Supra* note 231, Section 150 (2)(a).

<sup>242</sup> *Ibid*, Section 150 (2).

<sup>243</sup> *Supra* note 231, Section 152(1).

<sup>244</sup> *Ibid*, Section 156 (1).

<sup>245</sup> *Supra* note 231, Section 157, the best interests of the child have to be taken into consideration by the Court at all times.

<sup>246</sup> Social Assistance Act, No. 13 of 2004, Sections 5-13.

to social assistance is determined. In the *Grootboom* case, the Constitutional Court stated that “Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right”.<sup>247</sup> While the *Grootboom* case concerned the right to housing, the Court also discussed children’s rights to housing and social security.<sup>248</sup> It can therefore be used to argue that there is a need to take the situation of especially vulnerable children into account both when deciding who is entitled to social assistance according to legislation, and when the authorities makes their decisions regarding who should receive this benefit. Since the parents are mainly responsible for supporting their child according to article 18 of the CRC, it is likely that the Government would only be obliged to provide for children who are not looked after by their parents, such as orphans.<sup>249</sup>

Having said that, the right to social security is a right, which is dependent on the amount of funding available. There is a case from the Constitutional Court of South Africa, which clearly demonstrates the funding difficulties that the South African government faces. The *Soobramoney* case concerned the right to health care, but it also addressed some aspects of the right to social service. In the judgement, the problem of funding was very evident. The Constitutional Court said that:

“What is apparent from these provisions is that the obligations imposed on the state by sections 26 and 27 in regard to access to housing, health care, food, water and social security are dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by reason of the lack of resources. Given this lack of resources and the significant demands on them that have already been referred to, an unqualified obligation to meet these needs would not presently be capable of being fulfilled. This is the context within which section 27(3) must be construed”.<sup>250</sup>

In the *Soobramoney* case, the main question regarded the right to medical treatment for Mr. Soobramoney, who was terminally ill with a kidney disease and needed permanent dialysis. His hospital, which had more dialysis patients than they could handle, had to decide whom they were going to treat. They prioritized those that could eventually get well, and Mr. Soobramoney was not among them.

There is one conclusion, that may be drawn from the two cases. While there is no absolute right to social assistance, groups that are especially vulnerable should be prioritized when selecting who should receive the benefits that are available.

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<sup>247</sup> *Government of South Africa and Others v. Grootboom and others*, 2000, para. 44.

<sup>248</sup> *Ibid*, para. 76.

<sup>249</sup> This interpretation is supported by the *Shadow Report to South Africa’s first periodic State Report to the African Commission on Human and Peoples’ Rights, to be presented at the 38th Session of the African Commission on Human and Peoples’ Rights, 21 November – 5 December 2005, Banjul, the Gambia*, Prepared by the Centre for Human Rights, p. 3, <[www.sarpn.org.za/documents/d0001835/ACHPR\\_SA\\_Nov2005.pdf](http://www.sarpn.org.za/documents/d0001835/ACHPR_SA_Nov2005.pdf)>, visited on 23 March 2009.

<sup>250</sup> *Thiagraj Soobramoney v Minister of Health: Province of KwaZulu-Natal* (1997), para. 11.

## 4.1.5 South African Schools Act

The relation between child labour and education, discussed above, is very important. The right to education can be found in several different international instruments, such as the CRC and the ICESCR.<sup>251</sup> Basic education should be available free of charge.

There is a duty for South African children to attend school.<sup>252</sup> Compulsory schooling starts the first day of school of the year that the child turns seven, and lasts until the end of the school year the year that the child turns 15, or reaches the end of the ninth grade, whichever comes first.<sup>253</sup> According to Section 3(3) of the Act, it is up to the Councils to provide children with a place in school.

Section 39(1) of the Schools Act stipulates that the public schools are to a large extent funded by the State, but also receive some of their funds from school fees. If the parents cannot pay the school fees, it is possible to apply for an exemption from the charges.<sup>254</sup> In addition, there are automatic exceptions to the payment of school fees. These apply to children in foster care, orphanages, child headed households and other similar situations.<sup>255</sup> Others have to apply for their exemption. However, if too many people do not have to pay schools fees, the level of the fees will be investigated, to determine if it is too high.<sup>256</sup>

South African public schools are divided into five categories, depending on the relative wealth of the school.<sup>257</sup> In order to ensure that the payment of school fees does not become an obstacle for the poor to receive an education, a system of schools that are not allowed to charge school fees has been introduced.<sup>258</sup> The Minister will make an annual decision to decide which schools will not be able to charge fees (Section 39(7) of the Schools Act).<sup>259</sup> In 2008 the two poorest categories of schools were no fee schools.<sup>260</sup>

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<sup>251</sup> *Supra* note 110, art. 13(2)(a) and *supra* note 68, art. 28(1)(a).

<sup>252</sup> South African School's Act, No. 84 of 1996, Section 3.

<sup>253</sup> *Ibid.*, Section 3(1).

<sup>254</sup> *Supra* note 252, Section 40(1).

<sup>255</sup> Para 127 B and C of the National Norms and Standards for School Funding, which can be accessed at <[www.info.gov.za/gazette/notices/2004/27014.pdf](http://www.info.gov.za/gazette/notices/2004/27014.pdf)>, visited on 2 March 2009.

<sup>256</sup> *Ibid.*, para. 24.

<sup>257</sup> P. Tucker, *Every child in school, every day* (2008), <<http://web.wits.ac.za/NR/rdonlyres/E0357D9D-1DDA-4DDC-87BA-5BBEBAD4809A/0/SchoolfeesarticleinDeRebusPhillipaTucker.pdf>>, visited on 2 March 2009.

<sup>258</sup> *Supra* note 255, para. 125 C.

<sup>259</sup> Education laws amendment bill <[http://us-cdn.creamermedia.co.za/assets/articles/attachments/02336\\_edulawsab23d.pdf](http://us-cdn.creamermedia.co.za/assets/articles/attachments/02336_edulawsab23d.pdf)>, visited on 3 May 2009.

<sup>260</sup> Tucker (2008), *supra* note 257.

While at first glance, there is no right to a free basic education in South Africa, there are measures in place to ensure that those who cannot pay still have an opportunity to attend school.<sup>261</sup>

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<sup>261</sup> In the opinion of this commentator, this is a step in the right direction. However, there are still economical obstacles to education for some children, such as school uniforms and books.

# 5 Analysis

## 5.1 Should There be Specialised Regulation for Children Affected by AIDS?

The international community is aware of the difficulties HIV/AIDS poses in the enjoyment of children's rights. However, there is no special regulation to provide children affected by the disease with special protection, in order to ensure their rights. Nor does there seem to be any plans to draft an instrument or optional protocol in order to ensure protection for these vulnerable children.

### 5.1.1 Lack of Current Regulation

International law does provide some regulation to provide protection for people affected by HIV/AIDS. The ILO has drafted a recommendation, which will likely be adapted by the International Labour Conference in 2010.<sup>262</sup> However, the purpose of the recommendation is not to stop child labour, but to stop non-discrimination of people infected with HIV and AIDS, in order for them to be able to keep their jobs.

There are no instruments in international law that specifically address the problem of HIV/AIDS and child labour, and other children's rights. The most prominent document that discusses the impact of the disease on children's rights is General Comment No. 3 from the Committee on the Rights of the Child. The Comment does make an important point. This probably explains, to some degree, why nothing more has been done to ensure that children's rights are not affected by the epidemic. When HIV/AIDS first began to spread, children were not considered to be particularly affected by it.<sup>263</sup> This could not be further from the truth. Children are affected in many different ways. Perhaps the most obvious effect is the death of the child's parents. Secondly, there is a risk of the child being infected during the pregnancy itself through so-called mother to child transmission. According to the same report, one of the most serious aspects of the disease, which has a large impact on the lives of children, is the fact that most of the newly infected are young, between 15 and 24 years.<sup>264</sup>

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<sup>262</sup> ILO, *Recommendation on HIV/AIDS and the world of work*, <[www.ilo.org/public/english/protection/trav/aids/laws/briefenglish.pdf](http://www.ilo.org/public/english/protection/trav/aids/laws/briefenglish.pdf)>, visited on 11 March 2009.

<sup>263</sup> Committee on the Rights of the Child, *General Comment No. 3 (2003), HIV/AIDS and the Rights of the Child*, CRC/GC/2003/1, p. 1.

<sup>264</sup> *Ibid*, p. 1.

It is interesting to note that the connection between child labour and HIV/AIDS is particularly evident regarding for orphans.<sup>265</sup> This is probably not that surprising, since they are especially vulnerable, and more likely to be economically exploited.

Considering that the Committee for the Rights of the Child very obviously takes the threat that HIV/AIDS poses to children's rights seriously, it is remarkable that no special instrument exists giving these children protection. There are arguments both in favour, and against creating such rights.

## 5.1.2 Arguments against Special Protection

HIV/AIDS is not the only deadly disease that claims many of lives around the world. Malaria kills approximately 1 million people worldwide per year. It is one of the most deadly diseases in the world, if you count the number of victims.<sup>266</sup> According to the Centers for Disease Control and Prevention, more children are killed by malaria than AIDS.<sup>267</sup> This is probably due to the fact that they are not as likely to contract STDs, and that children are especially vulnerable to malaria. The situation is the reverse for adults, AIDS kill more adults than malaria and tuberculosis.<sup>268</sup> The number of AIDS orphans is expected to be over 20 million by 2010.<sup>269</sup> However, the estimated total number of orphans from any cause is around 133 million.<sup>270</sup>

Giving special protection to children affected by HIV and AIDS would, in other words, leave the vast majority of the world's orphans without the same protection. Even though they are not AIDS orphans, their lives are affected by the death of their parents in much the same way as AIDS orphans.

Many of the diseases that leave a large number of children orphaned are not self-inflicted in the same way that HIV/AIDS is. While there are cases of new infections through mother to baby transmissions and blood transfusions, most of those newly infected with HIV in sub-Saharan Africa received the virus through unprotected sex.<sup>271</sup> Malaria is not a sexually transmitted disease, it is caused by the bite of a mosquito.<sup>272</sup> The illness tends to be particularly serious in children and pregnant women, since their immune system is less developed.<sup>273</sup> It is a disease that mostly affects

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<sup>265</sup> Committee on the Rights of the Child (2003), *supra* note 263, p. 11.

<sup>266</sup> WHO, *World Malaria Report 2008*, p. 1,

<[www.who.int/malaria/wmr2008/malaria2008.pdf](http://www.who.int/malaria/wmr2008/malaria2008.pdf)>, visited on 3 March 2009.

<sup>267</sup> Centers for disease control and prevention, *The impact of malaria, a leading cause of death worldwide*, <[www.cdc.gov/malaria/impact/](http://www.cdc.gov/malaria/impact/)>, visited on 3 March 2009.

<sup>268</sup> WHO, *World Health Report*, 2004, p. 120,

<[www.who.int/whr/2004/en/report04\\_en.pdf](http://www.who.int/whr/2004/en/report04_en.pdf)>, visited on 3 March 2009.

<sup>269</sup> UNICEF, *Children and AIDS, a Stocktaking Report*, 2007, p. 16,

<[http://data.unaids.org/pub/Report/2007/20060116\\_stocktaking\\_report.pdf](http://data.unaids.org/pub/Report/2007/20060116_stocktaking_report.pdf)>, visited on 3 March 2009.

<sup>270</sup> UNICEF, *Child protection, facts on children*,

<[www.unicef.org/media/media\\_45451.html](http://www.unicef.org/media/media_45451.html)>, visited on 4 March 2009.

<sup>271</sup> UNAIDS (2008), *Supra* note 16, p. 43.

<sup>272</sup> WHO, *Malaria*, <[www.who.int/topics/malaria/en/](http://www.who.int/topics/malaria/en/)>, visited 3 March 2009.

<sup>273</sup> The Global Fund, *Malaria Background*,

<[www.theglobalfund.org/en/malaria/background/?lang=en](http://www.theglobalfund.org/en/malaria/background/?lang=en)>, visited on 3 March 2009.

poorer and less developed countries in the world. Just like HIV, it can slow down economic growth, making it even more difficult for these countries to develop.<sup>274</sup> Malaria is more likely to affect the poor that cannot afford to take precautionary measures to avoid contracting the illness. They are also unable to afford getting the medical treatment needed to combat it once infected.<sup>275</sup> Malaria can also be difficult to treat, since some strains of the disease have become resistant to the medicines used today.<sup>276</sup> Some studies show that malaria might also speed up the progress of HIV, although this effect is often not as pronounced as with other diseases.<sup>277</sup> Malaria is preventable, mostly through mosquito nets, but even such a simple method is too expensive for many. Other factors, such as global warming and change of land use, could, according to certain scientists, increase the number of malaria mosquitoes.<sup>278</sup>

Tuberculosis is another illness, which affects a lot of people, most of them poor. It is an airborne disease, although the virus is dormant in the majority of those infected.<sup>279</sup> It is estimated that one third of the world's population is infected. The WHO estimates that 1.6 million people died of tuberculosis in 2005.<sup>280</sup> HIV and tuberculosis are very interconnected. A person that is HIV positive is much more likely to develop tuberculosis as well, since the TB virus is less likely to stay dormant.<sup>281</sup>

The link between tuberculosis and poverty has been established for some time. Malnutrition and crowded living conditions are two of the reasons why the poor are more affected by the disease. Other contributing factors are the non-availability of clean water and healthcare facilities.<sup>282</sup> There are some ways of preventing the disease, such as several vaccines, but these might be out of the financial question for some. Another strategy is to ensure that the tuberculosis stays dormant. Even though an individual may still be infected, he or she will not be ill.<sup>283</sup>

These two diseases are just a few examples of illnesses that kill many each year, and leave many children orphaned. While they do receive

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<sup>274</sup> WHO, *Malaria fact sheet*, <[www.who.int/mediacentre/factsheets/fs094/en/index.html](http://www.who.int/mediacentre/factsheets/fs094/en/index.html)>, visited on 3 March 2009.

<sup>275</sup> Global Action for Children, *Malaria*, <[www.globalactionforchildren.org/issues/malaria/](http://www.globalactionforchildren.org/issues/malaria/)>, visited on 22 March 2009.

<sup>276</sup> WHO, *supra* note 274.

<sup>277</sup> HIV InSite, *Malaria and HIV*, <<http://hivinsite.ucsf.edu/InSite?page=kb-05-04-04>>, visited on 4 March 2009.

<sup>278</sup> 'Warming Trend May Contribute to Malaria's Rise', *Science Daily*, 22 March 2006, <[www.sciencedaily.com/releases/2006/03/060322142101.htm](http://www.sciencedaily.com/releases/2006/03/060322142101.htm)>, visited on 3 March 2009.

<sup>279</sup> WHO, *Tuberculosis fact sheet*, <[www.who.int/mediacentre/factsheets/fs104/en/index.html](http://www.who.int/mediacentre/factsheets/fs104/en/index.html)>, visited on 5 March 2009.

<sup>280</sup> *Ibid.*

<sup>281</sup> WHO Report 2009, *Global Tuberculosis Control: Epidemiology, Strategy, Financing*, WHO Press, Geneva, (2009), p. 10, available from <[www.who.int/tb/publications/global\\_report/2009/pdf/full\\_report.pdf](http://www.who.int/tb/publications/global_report/2009/pdf/full_report.pdf)>, visited on 5 March 2009.

<sup>282</sup> WHO, *Addressing Poverty in TB Control – Options for National TB Control Programmes*, WHO (2005), p. 16, <[http://whqlibdoc.who.int/hq/2005/WHO\\_HTM\\_TB\\_2005.352.pdf](http://whqlibdoc.who.int/hq/2005/WHO_HTM_TB_2005.352.pdf)>, visited on 5 March 2009.

<sup>283</sup> *Prevention of Tuberculosis*, <[www.wrongdiagnosis.com/t/tuberculosis/prevent.htm](http://www.wrongdiagnosis.com/t/tuberculosis/prevent.htm)>, visited on 5 March 2009.

attention by NGOs such as the WHO, they do not have the same prominent position as HIV/AIDS in the public debate. While the Committee for the Rights of the Child has written a General Comment regarding the impact of AIDS on the lives of children, there is no equivalent for tuberculosis or malaria. General Comment no. 4 is regarding the rights to health in general, but while it mentions HIV/AIDS several times, it does not bring up the problem posed by the other serious diseases, despite them affecting the lives of children all over the world.

While all the diseases discussed are preventable, AIDS is arguably the most easily prevented of the three as it relates to consensual sexual contact. Sexual abstinence, or the use of condoms during sex could have prevented the spreading of the disease in most cases in sub-Saharan Africa. The method of abstinence might not be entirely realistic, but encouraging young children to wait with their sexual debut could have some effect. When they do have sex, condoms should be used. Stopping mosquitoes from biting, or an air-borne virus is not quite that easy.

One also has to ask whether an instrument giving elevated protection is one that the States most hit by the AIDS epidemic would sign and ratify. Most of them are developing, with economic difficulties. It is unlikely that they would agree to take on additional responsibility, which would require substantial funding to be effective.

### **5.1.3 Arguments for Special Protection**

HIV/AIDS is one of the most serious threats to health in the world today. In some parts of the world, the average life expectancy has decreased as a result of the epidemic. The economic development of the countries that are the most affected by the disease has slowed as a result of the impact of the disease. It is expensive to keep HIV from developing to AIDS, and it is treatment that the patient will need for the rest of his or her life. This puts an enormous strain on the national health care systems, which need a lot of resources allocated especially to treat the people infected with the disease. Another serious side effect is that in many of the sub-Saharan countries, the majority of the victims are young. It kills off the part of the population most able to work. In more remote communities children might find themselves without the means of getting an education, since the teacher is dying from AIDS.

While it is true that not all of these problems are specific to HIV and AIDS, there is another aspect of the disease, which makes the need for special protective legislation especially urgent. There is widespread discrimination, not just of the AIDS victims, but of their families as well. AIDS orphans are likely to be discriminated against in their education, as well as in other aspects of their lives, even if they themselves are healthy. It has been alleged that children have been prevented from enrolling in school, because they have been unable to afford tuition, and the schools have refused to waive the fees, because they need the revenue generated from

the charges.<sup>284</sup> This discrimination aspect alone is a very strong argument in favour of providing specific protection to those affected by the disease. This social vulnerability of the surviving family members will reduce their future prospects. The lack of education will later on reduce the chances of getting a good job, and less chance of improving the living conditions of the affected.

Another serious consequence of HIV is that it breaks down the existing immune system, leaving the person infected more vulnerable to other diseases, such as tuberculosis.<sup>285</sup> Because the immune system is weakened, the victim might well suffer not only from HIV, but the other diseases discussed in chapter 2.3.2 as well. These are common side effects of HIV in certain parts of the world, such as sub-Saharan Africa.

Hand in hand with protection, there must be widespread education about the disease. There are many terrible misconceptions in South Africa about the disease to this day, especially (but not exclusively) among those less educated. One of the many misconceptions regarding AIDS is that it can be cured by having sexual intercourse with a virgin.<sup>286</sup> Of course, this is not true, but it has been alleged that this myth has led to some very young girls being infected after being raped. Some of the children were supposedly less than a year old.<sup>287</sup>

#### 5.1.4 Conclusion Regarding Special Protection

In human rights history, vulnerable groups have progressively been given more and more protection, in order for them to fully enjoy their rights. Given the special situation of discrimination and abandonment, in which many AIDS orphans find themselves, it is truly remarkable that no international instrument providing this protection exists. This is even more astounding considering that the Committee of Experts for the Rights of the Child has written a general comment regarding the impact AIDS has on children's rights.

While it is true that there are other diseases which leave children parentless and vulnerable, AIDS is more likely to kill both parents, and is more likely to lead to discrimination of the orphan. Various misconceptions regarding how the disease is spread makes children more likely to be excluded from society, and therefore forced into the worst forms of child labour, such as prostitution. It is mostly this discrimination factor, and the fact that AIDS orphans are more likely than others to be double orphans, that means there is a real need for special protection for these children.

In international law AIDS orphans are considered to be in a situation that makes them especially vulnerable.<sup>288</sup> However, in some instances, this

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<sup>284</sup> Human Rights Watch, *supra* note 1, p. 19.

<sup>285</sup> See discussion above, in chapter 2.3.2.

<sup>286</sup> G. J. Pitcher, D. MG Bowley, 'Infant Rape in South Africa', vol. 359, Issue 9303, *The Lancet* (2002), pp. 274-275.

<sup>287</sup> J. Flanagan, 'South African men rape babies as "cure" for AIDS', *The Telegraph*, 11 Nov 2001, available from

<[www.telegraph.co.uk/news/worldnews/africaandindianocean/southafrica/1362134/South-African-men-rape-babies-as-cure-for-Aids.html](http://www.telegraph.co.uk/news/worldnews/africaandindianocean/southafrica/1362134/South-African-men-rape-babies-as-cure-for-Aids.html)>, visited on 6 March.

<sup>288</sup> Committee on the Rights of the Child (2003), *supra* note 263, para. 1.

is not enough to secure their rights. Their connection to HIV/AIDS makes their situation worse than it would likely be if they were orphaned for some other reason.

## 5.2 Providing for the Child's Needs

According to international law, the parents are primarily responsible for providing for their children.<sup>289</sup> In the CRC, this rule can be found in article 18, which states that “parents or, as the case may be, legal guardians have the primary responsibility for the upbringing and development of the child”. The same article also places a duty on the State to provide help to the parents when they cannot properly fulfil the rights in the CRC.<sup>290</sup> If the parents work, the State should provide child care services.<sup>291</sup>

The parents are both equally responsible for the child's upbringing. This can be seen both from the wording of article 18, and the *travaux préparatoires*.<sup>292</sup> There were discussions whether this shared duty was just a legal duty, or whether it transferred to all aspects of the upbringing of the child.<sup>293</sup> Detrick brings up several conclusions regarding the interpretation of parental responsibility. First of all, during the drafting, one State party concluded that parents are protected from too much interference by the State into their family life. It is their choice how to best bring up their child. Secondly, it takes some of the pressure to act off the State, since it is not primarily responsible for the upbringing of the child.<sup>294</sup>

However, if the parents are dead, and the child is left alone, the State has an immediate responsibility to provide for the child. A South African report even suggested that this responsibility was not dependent on the resources of the State to provide this protection.<sup>295</sup> Unlike most other economic, social and cultural rights, the State has to provide for orphaned children.<sup>296</sup> However, this discussion can only be found in the draft report, not in the final copy, and therefore the accuracy of this statement can be questioned.

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<sup>289</sup> *Supra* note 68, art. 18. Also see discussion in Detrick (1999), *supra* note 69, pp. 459 - 460.

<sup>290</sup> *Supra* note 68, art. 18(2).

<sup>291</sup> *Ibid.*, art. 18(3).

<sup>292</sup> *Supra* note 68, art. 18(1) of the CRC states that “both parents have common responsibilities of the child”. During the drafting there were suggestions that the wording should be “the duty... shall lie equally with both the parents”, *see* Detrick (1999), *supra* note 69, p. 296.

<sup>293</sup> Detrick (1999), *supra* note 69, pp. 296 - 270.

<sup>294</sup> *Ibid.*, p. 303.

<sup>295</sup> *Supra* note 224, p. 6.

<sup>296</sup> *Ibid.*

## 5.3 Enjoyment of the Rights *de Facto* or *de Jure*?

Human rights cannot purely be implemented in the national law. There must be a *de facto* enjoyment of the rights. The State should be able to show that the law is effectively applied by Courts and in society. It remains to be seen whether South African children are properly protected against child labour, or whether there is room for improvement.

South Africa has taken both preventative and repressive measures in order to comply with their international obligations. There are also signs that rehabilitative measures are taken to a small extent. However, the evidence of this is very sporadic, and will not be discussed in great detail. Despite the efforts in ensuring this essential right for children, there is not necessarily a *de facto* enjoyment of the rights.

In order to abolish child labour many different measures, affecting various aspects of society, must to be taken. First and foremost, it is more effective to try and prevent child labour from ever becoming a reality, than to try and stop it once it is a fact. However, if cases of child labour are discovered, it is important to have repressive measures in place in order to properly punish those that avail themselves of this illegal workforce.

This section briefly describes some of the measures taken by South Africa in order to eliminate child labour.

### 5.3.1 Preventative Measures Taken by South Africa

Preventative measures are the first step towards the elimination of child labour. However, this requires action targeted at the underlying social reasons for the practice. A short description of some of the methods used by the South African Government will follow.

#### 5.3.1.1 The National Child Labour Action Programme for South Africa

The South African Government has established the National Child Labour Action Programme for South Africa. Different governmental departments have been cooperating in order to establish the programme, and the goal is to reduce child labour by up to 80 per cent.<sup>297</sup> The main part of Government involved is the Labour Department.<sup>298</sup> Different methods of combating child labour, as well as their effectiveness, are discussed.

One method proposed is the introduction of new legislation, in order to provide an increased protection for children against child labour,

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<sup>297</sup> South Africa.info, *SA to clamp down on child labour*,

<[www.southafrica.info/services/rights/labour-110608.htm](http://www.southafrica.info/services/rights/labour-110608.htm)>, visited on 9 March 2009.

<sup>298</sup> *Supra* note 224, p. 2.

combined with better methods of enforcement of the laws.<sup>299</sup> Another suggested measure is public information campaigns about the dangers of child labour. The need for cost effective measures is emphasised, because expensive methods are not considered to be “realistic or sustainable”.<sup>300</sup>

The report also discusses the need for preventative measures. Since child labour to a large extent is caused by poverty, the eradication of poverty is an essential step to eliminate the need for child labour.<sup>301</sup> Providing infrastructure to parts of the country that previously had none is a good way of eradicating poverty. It creates jobs for the adults, both during the building, but also during the maintenance phase. It also eliminates the need for children to walk long distances to fetch water, and other similar tasks, which are time consuming and physically demanding.<sup>302</sup> The most common form of child labour is the fetching of fuel and water by children.<sup>303</sup> The ones that spend most time each week collecting these necessities live in the ex-homelands.<sup>304</sup> Considering that South Africa has many AIDS orphans, it is important to create measures that take their specific situation into account.

### 5.3.1.2 Non-discrimination

Many children that are child labourers are also members of the most vulnerable groups in society. According to reports from all over the world, orphans are more likely to miss out on education, be exploited and generally discriminated against. Therefore, it is important to provide a framework, which gives protection against such discrimination.

In the South African Constitution, there is an equality provision, which also includes the principle of non-discrimination, in Sections 9(3) and (4). Neither the State nor a person can unfairly discriminate against a person on the grounds listed in the provision. These are, among others, race, gender, disability and age. The right is enjoyed by children as well, since it is applicable to “everyone”.<sup>305</sup>

The Constitution is not the only South African law to contain this right. One of the purposes of the Children’s Act is to prevent children from being discriminated against, according to Section 2(f). The Act also specifically states that any proceedings or similar decisions by authorities regarding children *must* protect the child from unfair discrimination. It also adds to the list of discrimination grounds found in the Constitution. Discrimination on *any* ground is forbidden. It then goes on to specifically mention several, apparently especially important areas of protection. One of them is discrimination based on health status.<sup>306</sup> This is, of course, particularly relevant for those children affected by HIV/AIDS because there

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<sup>299</sup> *Supra* note 206, p. 4.

<sup>300</sup> *Ibid.*, p. 4.

<sup>301</sup> *Supra* note 206, p. 29.

<sup>302</sup> *Ibid.*, pp. 29 - 30.

<sup>303</sup> *Supra* note 206, p. 49.

<sup>304</sup> *Ibid.*

<sup>305</sup> One of the rights in the Constitution that does not apply to children, the right to vote (Section 19(3)), states that “every adult citizen” enjoys this right.

<sup>306</sup> *Supra* note 231, Section 7(2)(d).

is still a lot of stigma attached to the condition, even for the family members of the infected.<sup>307</sup>

In order to guarantee that all children can attend school, the South African Schools Act forbids any unfair discrimination in the admission process to public schools.<sup>308</sup> Section 5(2) of the Act contains an express prohibition of administering any tests in order to permit a student to enrol in the school. Such tests can include HIV tests.<sup>309</sup> Every child has a right to an education, regardless of their status.<sup>310</sup> However, it is worth noting that a child can be exempted from the compulsory school attendance, if it is in its best interests.<sup>311</sup>

If one argues that child labour is unavoidable in today's society, it is also important to eliminate any discrimination that children face at work due to their status as minors. Many employers will hire child workers simply because they can pay them less, even though they might well perform the same tasks as an adult would. They are also less likely to know their rights, and therefore demand that these are not violated.<sup>312</sup> The right to be free from discrimination at work is not enforced. Equal pay for equal work is not observed in the cases where children are paid less for performing the same job. Nor is the principle abided by when children are hired, but not provided with the same protection as adults.

According to South African law, unfair discrimination in employment is forbidden. Child labour is prohibited according to the Children's Act and Basic Conditions of Employment Act (see discussion above), but the Employment Equity Act applies to all workers. The definition of employee is very broad, and does not take the legality of the employment relationship into account.<sup>313</sup> Nor does it require a formal contract of employment. Section 6(1) of the Act lists the different grounds for discrimination, and age is one of them. If children work, they should, in other words, be given the same rights and wages as other workers performing the same tasks. Anything else is unfair discrimination, forbidden by South African law.

The AIDS Law Project is a human rights organization, which specializes in realising the rights of persons affected by HIV/AIDS. In particular, the organization tries to ensure that there is no discrimination based on HIV/AIDS status. AIDS orphans that work are considered to be persons affected by the disease, since they are made vulnerable by it. A lot

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<sup>307</sup> UNICEF (2006), *supra* note 8, p. 18. For more specific information on action taken by South Africa to reduce this problem, see UNAIDS, *Reducing HIV Stigma and Discrimination: a critical part of national AIDS programmes, A resource for national stakeholders in the HIV response*, Geneva (2007), <[http://data.unaids.org/pub/Report/2008/jc1420\\_stigma\\_discr\\_en.pdf](http://data.unaids.org/pub/Report/2008/jc1420_stigma_discr_en.pdf)>, visited on 7 March 2009.

<sup>308</sup> *Supra* note 252, Section 5(1).

<sup>309</sup> C. van Wyk, 'HIV/AIDS Policy in South African Schools', in N. S. Harris, P. Meredith (eds.), *Children, Education, and Health: International Perspectives on Law and Policy*, Ashgate Publishing Ltd, Aldershot (2005), p. 190.

<sup>310</sup> *Supra* note 252, Section 3 to 5.

<sup>311</sup> *Ibid.*, Section 4(1).

<sup>312</sup> For a very brief, but informative website, which condenses information from numerous other sources, visit Anti-slavery, *Child labour* <[www.antislavery.org/homepage/antislavery/childlabour.htm](http://www.antislavery.org/homepage/antislavery/childlabour.htm)>, visited on 7 March 2009.

<sup>313</sup> Employment Equity Act, No. 55 of 1998, Section 1, definition of employee.

of the work of the Organization consists of helping those that have been the victims of unfair discrimination in different situations.<sup>314</sup>

### 5.3.1.3 Education

One of the detrimental results of child labour that nearly all the international instruments address is the fact that it hinders education. A natural consequence of children working long hours is that they do not have time to go to school. This will have many effects on society, which have been discussed already in the essay.<sup>315</sup> According to article 28(1)(a) of the CRC primary education should be provided free of charge. The South African law does not automatically grant free primary education, but it does provide a possibility for the school to waive the fees for those that are unable to pay.<sup>316</sup> There are also schools that are not allowed to charge fees at all. These are the schools with the poorest pupils, and the system was introduced to give even the poorest children a chance to get an education.

School attendance is compulsory, according to Section 3 of the South African Schools Act, and the schools cannot discriminate against any children during admission.<sup>317</sup> According to the same provision, it is not possible for schools to demand a certain test to be performed in order for the child to be admitted. This includes HIV tests, so in theory it is not possible to refuse admission of a child into a school based on their HIV status.

At first glance, it looks like all South African children attend school. It is, after all, compulsory, and should be free for those that are too poor to pay the school fees, who may also attend schools that do not charge fees. While this may help provide some of the poorest children with an education, there are still obstacles to education that need to be removed. The system of school fee waivers is a very good idea, but there are additional costs, such as school uniforms and books, that are still out of the economic question for some families.

The situation of child labourers is also largely ignored. Often they have to work in order to provide for their family, and going to school instead of contributing to family life with an income is not a realistic alternative. In reality, they do not have the option of attending school.

According to UNICEF, actual primary school attendance was 80 per cent for boys, and 83 per cent for girls in 2007.<sup>318</sup> There are different statistics of how much less likely orphans are to attend school, compared to their non-orphan peers. According to numbers reported by the South African government, orphans were less likely than non-orphans to attend school, for every 100 non-orphans, 95 orphans attended school as well.<sup>319</sup> Those

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<sup>314</sup> AIDS Law Project, <<http://www.alp.org.za/>>, visited on 5 March 2009.

<sup>315</sup> Chapter 2.1.

<sup>316</sup> *Supra* note 252, Section 39.

<sup>317</sup> *Ibid.*, Section 5.

<sup>318</sup> UNICEF, *South Africa: Statistics*,

<[www.unicef.org/infobycountry/southafrica\\_statistics.html](http://www.unicef.org/infobycountry/southafrica_statistics.html)>, visited on 5 March 2009.

<sup>319</sup> UN Data, *Orphans (both parents) aged 10-14 school attendance rate, where HIV is 1 %* +,

<[http://data.un.org/Data.aspx?d=CDB&f=srID:30011&c=2,3,4&s=\\_crEngNameOrderBy:asc,yr:desc&v=2](http://data.un.org/Data.aspx?d=CDB&f=srID:30011&c=2,3,4&s=_crEngNameOrderBy:asc,yr:desc&v=2)>, visited on 9 March 2009.

numbers are from 1998, and more recent studies seem to show a worrying trend. The likelihood of orphans attending school had fallen, with the statistics showing that for every 100 non-orphans attending school, just over 80 orphans did the same.<sup>320</sup> Part of the reason for this is probably the “delay effect” caused by AIDS. There is generally a period of several years from infection to illness and death. However, studies have shown that the likelihood of a child attending school also depends on the general economic situation of that child.<sup>321</sup> Therefore, it is important for the State to remove economic obstacles to education. While attempts have been made to do this, there is still room for improvement. Considering the extent of the challenges South Africa faces, this will be a gradual, and slow process.

Other non-governmental organizations have also started action programs in order to provide access to education for those that cannot afford it. RECLISA (Reducing Child Labour in South Africa) is one such organization.<sup>322</sup> RECLISA tries to create an awareness of the importance of an education for children, in order to get more people to send their children to school. The organization also has several pilot projects, one of these has the aim of “improving the capacity of education programs to serve working children”.<sup>323</sup>

#### 5.3.1.4 Providing for Children

As discussed above, the main responsibility for providing for children lies with the child’s parents.<sup>324</sup> However, if they are unable to do so, or in the case of orphans, when the parents are dead, the State resumes responsibility for providing for these children. According to the White Paper (draft) on the National Child Labour Action Programme for South Africa, the State has a strict responsibility to provide for children whose parents cannot support them, or whose parents are dead. The report states that “the constitutional rights in respect of children are not subject to the state’s available resources and must therefore be realised immediately, and can therefore be differentiated from clauses providing for the ‘progressive realisation’ of a given right”.<sup>325</sup> However, this is a bold statement, which is not included in the final report.<sup>326</sup> The Constitutional rights discussed include the right to social services and shelter. It seems that the usual progressive realization of economic and social rights does not apply to children, due to their vulnerable position in society.

The paper discusses different grants that children can benefit from. There are two main kinds of grant available to families, the child care grant, which is means-tested, and the foster care grant, which is also means tested.

<sup>320</sup> UNAIDS (2008), *supra* note 16, p. 165.

<sup>321</sup> G. H. Schierhout, ‘Education Outcomes and Household Illness and Death in the South African School Setting’, Vol. 73, *South African Journal of Economics* (2005), pp. 607 - 608.

<sup>322</sup> RECLISA, *The Global Context for RECLISA’s Work*, <[www.reclisa.org/content/index.cfm?navID=3&itemID=19](http://www.reclisa.org/content/index.cfm?navID=3&itemID=19)>, visited on 27 March 2009.

<sup>323</sup> RECLISA, *The face of child labour in sub-Saharan Africa*, <[www.reclisa.org/content/index.cfm?navID=2&itemID=12](http://www.reclisa.org/content/index.cfm?navID=2&itemID=12)>, visited on 27 March 2009.

<sup>324</sup> See Chapter 4.4.

<sup>325</sup> *Supra* note 224, p. 6.

<sup>326</sup> *Supra* note 206.

The childcare grant is criticized in the paper for several reasons. First and foremost, at the time the report was drafted, the grant was only given to parents of children under the age of 6, although the age increased in 2005 to children of 13 and under.<sup>327</sup> The next year, in 2006, the age was raised again, making the cut-off time of the childcare grant to the end of the school year when the child turns 15.<sup>328</sup> This had a large impact on the effect of the grant. The report stresses that a child is more likely to work the older he or she is. By having such a low cut-off age, the family is deprived of an income, which might be necessary for its survival. Without this income, children might have no choice but to work in order to earn wages.<sup>329</sup> The report also pointed to difficulties in the application process that makes the grant effectively inaccessible for many. The amount received depends on whether the family lives in a rural or urban area (and in the case of an urban area, whether it is a house or a shack).<sup>330</sup> The grant is not large, and it is only paid out to a maximum of six children.<sup>331</sup> There is an additional difficulty with the grant, in that it requires certain documentation, such as birth certificates, which are often difficult to obtain in some of the poorer and more remote areas of South Africa.<sup>332</sup>

The foster grant is much larger than the childcare grant, which is also criticized in the white paper. The fact that it is so large could serve as an incentive for parents to put their children in foster care.<sup>333</sup> While the grant is means tested, it does not test the means of the parents. Instead, the grant is given based on the economic situation of the child.<sup>334</sup> Children are usually fostered for a period of up to two years, and the grant is only valid while the child is fostered. Should the child be adopted, the grant will no longer be paid out to the family. This could be a disincentive for the family to adopt the child. This can result in a worse situation for the child. An adoption would mean that he or she has a new family, and this can provide the child with more stability, and less risk of discrimination within the family. If the child is still fostered after two years, the grant can be extended if special circumstances apply.<sup>335</sup>

There is a problem with these grants with regards to children. None of the grants are paid out to people under the age of 18.<sup>336</sup> This excludes child headed households from being able to receive these two kinds of assistance, regardless of what the economic situation of the household is.

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<sup>327</sup> *Supra* note 224, p. 8.

<sup>328</sup> *Supra* note 206, p. 4.

<sup>329</sup> *Supra* note 224, p. 8.

<sup>330</sup> Cape Gateway, *Grant for Caring for a Young Child (Child Support Grant)*, <[www.capegateway.gov.za/eng/directories/services/11586/47468](http://www.capegateway.gov.za/eng/directories/services/11586/47468)>, visited on 28 March 2009.

<sup>331</sup> *Ibid.*

<sup>332</sup> *Supra* note 206, p. 33.

<sup>333</sup> *Supra* note 224, p. 8.

<sup>334</sup> Cape Gateway, *Grant for Fostering a Child (Foster Child Grant)*, <[www.capegateway.gov.za/eng/directories/services/11586/47472](http://www.capegateway.gov.za/eng/directories/services/11586/47472)>, visited on 28 March 2009.

<sup>335</sup> *Ibid.*

<sup>336</sup> *Supra* note 206, p. 20.

### 5.3.1.5 Public Information about Child Labour

In the final draft for the National Child Labour Action Programme for South Africa, the need for and importance of information about the problem to reach the general population is stressed.<sup>337</sup> There are several suggestions for what kind of information should be provided to the public. The provisions of national labour law and the dangers and consequences of child labour are considered very important. Other aspects, such as trafficking and the need for the public to report violations are also highlighted.<sup>338</sup>

The ILO/IPEC campaign “Red card to child labour”, which was conducted in cooperation with FIFA, mainly focused on television ads. In some countries, such as South Africa, the campaign attempted to provide information to a broader audience. A ‘ground’ campaign was launched, which attempted to spread information about child labour to all parts of society, from politicians to children and school-teachers.<sup>339</sup>

Childline South Africa is a non-profit organization, which has educational programmes about children’s rights in schools and communities.<sup>340</sup> This is no specific programme for child labour, but because the prohibition of exploitation is a child right, child labour is included.

Of course there are other information campaigns about child labour in South Africa. However, it is not possible to provide a description of all of them within the space of this thesis.

### 5.3.1.6 Labour Inspection

Labour inspection is regulated in the Basic Conditions of Employment Act. The appointed labour inspectors can “promote, monitor and enforce compliance with an employment law”.<sup>341</sup> There are different methods used to achieve these goals. The labour inspectors can inform workers about their rights, inspect places of employment, and give orders of compliance.<sup>342</sup> The compliance order has certain formal requirements that are listed in Section 69. The order has to state which rule has been violated, and why, as well as provide a list of measures that need to be taken in order to comply with the law.<sup>343</sup> In order to inspect a work place, the inspectors have powers of entry. However, this power does not give them the right to enter a private home without written authorization. This is only given if the inspector can show a likely breach of employment law, according to Section 65 of the Basic Conditions of Employment Act. This does cause some problems with regard to child domestic workers, since they work in private homes. There needs to be some evidence of a violation of labour law before an inspection can be

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<sup>337</sup> *Supra* note 206, pp. 10 - 11.

<sup>338</sup> *Ibid.*, p. 34.

<sup>339</sup> IPEC, *Fact Sheet: Red Card to Child Labour*, <[www-ilo-mirror.cornell.edu/public/english/standards/ipecc/ratification/redcampaign/facts\\_figures.pdf](http://www-ilo-mirror.cornell.edu/public/english/standards/ipecc/ratification/redcampaign/facts_figures.pdf)>, visited on 22 April 2009.

<sup>340</sup> Childline South Africa, *Programmes*, <[www.childlinesa.org.za/content/view/45/55/](http://www.childlinesa.org.za/content/view/45/55/)>, visited on 22 April.

<sup>341</sup> *Supra* note 214, Section 64(1).

<sup>342</sup> *Ibid.*

<sup>343</sup> *Supra* note 214, Section 69.

made. The likelihood of obtaining such evidence before entering the residence is not very high. Having said that, there are cases of labour inspectors visiting homes, and finding violations of labour laws.<sup>344</sup>

In the ILO Committee of Experts Direct Request Concerning the Minimum Age Convention, the Committee notes that there were a total of 19 cases of child labour reported to the authorities after labour inspection.<sup>345</sup> Considering how many child labourers there are in South Africa, this is very little. The labour inspectors report only a tiny fraction of the child labour cases. This could be for several reasons. There simply might not be enough labour inspectors to tackle the massive workload. However, South Africa has been praised for improving its labour inspection. According to an ILO report, the restructuring of South African labour inspection has led to an increase in efficiency, greatly increasing the amount of inspections carried out.<sup>346</sup> This is definitely a step in the right direction.

Labour inspectors could also be reluctant to report cases of child labour, since they know that the children often depend on the income for its survival.<sup>347</sup> Most of child labourers work in rural areas, where the work places are less accessible, and an inspection of places of employment is therefore less likely.<sup>348</sup> Labour inspection departments also tend to be badly funded.<sup>349</sup> Inspecting remote places of employment might therefore simply be out of the economical question, because there is no funding for the labour inspectors to travel to those parts of the country. This could leave many children without the protection that this system can offer. The fact that many children work in the informal sector also makes inspection harder, because their work places are not registered businesses, so the inspector might not be aware of their existence.<sup>350</sup>

There are several possible explanations for the surprisingly low number of child labour inspections that have found violations including child labour. These problems are not unique to South Africa. However, labour inspection is a very good control mechanism to see whether employers abide by employment laws. It is therefore an essential tool in the attempts to abolish child labour. Without an efficient labour inspection, this goal will take much longer to reach.

An interesting aspect of the labour inspector's duties is the duty to report of children in need of care and protection to the authorities.<sup>351</sup> As

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<sup>344</sup> Department of Labour, *Domestic employers reprimanded*, <[www.labour.gov.za/media-desk/media-statements/2007/domestic-employers-reprimanded/?searchterm=number%20of%20labour%20inspectors](http://www.labour.gov.za/media-desk/media-statements/2007/domestic-employers-reprimanded/?searchterm=number%20of%20labour%20inspectors)>, visited on 22 April 2009.

<sup>345</sup> CEACR (2008), *supra* note 218.

<sup>346</sup> ILO, *Labour inspection in Africa – promoting worker rights*, <[www.ilo.org/public/english/dialogue/actrav/publ/140/5.pdf](http://www.ilo.org/public/english/dialogue/actrav/publ/140/5.pdf)>, visited on 22 April 2009.

<sup>347</sup> IPEC, *Combating Child Labour: A Handbook for Labour Inspectors*, International Labour Organization, Geneva (2002), p. 17.

<sup>348</sup> ILO, *South Africa Child Labour Data Country Brief*, ILO, Geneva, p. 4, <[www.ilo.org/ipeinfo/product/download.do?type=document&id=7805](http://www.ilo.org/ipeinfo/product/download.do?type=document&id=7805)>, visited on 22 April 2009.

<sup>349</sup> IPEC (2002), *supra* note 347, pp. 13 – 14.

<sup>350</sup> *Ibid*, p. 15.

<sup>351</sup> *Supra* note 231, Sections 110 and 150.

mentioned above, child labourers can sometimes be categorized as such children.

### **5.3.2 Repressive Measures Taken by South Africa**

In the cases where preventative methods do not work, it is important to have repressive measures in place. If there has been a breach of the law, the violators should be appropriately punished.

#### **5.3.2.1 Legal Consequences for Violating the Child's Right in National Law**

In the Direct Requests from the ILO Committee of Experts concerning the Minimum Age Convention, discussed above, the Committee notes that there has been some enforcement of the laws in the South African Courts. According to the South African Government, there have been several (although not that many) convictions of people using child labour. These cases are difficult to find. The best sources detailing them are newspaper articles and Government statements.

One case, which was reported to the ILO in 2004 is the *State vs. Daytona Stud Farm (Pty) Ltd*, from 2002. An 11-year old girl was severely injured while working at the farm, and the owner was fined 17 000 rand for employing a child under the age of 15. The fine was originally larger, but it was suspended, on the condition that the farm was not convicted of the same crime within the next five years. A prison sentence was also suspended on the same condition. The injured girl was a student working during the summer holiday. The employer had, according to the article, already paid for a prosthetic leg for the girl. He had also paid 20 000 South African Rand (approximately 1 700 Euro) into a disability fund for her.<sup>352</sup> A civil suit would follow the labour case, to try and receive further compensation to the girl for her injuries.

In a more recent case, from 2007, a businessman was fined for using a child under the age of 15 as a street trader. The man was sentenced to three years in prison, but this was again suspended on the condition that he was not convicted of the same crime within the next five years. The child was enrolled in a school, after cooperation between the social welfare, education and labour departments.<sup>353</sup> The attempt to give the child an education (and hopefully economical support during his school years, so that he can stay in school) is precisely the kind of measures which are needed in order to fully comply with the ILO conventions on child labour. The ILO continually

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<sup>352</sup> Farm fined after child labourer loses leg, Sunday Tribune, 5 February 2002, <[www.sundaytribune.co.za/index.php?fSectionId=3537&fArticleId=ct20020205204009145C620251](http://www.sundaytribune.co.za/index.php?fSectionId=3537&fArticleId=ct20020205204009145C620251)>, visited on 23 April 2009.

<sup>353</sup> Department of Labour, *Child Labour Lands Businessman Heavy Fine*, <[www.labour.gov.za/media-desk/media-statements/2007/child-labour-lands-businessman-heavy-fine](http://www.labour.gov.za/media-desk/media-statements/2007/child-labour-lands-businessman-heavy-fine)>, visited on 23 April 2009.

stresses the need for the reintegration of these children into society. They are not just supposed to be left without any means to support themselves.<sup>354</sup>

Despite this encouraging case, there is still cause for concern. There are still a very large number of child labourers in South Africa. The number of prosecutions for the use of child labour is very low. When there are convictions, the South African courts seem to have developed a practice of suspending the prison sentences, provided that the accused is not convicted for employing child labour within five years. Considering that the ILO conventions call for strong measures to be taken against those who hire child labourers, this is highly unlikely to fulfil the requirement.

## **5.4 Do Preventative and Repressive Measures Achieve the Desired Result?**

The methods used by the South African Government are both preventative and repressive. There are examples of rehabilitating measures being employed as well. South Africa has a compulsory education system. This can be used to keep children from working, thus improving their future prospects. The Government has also tried to inform the general public of child labour through different campaigns. Certain grants have been put in place for poor families. Labour inspectors have been known to inspect private houses, in order to determine if domestic workers have appropriate working conditions and hours, or if the domestic worker in question is a child. All of these are good preventative methods. However, the measures do not always reach those who are most in need of them. Labour inspection, education and the availability of proper documentation to receive grants are unlikely to be a regular occurrence in remote and poor regions.

Preventative measures on their own are also not enough to eliminate child labour. There will be cases that violate the South African labour laws, regardless whether or not the State tries to prevent this from occurring. The Government then needs to provide the judicial system with ways of punishing those that hire children to work for them.

The repressive measures taken in South African laws are according to the State's international legal obligations. They should, if implemented correctly, be severe enough to deter employers from hiring children to work for them. However, several court cases, discussed above, show that any prison sentences tend to be probational. The condition of probation is that the employer is not found guilty of the same crime in the following five years.<sup>355</sup> The question remains whether they are closely monitored during this time, to ensure that no further violation occurs. The present system is not likely to have the deterring effect that is needed in order to eliminate child labour.

Repressive measures are insufficient to adequately assist working children. By incarcerating the employers, the child no longer has a means of

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<sup>354</sup> *Supra* note 64, para. 2(b).

<sup>355</sup> Sunday Tribune (2002), *supra* note 352 and Department of Labour (2007), *supra* note 353.

supporting himself or herself. This leaves few alternatives but to find another, maybe even more dangerous job. There are examples where children have been forced to leave relatively safe jobs at factories, only to become prostitutes in order to survive.<sup>356</sup>

A third, but essential aspect of the process to eliminate child labour tends to be overlooked. As the ILO clearly states in R190 that it is not enough to remove the child from the labour situation. Concrete measures have to be taken for this child to be reintegrated back into society.<sup>357</sup> Some of the rehabilitating methods suggested are also ones that can be used to prevent child labour. According to the recommendation, “measures which address their educational, physical and psychological needs” are the ones that should be considered in the child’s rehabilitation process.<sup>358</sup> This last step is needed in order to break the vicious circle of poverty and work, and integrate the child into society. The child will need to be provided for, and have the opportunity to go to school. Depending on the child and the type of employment he or she engaged in, physical damage and emotional scars have to be addressed in an appropriate way. There are examples of child labourers that have had an opportunity to rehabilitate, at least to a certain degree.<sup>359</sup>

There are signs that the measures taken by South Africa in order to eliminate child labour have had some effect. The number of child labourers has increased, but this is to some extent due to a population increase. The actual *percentage* of children working has decreased.<sup>360</sup> This is a small, but positive sign for children in the country. The problem is so large, that it will take a long time, a lot of resources, and many more implemented measures before child labour is eliminated. There are still approximately 1 400 000 child labourers in the country.<sup>361</sup> Most of these children live in rural areas.<sup>362</sup> This can to some extent be attributed to the lack of infrastructure in remote areas, which creates a need for water and fuel fetching. Infrastructure would also create employment, both during construction and maintenance phases. There would, in other words, be more opportunities for adults to provide for their children, reducing the need for young people to enter into the workforce, in order to supply an income for their family. This is especially true for children living in the former homelands.<sup>363</sup>

Despite the abolition of apartheid, there is also a difference between black and white children. Black and coloured children are more likely to work than white.<sup>364</sup>

HIV/AIDS orphans in South Africa are less likely to be attending school than their non-orphan peers.<sup>365</sup> They also face discrimination in

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<sup>356</sup> Green (1999), *supra* note 55, p. 26.

<sup>357</sup> *Supra* note 64, para. 2(b).

<sup>358</sup> *Ibid.*

<sup>359</sup> Department of Labour (2007), *supra* note 353.

<sup>360</sup> ILO (2006), *supra* note 4, p. 6.

<sup>361</sup> WHO (2008), *supra* note 6.

<sup>362</sup> ILO, South Africa Child Labour Data Country Brief, International Labour Office, Geneva (2008), p. 4.

<sup>363</sup> *Supra* note 206, p. 49

<sup>364</sup> *Ibid.*, p. 15.

<sup>365</sup> UNICEF (2006), *supra* note 8, p. 38.

society, and sometimes in their new families, due to their connection with the disease.

The children finding themselves at a disadvantage due to skin colour, HIV/AIDS status, or living in rural areas need more measures to assist them. These should take the particular difficulties facing the different groups into consideration.

## 6 Recommendations

- Ensure access to education for everyone, as a method to prevent child labour and ensuring a future for children.
- Provide information, especially to parents, about the right to exemption from school fees.
- Provide information and education about HIV/AIDS in order to decrease the social stigma caused by the disease.
- Provide information and education about the dangers and consequences of child labour.
- Provide infrastructure for areas where it is needed. This measure will create jobs and reduce the need for water- and fuel fetching duties for children.
- Ensure that social assistance programmes are available to child-headed households. These households are often in a very vulnerable position, and their situation needs to be taken into account in the grants process.
- Introduce a more flexible documentation system for grant reception. The demand for certain documentation is an obstacle to receiving the grants for many, even though they are entitled to it, since they cannot access their birth certificate. The ones affected are often the ones most in need of the grant. Another system of identification should be introduced.
- Adequate implementation of the national law in practice, offenders that hire child labourers need to receive the punishments provided in South African law.
- Ensure that the child labourers benefit from the former employer's sentence, through proper economic compensation for the child worker.
- Recognition that child labour is not the problem of the only the labour department. The problem spans many parts of government, and many aspects of society. Appropriate cooperation needs to be ensured.
- Close regulation of exactly what kind of work is to be considered as light work and work acceptable for children between 15-18. The current blanket provisions of South African law need to be improved.

- Introduction of self-employment regulation in the Basic Conditions of Employment Act, to ensure that this sector does not become a loop-hole in the for child labour legislation.
- Measures targeting children in former homelands, AIDS orphans and other, very vulnerable groups. These are the children that are most likely to be exploited, and therefore they need to be prioritized in Governmental programmes to eliminate child labour.

## 7 Conclusion

Child labour is a problem found in all countries of the world. It has a large effect on both society as a whole and the children that work. Child labour will hinder the development of the country and wear out the young generation before its time.

South Africa finds itself in a child labour crisis. The HIV/AIDS epidemic has accelerated and emphasised the problem, largely due to the quantity of orphaned children. In order to stop child labour in South Africa, AIDS orphans is one of the groups of vulnerable children that needs to be prioritized. They should also be provided with special protection in law, because they face additional difficulties compared to other orphans. Information must be more widespread about the disease, in order to eradicate many of the misconceptions regarding HIV/AIDS that are still common to this day.

South African legislation closely follows the blanket provisions of international law. However, the implementation in practice leaves a lot to be desired. The law needs to be enforced by the courts and certain loop-holes, that leave parts of the labourers without any legal protection, should be closed.

Despite all of this, there are positive signs. The percentage of children performing labour is decreasing. As the AIDS epidemic stabilizes, and less people die from the disease, the economical pressure put on the South African Government will decrease. When there are fewer AIDS orphans, there will be fewer children that need to work in order to support themselves. The State will also have to spend less money on grants to those in need. As the State finances improve, the social security safety net can improve.

The child labour issue will not be solved overnight. It is a time-consuming and expensive process. Therefore, it is not possible to do everything at once. Rather, child labour has to be eliminated little by little. By prioritizing the children most likely to be exploited, the measures and resources will be the most effective.

The South African Government does appear to take the child labour issue, and the international obligations that go with it, seriously. Taking the problem seriously and giving it attention is essential if the country is to overcome its problems, and giving the new generation the chance in life it deserves.

# Bibliography

## Books

H. B. de la Cruz *et al*, *The International Labour Organization: the International Standards System and Basic Human Rights*, Westview Press, Oxford (1996).

M. J. Bossuyt, *Guide to the "Travaux Préparatoires of the International Covenant on Civil and Political Rights*, Kluwer Academic Publishers Group, Dordrecht (1987).

S. Detrick, *A Commentary on the United Nations Convention on the Rights of the Child*, Kluwer Law International, The Hague (1999).

S. Detrick, *The United Nations Convention on the Rights of the Child: A Guide to the "Travaux Préparatoires"*, Martinus Nijhoff Publishers, Dordrecht (1992).

S. Joseph *et al*, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, 2nd edition, Oxford University Press (2004).

V. Forastieri, *Children at Work: Health and Safety Risks*, 2nd edition, International Labour Office, Geneva (2002).

V. Muntarbhorn, 'Article 34: Sexual Exploitation and Sexual Abuse of Children' in: A. Alen, J. Vande Lanotte, E. Verhellen, F. Ang, E. Berghmans and M. Verheyde (Eds.) *A Commentary on the United Nations Convention on the Rights of the Child*, Martinus Nijhoff Publishers, Leiden, (2007).

G. Nesi *et al* (eds.), *Child Labour in a Globalized World: A Legal Analysis of ILO Action*, Ashgate Publishing Ltd, Aldershot (2008).

N. S. Harris, P. Meredith (eds.), *Children, Education, and Health: International Perspectives on Law and Policy*, Ashgate Publishing Ltd, Aldershot (2005).

M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, 2nd revised edition, N.P. Engel Verlag, Kehl (2005).

R. K. M. Smith, *Textbook on International Human Rights*, 3<sup>rd</sup> Edition, Oxford University Press, Oxford (2007).

G. Ulfstein *et al*, *Making Treaties Work*, Cambridge University Press, Cambridge (2007).

G. Van Bueren, *The International Law on the Rights of the Child*, Kluwer Law International, The Hague (1998).

M. Weiner, *The child and the state in India: child labor and education policy in comparative perspective*, Princeton University Press, Princeton (1990).

International Programme on the Elimination of Child Labour, InFocus Programme on Safety and Health at Work and the Environment, International Labour Office, International Association of Labour Inspection, *Combating Child Labour: A Handbook for Labour Inspectors*, International Labour Organization, Geneva (2002).

## Articles

N. Béchu, 'The impact of AIDS on the Economy of Families in Côte d'Ivoire: Changes in consumption among AIDS affected households', in M. Ainsworth *et al* (eds.), "*Confronting AIDS: Evidence from the Developing World, European Commission*", Brussels (1998), pp. 342-343.

G. J. Pitcher, D. MG Bowley, 'Infant Rape in South Africa', vol. 359, Issue 9303, *The Lancet*, (2002), pp. 274-275.

D. M. Chirwa, 'The merits and demerits of the African Charter on the Rights and Welfare of the Child', Vol 10, *The International Journal of Children's Rights* (2002), pp. 157-177.

B. Creighton, 'Combating Child Labour: The Role of International Labour Standards', Vol. 18, *Comparative Labour Law Journal* (1997), pp. 362-396.

K. Hanson and A. Vandaele, 'Working children and international labour law: a critical analysis', vol. 11, *The International Journal of Children's Rights* (2003), pp. 73-146.

A. Lloyd, 'Evolution of the African Charter on the Rights and Welfare of the child and the African Committee of Experts: Raising the gauntlet', Vol. 10, *The International Journal of Children's Rights* (2002), pp. 179-198.

D. McGoldrick, 'The United Nations Convention on the Rights of the Child', vol. 5, *International Journal of Law and the Family* (1991), pp. 132-169.

Y. Noguchi, 'ILO Convention No. 182 on the worst forms of child labour and the Convention on the Rights of the Child', vol. 10, *The International Journal of Children's Rights* (2002), pp. 355-369.

D. M. Smolin, 'Strategic Choices in the International Campaign Against Child Labour', vol. 22, *Human Rights Quarterly* (2000), pp. 947-987.

L. Sweptson, 'The Convention on the Rights of the Child and the ILO', Vol. 61, *Nordic Journal of International Law*, pp. 7-18.

J. Vandemoortele and E. Delamonica, 'The "Education Vaccine" Against HIV', Vol. 3(1), *Current Issues in Comparative Education* (2002), pp. 6-13.

M. Woodhead, 'Psychosocial Impacts of Child Work: A Framework for Research, Monitoring and Intervention', vol. 12, *The International Journal of Children's Rights* (2004), pp. 321-377.

## Reports

Human Rights Watch, *Letting Them Fail: Government Neglect and the Right to Education for Children Affected by AIDS*, Human Rights Watch, vol. 17, no. 13(a), New York (2005).

ILO, "A Future Without Child Labour" – the Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, International Labour Conference (2002), 90th Session, Report I(B).

ILO, *Report of the Committee of Experts on the Application of Conventions and Recommendations: (article s 19, 22 and 35 of the Constitution) : third item on the agenda: Information and reports on the application of Conventions and Recommendations*, International Labour Organization, Geneva, (2008).

ILO, *The end of child labour: Within reach. Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work*, International Labour Office, Geneva (2006).

ILO, *Child Labour: Targeting the Intolerable, Report VI(1), Sixth item on the agenda, International Labour Conference, 86th Session, 1998*, International Labour Organization, Geneva (1998).

ILO, *South Africa Child Labour Data Country Brief*, ILO, Geneva (2008).

International Working Group on Child Labour, *Have we asked the children? Discussion Paper*, Concerned for Working Children, Bangalore/Amsterdam (1997).

UNAIDS, *Report on the Global AIDS Epidemic 2008*, UNAIDS, Geneva (2008).

UNAIDS, *Report on the Global AIDS Epidemic 2006*, UNAIDS, Geneva (2006).

UNAIDS, UNICEF, USAID, *Children on the Brink*, UNICEF, New York (2004).

UNICEF, UNAIDS and PEPFAR, *Africa's Orphaned and Vulnerable Generations: Children Affected by AIDS*, UNICEF, New York (2006).

U.S. Department of Labor, *By the Sweat and Toil of Children: Efforts to Eliminate Child Labor*, Vol V (1998).

WHO, *World Malaria Report 2008*, WHO, Geneva (2008).

WHO Report 2009, *Global Tuberculosis Control: Epidemiology, Strategy, Financing*, WHO Press, Geneva (2009).

WHO, *Addressing Poverty in TB Control – Options for National TB Control Programmes*, WHO, Geneva (2005).

WHO, *Children at Work: Special Health Risks, Report of a WHO study group*, WHO Technical Report Series 756, World Health Organization, Geneva (1987).

WHO; UNAIDS UNICEF, *2008 Update South Africa: Epidemiological Fact Sheet on HIV and AIDS - Core data on epidemiology and response*, UNAIDS, Geneva (2008).

*Shadow Report to South Africa's first periodic State Report to the African Commission on Human and People's Rights, to be presented at the 38th Session of the African Commission on Human and Peoples' Rights, 21 November – 5 December 2005, Banjul, the Gambia*, Prepared by the Centre for Human Rights.

## **Documents**

*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.4/1985/25.

UN Committee on the Rights of the Child (CRC), *General Comment No. 3, HIV/AIDS and the Rights of the Child*, 17 March 2003, CRC/GC/2003/3.

Committee of Experts on the Application of Conventions and Recommendations: *Individual Direct Request concerning Minimum Age Convention, 1973 (No. 138), South Africa* (2008).

UN Human Rights Committee (HRC), *CCPR General Comment No. 6, Article 6 (Right to Life)* 30 April 1982.

UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, 11 August 2000, E/C.12/2000/4

UN Human Rights Committee (HRC), *CCPR General Comment No. 17: Article 24 (Rights of the Child)*, 7 April 1989.

## **Legislation**

### **International instruments**

International Covenant on Civil and Political Rights.

International Covenant on Economic, Social and Cultural Rights.

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

Constitution of the World Health Organization.

### **South African legislation**

Constitution of South Africa.

The Basic Conditions of Employment Act, No. 75 of 1997.

The Children's Act, No. 38 of 2005.

Social Assistance Act, No. 13 of 2004.

Criminal Procedure Act, No. 51 of 1977.

South African School's Act, No. 84 of 1996.

### **Internet sources**

Report of the Committee of Experts on the Application of Conventions and Recommendations, *Observation, Minimum Age Convention (No. 138), Malaysia*, <<http://webfusion.ilo.org/public/db/standards/normes/appl/appl-displaycomment.cfm?hdroff=1&ctry=0820&year=2008&type=O&conv=C138&lang=EN>>, visited on 30 March 2009.

Report of the Committee of Experts on the Application of Conventions and Recommendations, *Observation, Minimum Age Convention (No. 138), Central African Republic*, <<http://webfusion.ilo.org/public/db/standards/normes/appl/appl-displaycomment.cfm?hdroff=1&ctry=2590&year=2008&type=R&conv=C138&lang=EN>>, visited on 30 March 2009.

ILO, *Recommendation on HIV/AIDS and the world of work*,  
<[www.ilo.org/public/english/protection/trav/aids/laws/briefenglish.pdf](http://www.ilo.org/public/english/protection/trav/aids/laws/briefenglish.pdf)>,  
visited on 11 March 2009.

*Effective abolition of child labour*,  
<[www.ilo.org/declaration/principles/abolitionofchildlabour/lang--en/index.htm](http://www.ilo.org/declaration/principles/abolitionofchildlabour/lang--en/index.htm)>, visited on 2 April 2009.

Human Rights Nexus, *Optional Protocol to ICESCR Adopted*,  
<[http://humanrightsnexus.org/index.php?option=com\\_content&task=view&id=49&Itemid=66](http://humanrightsnexus.org/index.php?option=com_content&task=view&id=49&Itemid=66)>, visited on 30 March 2009.

Education laws amendment bill <[http://us-cdn.creamermedia.co.za/assets/articles/attachments/02336\\_edulawsab23d.pdf](http://us-cdn.creamermedia.co.za/assets/articles/attachments/02336_edulawsab23d.pdf)>, visited on 3 May 2009.

National Norms and Standards for School Funding,  
<[www.info.gov.za/gazette/notices/2004/27014.pdf](http://www.info.gov.za/gazette/notices/2004/27014.pdf)>, visited on 2 March 2009.

Status of ratification of the Convention on the Rights of the Child  
<[www.unhchr.ch/html/menu2/6/crc/treaties/status-crc.htm](http://www.unhchr.ch/html/menu2/6/crc/treaties/status-crc.htm)>, visited on 3 March 2009.

UNICEF, *Child protection, facts on children*,  
<[www.unicef.org/media/media\\_45451.html](http://www.unicef.org/media/media_45451.html)>, visited on 4 March 2009.

WHO, *Malaria*, <[www.who.int/topics/malaria/en/](http://www.who.int/topics/malaria/en/)>, visited 3 March 2009.

WHO, *Malaria fact sheet*,  
<[www.who.int/mediacentre/factsheets/fs094/en/index.html](http://www.who.int/mediacentre/factsheets/fs094/en/index.html)>, visited on 3 March 2009.

WHO, *Tuberculosis fact sheet*,  
<[www.who.int/mediacentre/factsheets/fs104/en/index.html](http://www.who.int/mediacentre/factsheets/fs104/en/index.html)>, visited on 5 March 2009.

Centers for disease control and prevention, *The impact of malaria, a leading cause of death worldwide*, <[www.cdc.gov/malaria/impact/](http://www.cdc.gov/malaria/impact/)>, visited on 3 March 2009.

The Global Fund, *Malaria Background*,  
<[www.theglobalfund.org/en/malaria/background/?lang=en](http://www.theglobalfund.org/en/malaria/background/?lang=en)>, visited on 3 March 2009.

UNAIDS, *Reducing HIV Stigma and Discrimination: a critical part of national AIDS programmes, A resource for national stakeholders in the HIV response*, Geneva (2007),

<[http://data.unaids.org/pub/Report/2008/jc1420\\_stigma\\_discr\\_en.pdf](http://data.unaids.org/pub/Report/2008/jc1420_stigma_discr_en.pdf)>, visited on 7 March 2009.

AIDS Law Project, <<http://www.alp.org.za/>>, visited on 5 March 2009.

Global Action for Children, *Malaria*, <[www.globalactionforchildren.org/issues/malaria/](http://www.globalactionforchildren.org/issues/malaria/)>, visited on 22 March 2009.

*Prevention of Tuberculosis*, <[www.wrongdiagnosis.com/t/tuberculosis/prevent.htm](http://www.wrongdiagnosis.com/t/tuberculosis/prevent.htm)>, visited on 5 March 2009.

Anti-slavery, *Child labour* <[www.antislavery.org/homepage/antislavery/childlabour.htm](http://www.antislavery.org/homepage/antislavery/childlabour.htm)>, visited on 7 March 2009.

UNICEF, *South Africa: Statistics*, <[www.unicef.org/infobycountry/southafrica\\_statistics.html](http://www.unicef.org/infobycountry/southafrica_statistics.html)>, visited on 5 March 2009.

UN Data, *Orphans (both parents) aged 10-14 school attendance rate, where HIV is 1 % +*, <[http://data.un.org/Data.aspx?d=CDB&f=srID:30011&c=2,3,4&s=\\_crEngNameOrderBy:asc,yr:desc&v=2](http://data.un.org/Data.aspx?d=CDB&f=srID:30011&c=2,3,4&s=_crEngNameOrderBy:asc,yr:desc&v=2)>, visited on 9 March 2009.

'Warming Trend May Contribute to Malaria's Rise', *Science Daily*, 22 March 2006, <[www.sciencedaily.com/releases/2006/03/060322142101.htm](http://www.sciencedaily.com/releases/2006/03/060322142101.htm)>, visited on 3 March 2009.

FAO Newsroom, *Agriculture accounts for 70 percent of child labour*, <[www.fao.org/newsroom/en/news/2006/1000394/index.html](http://www.fao.org/newsroom/en/news/2006/1000394/index.html)>, visited on 8 April 2009.

WHO, *Hazardous child labour*, <[http://www.who.int/occupational\\_health/topics/childlabour/en/](http://www.who.int/occupational_health/topics/childlabour/en/)>, visited on 4 March 2009.

ILO, *Decent work for all*, <[http://www.ilo.org/global/About\\_the\\_ILO/Mainpillars/WhatisDecentWork/lang--en/index.htm](http://www.ilo.org/global/About_the_ILO/Mainpillars/WhatisDecentWork/lang--en/index.htm)>, visited on 23 March 2009.

Farm fined after child labourer loses leg, *Sunday Tribune*, 5 February 2002, <[www.sundaytribune.co.za/index.php?fSectionId=3537&fArticleId=ct20020205204009145C620251](http://www.sundaytribune.co.za/index.php?fSectionId=3537&fArticleId=ct20020205204009145C620251)>, visited on 23 April 2009.

South Africa.info, *SA to clamp down on child labour*,  
<[www.southafrica.info/services/rights/labour-110608.htm](http://www.southafrica.info/services/rights/labour-110608.htm)>, visited on 9  
March 2009.

Department of Labour, *Child Labour Lands Businessman Heavy Fine*,  
<[www.labour.gov.za/media-desk/media-statements/2007/child-labour-lands-businessman-heavy-fine](http://www.labour.gov.za/media-desk/media-statements/2007/child-labour-lands-businessman-heavy-fine)>, visited on 23 April 2009.

*White Paper (draft) on a National Child Labour Action Programme for South Africa, Draft for consideration by government departments and other stakeholders*, Draft 3.1, July 2003, p. 6,  
<[www.info.gov.za/view/DownloadFileAction?id=68775](http://www.info.gov.za/view/DownloadFileAction?id=68775)>, visited on 15  
April 2009.

The National Child Labour Action Programme for South Africa, *Final Draft for consideration by government departments and other stakeholders*, Draft 4.10, October 2003, p 3, available to download from  
<[www.labour.gov.za/documents/useful-documents/basic-conditions-of-employment/useful-documents](http://www.labour.gov.za/documents/useful-documents/basic-conditions-of-employment/useful-documents)>, visited on 4 April 2009.

Cape Gateway, *Grant for Caring for a Young Child (Child Support Grant)*, <[www.capegateway.gov.za/eng/directories/services/11586/47468](http://www.capegateway.gov.za/eng/directories/services/11586/47468)>, visited on 28 March 2009.

Cape Gateway, *Grant for Fostering a Child (Foster Child Grant)*,  
<[www.capegateway.gov.za/eng/directories/services/11586/47472](http://www.capegateway.gov.za/eng/directories/services/11586/47472)>, visited on 28 March 2009.

Childline South Africa, *Programmes*,  
<[www.childlinesa.org.za/content/view/45/55/](http://www.childlinesa.org.za/content/view/45/55/)>, visited on 22 April.

IPEC, *Fact Sheet: Red Card to Child Labour*, <[www-ilo-mirror.cornell.edu/public/english/standards/ipcc/ratification/redcampaign/facts\\_figures.pdf](http://www-ilo-mirror.cornell.edu/public/english/standards/ipcc/ratification/redcampaign/facts_figures.pdf)>, visited on 22 April 2009.

RECLISA, *The Global Context for RECLISA's Work*,  
<[www.reclisa.org/content/index.cfm?navID=3&itemID=19](http://www.reclisa.org/content/index.cfm?navID=3&itemID=19)>, visited on 27  
March 2009.

RECLISA, *The face of child labour in sub-Saharan Africa*,  
<[www.reclisa.org/content/index.cfm?navID=2&itemID=12](http://www.reclisa.org/content/index.cfm?navID=2&itemID=12)>, visited on 27  
March 2009.

Department of Labour, *Domestic employers reprimanded*,  
<[www.labour.gov.za/media-desk/media-statements/2007/domestic-employers-reprimanded/?searchterm=number%20of%20labour%20inspectors](http://www.labour.gov.za/media-desk/media-statements/2007/domestic-employers-reprimanded/?searchterm=number%20of%20labour%20inspectors)>, visited on 22 April 2009.

ILO, *Labour inspection in Africa – promoting worker rights*,  
<[www.ilo.org/public/english/dialogue/actrav/publ/140/5.pdf](http://www.ilo.org/public/english/dialogue/actrav/publ/140/5.pdf)>, visited on 22 April 2009.

ILO, South Africa Child Labour Data Country Brief, ILO, Geneva, p. 4,  
<[www.ilo.org/ipecinfo/product/download.do?type=document&id=7805](http://www.ilo.org/ipecinfo/product/download.do?type=document&id=7805)>,  
visited on 22 April 2009.

C. Flores-Oebanda, *Addressing vulnerability and exploitation of child domestic workers: An open challenge to end a hidden shame*, p. 2,  
<[www.un.org/womenwatch/daw/egm/elim-disc-viol-girlchild/ExpertPapers/EP.10%20%20Flores%20Oebanda.pdf](http://www.un.org/womenwatch/daw/egm/elim-disc-viol-girlchild/ExpertPapers/EP.10%20%20Flores%20Oebanda.pdf)>, visited on 4 May 2009.

J. Flanagan, ‘South African men rape babies as ”cure” for AIDS’, *The Telegraph*, 11 Nov 2001, available from  
<[www.telegraph.co.uk/news/worldnews/africaandindianocean/southafrica/1362134/South-African-men-rape-babies-as-cure-for-Aids.html](http://www.telegraph.co.uk/news/worldnews/africaandindianocean/southafrica/1362134/South-African-men-rape-babies-as-cure-for-Aids.html)>, visited on 6 March

# Table of Cases

*Government of South Africa and Others v. Grootboom and others*, 2000  
(11) BCLR 1169 (CC)

*Thiagraj Soobramoney v Minister of Health: Province of KwaZulu-Natal*  
D&CLD 5846/97

The State vs. Daytona Stud Farm (Pty) Ltd. (The Cape High Court)