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FORCED CHILD LABOUR:

A Critical Analysis of the Democratic Republic of Congo's Compliance with International Labour Standards.

By

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Dissertation presented for the approval of Senate in fulfilment of part of the requirements for the degree of **Master of Laws (LLM)** in the Department of Public Law in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.



FEBRUARY 2013

PLAGIARISM DECLARATION

I hereby declare that I have read and understood the regulations governing the submission of Master of Laws dissertation, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

Signature:**Student No: KMWKAS001****Date: 8 Feb. 2013****Word-count: 24 882**

DEDICATION

This dissertation is dedicated to all the children from the DRC who are constantly exposed to forced child labour. They deserve to enjoy full protection from the entire society.

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This dissertation is the result of hard work, and love, support, encouragement, and assistance of a number of people to whom I am thankful and appreciative.

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Kasongo Theodore Kamwimbi

LIST OF ACRONYMS AND ABBREVIATIONS

1. Entities

AU	African Union
BICE	International Catholic Child Bureau
CEACR	Committee of Experts on the Application of Conventions and Recommendations
DDR	Disarmament, Demobilisation and Reintegration
DRC	Democratic Republic of Congo
ECACL	Education to Combat Abusive Child Labour
FAT	Famille d'Accueil Transitoire (Transit Family model)
F.N.P.C	Fraternité nationale des prisons au Congo (National brotherhood of prisons in the DRC)
GA	General Assembly
HRC	United Nations Human Rights Committee
ICC	International Criminal Court
ILAB	Bureau of International Labour Affairs
ILC	International Labour Conference
ILCCR	International Labour Conference Committee Report
ILO	International Labour Organisation
ILRF	International Labour Rights Fund
IPEC	International Programme on the Elimination of Child Labour
ITUC	International Trade Union Confederation
KPCS	Kimberley Process Certification Scheme
MONUC	Mission de l'Organisation de Nations Unies en RDC (United Nations Observer Mission in the DRC)
MONUSCO	United Nations Organisation Stabilisation Mission in the DRC
NCCL	National Committee to Combat the Worst Forms of Child Labour
NGO	Non-governmental organisation
OECD	Organisation for Economic Co-operation and Development
RAID	Rights & Accountability in Development
SADC	Southern African Development Community
S.C.	United Nations Security Council
TPE	Tribunal pour enfants (Juvenile Court)
UBOS	Uganda Bureau of Statistics
UN	United Nations
UNCHS	United Nations Commission on Human Settlements
UNICEF	United Nations Children's Fund
UNESCO	United Nations Educational, Scientific and Cultural Organisation

2. Legal instruments

ACHPR	African Commission on Human and Peoples' Rights
ACRWC	African Charter on the Rights and Welfare of the Child
APA	Administrative Procedure Act
CRC	Convention on the Rights of the Child
CTOC	Convention against Transnational Organised Crime
ICCPR	International Covenant on Civil and Political Rights

ICESCR	International Covenant on Economic, Social and Cultural Rights
TVPRA	Trafficking Victims Protection Reauthorisation Act
UDHR	Universal Declaration of Human Rights

3. Short names for international instruments

Forced Labour Convention: *Convention concerning Forced or Compulsory Labour*.
 Minimum Age Convention: *Convention concerning Minimum Age for Admission to Employment*.

Slavery Convention of 1926: *Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention of 1926*.

Worst Forms of Child Labour Convention: *Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour*.

4. Journals

Comp	Comparative
Int	International
J	Journal
L	Law
Q	Quarterly
Rts	Rights
Rev	Review

5. Short names to law provisions

Art	Article
C	Convention
Para	Paragraph
R	Recommendation
Res	Resolution
S	Section
Ss	Sections

6. Other names

AIDS	Acquired immunodeficiency syndrome
CF	Congolese franc
DDR	Disarmament, Demobilisation and Reintegration
FARDC	Forces Armées de la République Démocratique du Congo (Armed Forces of the Democratic Republic of Congo)
HIV	Human immunodeficiency virus infection
MDRP	Multi-country Demobilisation and Reintegration Program
NCP	National Contact Point
PEDER	Programme Diocésain d'encadrement des enfants de la rue (Diocesan Programs for the Care of Street Children)
UK	United Kingdom
US	United States of America
\$	Dollar

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4.2.1	At internal/domestic or national level	41
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Chapter One

INTRODUCTION

1.1 Background information

Child labour manifests itself in abusive and intolerable forms, affecting an estimated 215 million children worldwide.¹ Considering the seriousness of the problem, which is recognised as an issue of human rights at work,² the ILO has committed itself to work towards its elimination. Therefore, two Conventions considered as core international child labour standards have been adopted: *Minimum Age Convention*, 1973 (No. 138); and *Worst Forms of Child Labour Convention*, 1999 (No. 182). All ILO Member States, even if they have not ratified these Conventions, have an obligation to respect, to promote and to realise the principles concerning fundamental rights, namely the elimination of all forms of forced or compulsory labour, and the effective abolition of child labour.³ In addition to the adoption of these Conventions, the ILO established the *International Programme on the Elimination of Child Labour (IPEC)* in 1992.⁴

The DRC has signed and ratified the above-mentioned core international labour standards, as well as regional⁵ and international⁶ treaties, which ‘include a broad prohibition on forced labour.’⁷ The country has furthermore significantly enacted legislations⁸ protecting children against forced labour. However, the reality on the ground shows that the DRC often faces challenges in implementing the treaties it has

1 ILO *Accelerating action against child labour* (2010) 19 at 5.

2 Ibid 43 at 13.

3 ILO ‘Declaration on Fundamental Principles and Rights at Work’ (1998) art. 2.

4 L Williams (ed) *International Poverty Law* (2006) at 163.

5 *African [Banjul] Charter of Human and Peoples’ Rights*, 1981 (ratified on 20 July 1987, by virtue of the *Decree-Law No.87/027* of 20 July 1987); *ACRWC* (ratified by virtue of *Decree No. 007/01* of 28 March 2001); *African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (‘Kampala Convention’)* 2009, signed on 02 February 2010; *Great Lakes Protocol on the Protection and Assistance to Internally Displaced Persons*, 2006.

6 *CRC*, 1989 (ratified on 27 Sept.1990); *ICCPR*, 1966 (accessed on 1 Nov. 1976); *Supplementary Convention on the Abolition of Slavery, Slave Trade, and Institutions and Practices Similar to Slavery*, 1956 (accessed on 28 Feb. 1975); the 4 *Geneva Conventions* of 12 August 1949 (ratified on 24 Feb. 1961) and their *Additional Protocols* of 8 June 1977, successively ratified on 3 June 1981, and 28 March 2001 by virtue of *Decree No. 004/01* of 28 March 2001. See status of ratification of the United Nations Treaties online at <http://treaties.un.org/pages/Treaties.aspx?id=4> [accessed 14 March 2012].

7 H Cullen *The role of international law in the elimination of child labour* (2007) 25.

8 The 2006 Constitution; *Child Protection Act*; *Labour Code*; *Ministerial Order No. 12/MIN/TPS/AR/34/2006*; *Sexual Violence Act*.

ratified, as many children are subjected to forced labour, including in armed conflicts.⁹

Forced child labour is also widespread in the mines, quarries and subsistent agriculture where ‘many children are forced to work either by individuals or armed groups, [...] and girls are forced into prostitution.’¹⁰ This has been confirmed by the DRC Government, specifying that children are forced to work as ‘child soldiers, water sellers, domestic servants, and entertainers in bars and restaurants’.¹¹

Despite the specificity and controversy around the question of child soldiering, child soldiers are included in the discussion of child labour as their activities are considered ‘a full-time occupation, implying long hours of work and little possibility of returning home.’¹² Considered a form of child labour,¹³ child soldiering constitutes ‘one of the most damaging, exploitative forms of child labour,’¹⁴ as it ‘involves heavy, gruelling work and entails the worst violations of children's human rights’.¹⁵ Child soldiers are consistently recruited and used by warring parties in sexual exploitation¹⁶ and in the illegal exploitation of natural resources, including trade in so-called ‘blood’ or ‘conflict’ diamonds and coltan.¹⁷ This type of exploitation and abuse of child soldiers is tantamount to the ‘worst forms’ of child labour mentioned in *ILO Convention 182*.¹⁸

Previously though, ‘the use of children as soldiers was not included within the scope of child labour,’¹⁹ and therefore fell outside the competence of the ILO, only to be

9 See for instance, the ICC Trial Chamber I in *The Prosecutor v. Thomas Lubanga Dyilo* (“*Lubanga case*”)(No.: ICC-01/04-01/06).

10 ITUC *Internationally recognised core labour standards in the DRC* (2010) at 8.

11 US Department of State *2011 Country reports on human rights practices - DRC* (2012) at 43-44.

12 Amnesty International ‘Child soldiers: one of the worst abuses of child labour’ (1999) at 4.

13 M Wessells *Child Soldiering as Child Labour*, cited in A Abbott ‘Child soldiers: the use of children as instruments of war’ *Suffolk Trans'l L.R.* (2000) 499-537 at 512 *infra* 75.

14 Wessells *op cit* (note 13), cited in P Olsson ‘Trafficking, Child Soldiers and Globalisation of the Legal Field’ in J McCulloch, S Pickering (eds) *Borders and crime: pre-crime, mobility and serious harm in an age of globalisation* (2012) at 135.

15 See Wessells, (note 14) at 135.

16 *Children and armed conflict in the DRC: report of the Secretary-General*, UN Doc. S/2010/369, para 27 (2010).

17 *Children and armed conflict: report of the Secretary-General*, UN Doc. A/55/163, para 16 (2000); cited in Cullen *op cit* (note 7) at 121 *infra* 224.

18 Art 3. See Cullen *op cit* (note 7) at 123.

19 Amnesty International *op cit* (note 12) at 5.

related to international humanitarian law²⁰ and identified as a war crime.²¹ But, considering the direct link between the use of child soldiers, human trafficking, child labour violations, and child slavery,²² the use of children as soldiers is now recognised as a child labour issue.²³ Forced soldiering may therefore be looked at from a broader context of human rights law and also from the ILO perspective.

Forced child labour is also most significant in hunting and fishing sectors in many provinces where many poor families force their children into labour to survive. Forcing child into labour is therefore considered to be a means for the household survival and is directly related to poverty.²⁴ This economic constraints approach becomes a major obstacle to the implementation of legislation against forced child labour in the DRC. The question of relevance of legal protection and enforcement against forced child labour may consequently be raised. This is mainly due to the dilemma between a need for socio-economic survival and the necessity for legal protection of children from exploitation and abuse in the country.

1.2 Problem statement

Forced child labour is a complex and contentious concept in the child labour regime, which has not been clearly defined or distinguished from other forms of child labour in the DRC context. This dissertation therefore defines forced child labour as constituting one of the unconditional worst forms of child labour outlined in Article 3 of the *ILO Convention No.182*. As such, forced child labour automatically constitutes an abuse wherever it occurs,²⁵ and is generally illegal and objectionable form of work²⁶ and is inappropriate for children under 18.²⁷ This dissertation also stresses a distinction between forced child labour and other forms of child labour on

20 DM Smolin 'Strategic choices in the international campaign against child labour' (2000) 22 *Hum. Rts. Q* 942, 964-65; cited in Cullen op cit (note 7) at 122-23 infra 232.

21 *Rome Statute* of the ICC (Art 8(2)(b)(xxvi)). See D Nanjunda *Child Labour and human rights: A Prospective* (2008) at 32.

22 S Tiefenbrun 'Child Soldiers, Slavery and the Trafficking of Children', 31 *Fordham Int'l L.J.* 415 (2007) at 461.

23 Nanjunda op cit (note 21) at 33.

24 J Ballet *et al. Child labour, human rights and the capability approach* (2006) 4.

25 Narayan O *Harnessing child development: children and the culture of human* (2005) at 7.

26 US Department of Labour *2004 Findings on the worst forms of child labour* (2005) at lviii.

27 Reinert K and Rajan R (eds) *The Princeton Encyclopedia of the world economy* (2009) at 175.

the basis of a number of elements that are discussed in more detail in the relevant sections.

The phenomenon of forced child labour is on the increase throughout the DRC despite the country's ratification of international and regional treaties, and the enactment of national legislation, which includes penal sanctions.²⁸ Moreover, the Ministry of Labour in charge of the enforcement of child labour laws has not effectively fulfilled its mandate due to a lack of capacity and resources.²⁹

This dissertation demonstrates that the DRC legal system is unable to put an end to forced child labour because of various problems related to the country's political, social and economic status, including poverty, no-access to education and other social, educational resources. In this case, what are then the alternative remedies to eradicate the problem? This question will be discussed throughout this dissertation along with the following research questions.

1.3 Research Questions

In order to achieve the above-mentioned objectives, the following key questions need to be addressed:

- What are the root causes and consequences of forced child labour in the DRC?
- In what forms does forced child labour manifest itself in the DRC?
- What effective measures can potentially reduce this phenomenon in the DRC?
- To what extent does the DRC promote adequate standards of protection?

1.4 Purpose of study and research objectives

The preliminary purpose of the study will be to show that in regard to forced child labour the DRC is currently not complying with its labour legislations, the regional and international labour standards. The study will therefore have as its overarching,

²⁸ *Labour Code* (art 326); *Child Protection Act* (art 187); *Sexual Violence Act* (art 174).

²⁹ US Department of State *Country Reports – 2003: DRC*, Section 6d; cited in US Department of Labour op cit (note 26) 124 infra 1094

primary aim to encourage and recommend the State to observe and enforce all these labour standards. The study will clearly encourage the Congolese law-makers to adopt *de lege ferenda* or *de lege lata* legislations and practical mechanisms, which will effectively protect children from forced labour. This may be a difficult task, given the well-known absence of leadership and political will in the DRC to effectively deal with child abuse.

- The main objective of the study will be to identify and analyse existing national, regional and international labour standards applicable in the DRC context.
- The study also seeks to provide essential and realistic tools for combating forced child labour, such as poverty reduction and increase access to education in the DRC.

1.5 Chapter synopsis

The research study is divided into four important chapters with an introductory section and a final section including a conclusion and a set of recommendations. Chapter Two defines key issues and describes the notion of a child; forced child labour; and discusses the legal framework for forced child labour focusing on three aspects, namely international, regional standards, and national legislation.

Chapter Three focuses specifically on forced child labour in the DRC and analyses the DRC's compliance with international, regional and national labour legislations.

Chapter Four discusses legal protection and enforcement of the laws against forced child labour in the DRC.

The final chapter presents a general summary, the conclusion, as well as a set of commendations as to a way forwards and contribution to this debate.

Chapter Two

GENERAL OVERVIEW AND LEGAL FRAMEWORK FOR FORCED CHILD LABOUR

2.1 General overview

Forced child labour is a complex issue that requires a proper general overview and legal framework to get a better understanding of the key concepts at stake. This Chapter provides some background information about forced child labour and explores the existing legal frameworks relevant to the protection of children from the phenomenon. In order to better understand and critically analyse the notion of forced child labour, it is important to first define the term ‘child’.

2.2 Notion and legal definition of a child

This section focuses on the definition of a child as provided respectively under international and regional treaties (1), as well as the DRC’s domestic law (2).

2.2.1 Definition of child under international human rights and ILO standards

Under most international human rights treaties, a child is defined as any person under the age of 18, unless majority is attained earlier under the law applicable to the child.³⁰ However, 15 years is set as the age level for recruitment of children into the armed forces,³¹ as volunteers,³² and for recruitment or participation in armed conflicts³³ to such an extent that conscription or enlistment of children under the age of 15 into armed forces, or their use in hostilities constitutes a war crime.³⁴

While the *ILO Convention No. 182*, under Article 2 states that, the term ‘child’ should apply to all persons under 18, the *ILO Convention No.138* provides different

30 *Convention on the Rights of the Child (CRC)* (Art 1); See also the *Optional Protocol to the CRC on the involvement of children in armed conflict* (Art 1 and 2).

31 Art 38 (3) of the *CRC*. See E Verhellen *Convention on the Rights of the Child: background, motivation, strategies, main themes* 4th ed. (2006) at 78.

32 Art 3 of the *Optional Protocol to the CRC*.

33 Art 77 (2) of *Additional Protocol I* and Art 4(3)(c) of the *Additional Protocol II to the four Geneva Conventions of 1949*.

34 See Art 8(2) (b) (xxvi) and 8 (2) (e) (vii) of the *Rome Statute of the ICC*.

minimum ages, depending on the types of the work in question.³⁵ For admission to employment or work, Article 2 (3) lays down a general minimum age of not less than 15 years. For admission to hazardous employment or work, Article 3 (1) sets a general minimum age of not less than 18 years, but in case the minimum age for admission to hazardous work is below 18 years, ‘immediate steps should be taken to raise it to that level’.³⁶ However, the minimum age for admission to work may be set at 16 by national legislations or the competent authority, after consultation with the employers’ and workers’ organisations on two specific conditions.³⁷

A lower age of 12 to 15 years may be laid down for light work, on the condition that such work is not harmful to the concerned young persons’ health or development; and is not detrimental to their full-time education, their participation in vocational orientation or training programmes or their capacity to benefit from the instruction received.³⁸ Moreover, Night Work Conventions aimed specifically at young persons, prohibit children under the age of 18 from performing night work.³⁹

However, there are exceptions contained in night work conventions. Night work or employment is allowed for children over 14 years and young persons under the age of 18 years under certain conditions relating to compulsory school attendance and work time intervals.⁴⁰ Moreover, young persons between 16 and 18 years of age may be allowed to be employed or work at night in apprenticeship or vocational training activities.⁴¹

35 Art 1.

36 *Minimum Age Recommendation No. 146* (para 9). See R Hernández-Pulido and T Caron ‘Protection of children and young persons’ in ILO *Fundamental rights at work and international labour standards* (2003) at 95.

37 Full protection of the health, safety and morals of the young persons concerned, and their participation in adequate specific instruction or vocational training programmes in the relevant branch of activity. (Art 3(3)).

38 Art 7. See Hernández-Pulido and Caron (note 36) at 94.

39 *Convention No. 6* (art 2); *Convention No. 20* (art 3(a)); *Convention No. 90* (1948): art 3(1).

40 *Convention No. 79* (Art 2 and 3).

41 *Convention No. 90* (Art 3 (2))

2.2.2 Definition of child under regional human rights standards

Most regional treaties define a child as every human being below the age of 18 years, unless under the law applicable to the children, majority is attained earlier. These instruments include the *African Charter on the Rights and Welfare of the Child* (ACRWC);⁴² the *Protocol on the Prevention and Suppression of Sexual Violence against Women and Children*;⁴³ *Protocol on the Property Rights of Returning Persons*;⁴⁴ the *SADC Protocol on Gender and Development*;⁴⁵ and the *Model Law on HIV in Southern Africa*.⁴⁶

2.2.3 Definition of child under the DRC's national law

In the Congolese legal system, the Constitution which is the supreme law of the land⁴⁷ clearly defines a minor child as 'any person who, without regard to sex, has not yet attained 18 years of age.'⁴⁸ This definition is applicable to all areas of life and consolidates the definition contained in other legal provisions,⁴⁹ which is formulated in the same way.⁵⁰ It is clear that this definition uses the terms 'minor' and 'child' interchangeably. Furthermore, the *Labour Code* stipulates that, for any definition of a child, *reference should be made to the definition provided by Article 219 of the Family Code*.⁵¹ Similarly, Article 2 of the *Ministerial Order 12/CAB-MIN/ETPS/045/08* pertaining to the conditions of work for children⁵² states that the expression 'child' refers to any person who is under the age of 18. There are other legal enactments referring to children as persons under the age of 18 years.⁵³

42 Art 2.

43 Art 1 (1).

44 Art 1(1).

45 Art 1(2).

46 Part I (3) (b).

47 See J Crabb 'The Democratic Republic of the Congo (Kinshasa)' in J W Salacuse *An introduction to law in French-speaking Africa* (1969) in K Redden (ed.) *The Legal Systems of Africa series* 437 at 482.

48 Art 41.

49 *Family Code* (Art 219); *Child Protection Act* (Art 2(1)).

50 CRC *Consideration of reports submitted by States parties under article 44 of the Convention: CRC: DRC* (2008) para 66 at 16.

51 Art 7 (k).

52 *Ministerial Order 12/CAB-MIN/ETPS/045/08*.

53 *Decree-Law No. 066* (Art 2); *Act No. 04/023* (Art 7); *Military Judicial Code* (Art 114); *Sexual Violence Act* (Art 167).

The *Sexual Violence Act* protecting children under the age of 18 against early marriages and sexual abuse has an impact on the interpretation of the discriminatory provision of Article 352(1) of the *Family Code*. This provision stipulates that, ‘marriage may not be contracted by a man who is under the age of 18 or a woman who is under the age of 15.’⁵⁴ However, there are exceptions in different pieces of legislation which sets 18 years as the general age-level, including the law that sets the age of criminal responsibility at 16.⁵⁵

In addition, the *Labour Code* and the *Child Protection Act* contain several innovations, including the raising of the minimum age for admission to employment or work from 14 to 16 years. This means that persons 16 years of age or older have the capacity to enter into contracts for employment.⁵⁶ In this regard, the *Child Protection Act* specifically stipulates that ‘no child under the age of 16 years shall be employed’.⁵⁷ There are, however, exceptions to this rule, which are clearly stipulated in the two pieces of legislation.

On the one side, Article 6(2)(c) of the *Labour Code* allows a person aged 15 to be hired or retained in service only in the performance of light and healthy work as provided for by a decision of the Minister of Labour and Social Protection.⁵⁸ The *Labour Code* provides exemptions with regards to light and healthy work that is authorised for persons who are at least 15 years old but less than 16 years old.⁵⁹ The competent Labour Inspector may grant temporary exemptions for children under the age of 16 and those under the age of 18 at the employer’s request, if there are compelling reasons for vocational training.⁶⁰ Such exemptions are not applicable to female workers.⁶¹

The *Child Protection Act* contains a similar provision, but refers to a person who is at least 16 years of age and less than 18 years of age.⁶² In this context, ‘the matter shall

54 CRC op cit (note 50) para 67 at 16.

55 *Ordinance Law No. 78/016* (Art 1)

56 Art 6 (2) of *Labour Code*. See Id at 46.

57 Art (50)(1).

58 See *Ministerial Order 12/CAB-MIN/ETPS/045/08* (Art 17).

59 Art 38 (4).

60 *Ministerial Order 12/CAB-MIN/ETPS/045/08* (Art 19 (1)).

61 *Ibid* (Art 19 (2)).

62 Art 54.

be referred to court, at the request of the parents or any person exercising parental or guardianship authority over the child, by the labour inspector or any interested person'.⁶³ The *Child Protection Act* also provides that without prejudice to his / her employment, the child shall retain the right to continue his / her studies until he / she reaches 18 years of age.⁶⁴

On the other side, the *Labour Code* allows a person aged 15 to be hired or retained in service with the express permission of the Labour Inspector and that person's parent or guardian.⁶⁵ Any opposition of the Labour Inspector and the parent or guardian to this exception may be removed by the Court when justified by circumstances or by fairness.⁶⁶ However, the *Labour Code* contains a contradictory provision, which stipulates that 'children shall not be hired to work in an enterprise, even as apprentices, before the age of 15, except with the express permission of the competent Labour Inspector and of their parents or guardian.'⁶⁷ This provision further stipulates that 'under no circumstances, shall this express permission be given below the age of 15'.⁶⁸ Similarly, the *Child Protection Act* provides that 'a child aged 15 years shall not be hired or retained in service, even as an apprentice, except with the express permission of the juvenile court, following psycho-medical opinion of an expert and of the labour inspector'.⁶⁹

While the labour legislation allows children aged from 16 years to enter into employment contracts, the *Law of Contracts or Conventional Obligations*⁷⁰ prohibits any person declared legally incapable, namely a minor,⁷¹ except an emancipated minor,⁷² from entering into contracts. Although the labour legislation does not provide any further specification concerning the contracts, it may be argued that it refers to contracts of any kind, including employment contract.

63 Art 50(3).

64 Art 51.

65 Art 6(2)(a).

66 Art 6(2)(b).

67 Art 133(1).

68 Art 133(2).

69 Art 50(2).

70 *Civil Code of Obligations, Book III* (art 23).

71 *Family Code* (Art 215(1)).

72 *Family Code* (Art 292 & 288-89).

On the basis of the legal incapacity theory, the *Family Code*⁷³ prohibits, subject to nullification, any acts of disposition accomplished by the minor on his or her own. Such acts of dispositions include renunciations, transactions and final settlement of any account, which the employee shall receive from the employer at the time of the employment contract's termination.⁷⁴ However, such legal incapacity provided under the *Family Code* does not affect the minor's delictual or quasi-delictual liability, if the minor may display judgment.⁷⁵

Furthermore, based on the general principles of capacity it contains, the *Family Code* implicitly provides the incapacity of a minor under the age of 18 to sue or be sued without legal representation.⁷⁶ This inadequacy of the law should clearly call for real legal reform to effectively take place at parliamentary level.

The above-mentioned contradictions in the DRC legislation are indicative of the conflict caused by different age limits set by international, regional and national law in terms of implementation. Consequently, the DRC is 'not capable of implementing a minimum age for employment or work in all sectors of the economy',⁷⁷ particularly in the informal or artisanal sector, where the majority of children are exposed to forced child labour.⁷⁸

2.3 Notion of forced child labour

Forced child labour is about children working in conditions, which have nothing to do with a free employment relationship,⁷⁹ 'receiving little or no pay and having no control over their daily lives.'⁸⁰ Child labour amounts to forced labour not only when 'children are forced, as individuals in their own right, by a third party to work under the menace of a penalty, but also [because the] child's work is included within the

73 Art 217 & 294.

74 *Labour Code* (Art 77).

75 Art 214.

76 See Art 211-218.

77 C Shukla & S Ali (eds) *Child Labour: Socio-Economic Dimensions* (2006) at 141.

78 United States President 2008 *Comprehensive report on US trade and investment policy toward Sub-Saharan Africa* (2008) at 96.

79 *Children in bondage: a call for action* at 4; cited in M E Jaffe *et al* (ed) *By the sweat and toil of children* (1995) at 77 *infra* 4.

80 *World Labour Report* 1993 at 17; cited in Jaffe *et al* *ibid* *infra* 5.

forced labour provided by the family as a whole.’⁸¹ Clearly, forced child labour is recognised when the concerned children are compelled to ‘carry out work that exceeds their physical and moral capacity, and under conditions that have a serious detrimental effect on their health, safety and development.’⁸² This amounts to the violation of a number of children’s basic human rights, which are essential for the healthy development and survival of the child enshrined in most human rights instruments.⁸³

Under Article 3 (a) of *ILO Convention 182*, forced child labour is identified as one of the worst forms of child labour, which ‘are so harmful that they must be outlawed with immediate effect and eliminated as soon as possible.’⁸⁴ Being abusive, exploitative, detrimental to children, and contrary to their best interests,⁸⁵ this form of child labour interferes with school, recreation and rest, pursuant to Article 32 of the *CRC*.⁸⁶

There is thus a clear distinction between forced child labour and other forms of child labour based on the presence of four elements, namely ‘a restriction of the freedom to move; a degree of control over the child going beyond the normal exertion of lawful authority; physical or mental violence; and absence of informed consent’.⁸⁷

Forced child labour not only poses a major problem to the development and wellbeing of children of all ages, but also violates children’s rights. It is therefore imperative to analyse the legal framework of the question.

81 ILO *A Global alliance against forced labour* (2005) 6.

82 Jaffe *et al* op cit (note 79) at 77.

83 G Van Bueren *The International law on the rights of the child* (1998) at 262.

84 Cullen op cit (note 7) at 139-140; H Hindman (ed) *The world of child labour: an historical and regional survey* (2009) at xxvii; Woodhead M (2007) ‘Harmed by work or developing through work?: issues in the study of psychosocial impacts’, in B Hungerland *et al* (eds) *Working to be someone: Child focussed research and practice with working children* at 31. See also Nanjunda op cit (note 21) at 265.

85 W H Burns (ed) *Child labour and human rights: making children matter* (2005) at xv.

86 ILO, ‘Child Labour: Targeting the Intolerable’ (1996), cited in Cullen H ‘*The Nature of State obligations in relation to child labour: choosing prosecution over protection*’ at 103 *infra* 13.

87 IPEC and SIMPOC *Every child counts new global estimates on child labour* (2002) at 35.

2.4 Legal definition of forced child labour

As far as forced child labour is concerned, there is no specific legal definition provided by international and regional labour standards, or domestic legislations. This study therefore relies on definitions of forced labour and related practices provided by the ILO and United Nations standards on minimum age for employment, forced labour, the economic exploitation of children, and slavery-like practices.⁸⁸

Forced labour is defined as ‘all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.’⁸⁹ This definition is extended and broadly interpreted given children’s lack of voluntariness ‘considered as a constitutive requirement of child labour.’⁹⁰

In fact, children, because ‘of their immaturity, may never engage in [work or service] on an authentically voluntary basis’.⁹¹ It is argued that ‘such consent is not valid if the employment is likely to jeopardise the health, safety or morals of the child whereby it is generally prohibited for persons below the age of 18.’⁹² For instance, ‘from a psychological and social point of view, children’s choices to join and remain in armed groups cannot be considered “voluntary”’.⁹³ This has therefore been suggested before the ICC as follows:

[C]hildren cannot give ‘informed’ consent to join an armed group, because of limited understanding of the consequences of their choices; their inability to control or fully comprehend the structures and forces they are dealing with; and their inadequate knowledge and understanding of the short- and long-term consequences of their actions.⁹⁴

88 Jaffe *et al.* op cit (note 89) at 79.

89 *ILO Convention 29* (Art 2(1)). See *ILO Convention 29 in ILO International Labour Conventions and Recommendations: 1919-1991* (1992) 115.

90 S Sanna ‘Slavery and practices similar to slavery as worst forms of child labour’ in G Nesi *et al* (eds) *Child labour in a globalised world: a legal analysis of ILO Action* (2008) 114.

91 *Id* at 115.

92 ILC Report III (Part 1B) *General survey concerning the Forced Labour Convention No. 29 and the Abolition of Forced Labour Convention No. 105* (2007); cited in UN General Assembly, *Status of the Convention on the Rights of the Child* U.N. Doc. A/64/172 (2009) para 19 at 6-7 *infra* 15.

93 E Schauer & T Elbert ‘The psychological impact of child soldiering’ (2010) in E Martz (ed) *Trauma rehabilitation after war and conflict: community and individual perspectives* at 318.

94 Report of Ms Schauer (CHM-0001) *The Psychological impact of child soldiering*, p 7 – 8; T-166-ENG, p 13, lines 10 – 19; p 90, lines 1 - 4; cited in ICC Trial Chamber I, in the “*Lubanga case*” op cit (note 9) para 610 at 279-80 *infra* 1783.

Moreover, children ‘are compelled to do work due to certain circumstances, such as the conditions of poverty and marginalisation of their life, the exposure to violence and abuses and the lack of schooling’.⁹⁵ Children living in these conditions are denied the possibility to make a choice and find themselves in a state of submission with no chance of self-determination, which usually characterises slavery-like practices.⁹⁶ Based on this approach,⁹⁷ forced child labour is defined as ‘employment that is likely to jeopardise health, safety or morals of persons below 18 years of age, in conformity with the relevant ILO Conventions.’⁹⁸

Consequently, all activities defined as worst forms of child labour, even in the case of *Convention 182*, correspond to slavery-like practices covered under article 3(a) and should therefore be considered as forced child labour.⁹⁹

Forced child labour is clearly part of the unconditional worst forms of child labour deemed to be unacceptable, which are defined and prohibited by Article 3(a) (c) of the *Convention No. 182*.¹⁰⁰ Moreover, the unacceptable worst forms of child labour manifest themselves in the violation of a country’s national minimum age laws; a threat to children’s physical, mental, or emotional wellbeing; intolerable abuse; and work that prevents children from attending school.¹⁰¹ Forced labour also includes activities involving seizure of personal documents (passports, permits, etc), debt towards the employer, forced overtime or extremely low wages, threat of penalty or of harsh and inhumane treatment (verbal, sexual abuse, corporal punishment, mental or physical coercion).¹⁰²

2.5 Common forms of forced child labour in the DRC

Considering children’s lack of voluntariness described above, forced child labour manifests itself in different ways in the DRC, including through child trafficking (1)

95 Sanna op cit (note 90) at 115.

96 Ibid.

97 ILC op cit (note 92) § 41; cited in Sanna op cit (note 90) at 115.

98 See *ILO Convention No 138* (Art 3(1)); *ILO Convention No 182* (art 1, 2, & 3) (d)).

99 *Supplementary Slavery Convention* (Art 1). See also Sanna op cit (note 90) at 115.

100 *ILO A future without child labour* (2002) para 31 at 11.

101 G Hamot and E Jensen *Teaching about child labour and international human rights* (2003) at 1.

102 J Noterdaeme ‘Corporate social responsibility and child labour’ (2010) at 6.

for sexual exploitation purposes.¹⁰³ It also manifests itself through debt bondage and serfdom (2); support services conducted by ‘children associated with armed groups’ (3); child prostitution and child pornography (4). Moreover, considering the DRC mineral wealth, this section includes child mining and quarrying (5); and street children considered from an economic perspective (6).¹⁰⁴

2.5.1 Child trafficking

Child trafficking is defined as ‘the movement of [children] from one place to another through force, coercion, or deception to exploit them for their labour,’¹⁰⁵ which amounts to a form of economic exploitation and a slavery-like practice,¹⁰⁶ and as such, should be assimilated to forced child labour.

The DRC is a source and destination country for child trafficking for the purposes of forced labour and sexual exploitation, mainly in eastern provinces devastated by cyclic and violent conflicts and populated by various armed groups.¹⁰⁷ Many children are exploited internally within the country’s borders in conditions of involuntary domestic servitude. Some others are trafficked to neighbouring countries and to European nations for commercial sexual exploitation, forced prostitution, domestic servitude, and forced agricultural labour.¹⁰⁸ These practices clearly amount to forced child labour,¹⁰⁹ which is considered a form of economic exploitation and slavery.¹¹⁰ Child trafficking is taken so seriously that it is prohibited globally and at all levels, namely under international,¹¹¹ regional or sub-regional¹¹² legal standards, as well as under the DRC domestic law.¹¹³

103 US Department of State “DR Congo (Tier 2 Watch List),” in *Trafficking in Persons Report – 2007* (2007). See also US Department of State ‘Country Reports – 2007: DRC,’ s 5; cited in US Department of Labour *2007 Findings on the worst forms of child labour - DR Congo* (2008).

104 See *ILO Convention 182* (Art 3).

105 L Bass *Child labour in Sub-Saharan Africa* (2004) at 152.

106 Sanna op cit (note 90) at 126.

107 US Department of State *2011 trafficking in persons report - DR Congo* (2011) at 129.

108 Ibid.

109 T Buck and A Nicholson ‘Child slavery: constructing the international legal framework’ in G Craig (ed) *Child slavery now: a contemporary reader* (2010) at 46.

110 Sanna op cit (note 90) at 125-126.

111 See the *CRC and its protocols (OP) on the sale of children, child prostitution and child pornography; ILO Convention No 182*, and the *Convention against Transnational Organised Crime (CTOC)*(2000) and its *Palermo Protocol*; cited in J Gallinetti *Child trafficking in SADC countries: the need for a regional response* (2008) at 14; and Buck and Nicholson op cit (note 109) at 44-45.

International Conventions and their Protocols prohibiting child trafficking, as well as international and domestic judicial discourse call for accountability and punishment of those engaged in child trafficking.¹¹⁴ The *DRC Sexual Violence Act* prescribes a penalty ranging from 10 to 20 years' imprisonment for the trafficking and sexual exploitation of children.¹¹⁵ Similarly, the *Child Protection Act* prescribes that the trafficking or sale of children is punishable by imprisonment for 10 to 20 years, and a fine of 500.000 to 1 million Congolese francs (CF).¹¹⁶

Despite the existence of such inspiring legislation protecting children against trafficking, the DRC seems not to be in compliance with the minimum standards for the elimination of trafficking. In fact, there is no evidence of the Government's progress in punishing labour or sex trafficking perpetrators, particularly in the national army.¹¹⁷ The Government has also failed to provide protective services for the majority of trafficking victims and to raise public awareness of child trafficking.¹¹⁸ This Government's failure is mainly due to the shortage of human, material, technical and financial resources.¹¹⁹

2.5.2 Debt bondage and serfdom

The generally accepted definition of debt bondage is the legal definition provided by the *1956 Supplementary Slavery Convention*,¹²⁰ and as slavery-like practice debt bondage amounts to abusive child labour, regardless of the industry.¹²¹ Similarly, this *Convention* provides the legal definition of serfdom that refers to the servile condition

112 ACRWC; The *Banjul Charter* (1981); *Ouagadougou Action Plan* (2006); *African Union Convention ("Kampala Convention")*.

113 See *Sexual Violence Act* (2006); *Child Protection Code* (2009), cited in US Department of State op cit (note 107) at 130-131.

114 Buck and Nicholson op cit (note 109) at 44-45.

115 Art 174 (j).

116 Art 162.

117 US Department of State op cit (note 107) at 130.

118 Ibid.

119 Ibid.

120 Art 1 (a). See *Economic and Social Council, Slavery: Report of the Committee appointed by Resolution 564 (XIX)*, 1955, UN Doc/E2824, 1956 at 21; cited in J Allain *The slavery conventions: the travaux préparatoires* (2008) 272 infra 78.

121 Cullen op cit (note 7) at 23.

or status of a tenant to live and labour on another person's land and to render some service to such other person.¹²²

In the DRC, the law specifically prohibits debt bondage and serfdom¹²³ as well as slavery and similar practices¹²⁴ in compliance with international human rights standards,¹²⁵ although no clear definition is provided for these terms. Despite the enactment of these legal texts, many children in the DRC are exploited in unlicensed artisanal mines and in situations of debt bondage for lower wages.¹²⁶ In eastern provinces, threats and coercion are constantly used on children by armed groups¹²⁷ to force them to perform illegal activities, such as mining for minerals, paying illegal 'taxes' or carrying looted goods from mining villages.¹²⁸

Clearly, most cases of debt bondage and serfdom used against children occur in the context of armed conflict and affect children associated with armed groups, commonly known as child soldiers.

2.5.3 Forced or compulsory support services conducted by 'children associated with armed groups'

First of all, it is important to provide an explanatory note and brief definition of key relating concepts, namely 'children associated with armed groups' and 'support services'. The term 'children associated with armed groups' is considered to be the correct definition for 'child soldiering,' or 'child soldiers' and it 'is becoming increasingly adopted by the child rights community'.¹²⁹ But, for consistency's sake, this dissertation uses these terms interchangeably.

The concept 'support services' falls within the sphere of the overall prohibition of forced labour, specifically mentioned in Article 3(a) of *ILO Convention 182* as

122 Art 1 (b).

123 See *Labour Code* (Art 3 (a)); *Ministerial Order 12/CAB-MIN/ETPS/045/08* (Art 1 (a)).

124 Constitution (Art 16 (c)).

125 *ICCPR* (Art 8); *UDHR* (Art 4).

126 US Department of State op cit (note 107) at 129.

127 Ibid.

128 Ibid.

129 A Kielland and M Tovo *Children at work: child labour practices in Africa* (2006) at 115.

‘forced or compulsory recruitment of children for use in armed conflict’.¹³⁰ This concept means activities carried out by children in armed forces, which may be risky, devastatingly heavy and physically-demanding, such as transporting equipment, food, and ammunition, or constructing military facilities and temporary huts.¹³¹ These may also be the same activities that a child conducts in normal circumstances, including cooking, washing laundry, fetching water, and doing dishes.¹³² Surely this category may also include the use of children to mine for precious minerals, which is prevalent in the DRC eastern provinces, under threats and coercion by armed groups and the national army (FARDC) troops.¹³³

Moreover, sexual abuse may be included in this category of forced or compulsory support services conducted by ‘children associated with armed groups’.¹³⁴ ICC Judge Odio Benito agrees that ‘girls who are used as sex slaves or ‘wives’ of commanders or other members of the armed group provide essential support to the armed groups.’¹³⁵ She therefore calls for sexual violence to be included within the legal concept of ‘use to participate actively in the hostilities,’¹³⁶ considering the scale of sexual abuse and gender-based violence suffered by children, especially girls during armed conflicts.

These actions violate the states’ international obligations to protect children against their enlistment or use into military service as required by international and regional treaties¹³⁷ duly signed and ratified by the DRC. Moreover, the belligerents’ actions violate the *United Nations Security Council Resolution 1332* (2000)¹³⁸ on the situation concerning the DRC that called for all parties to the conflict to cease the recruitment and use of child soldiers.¹³⁹

130 Sanna op cit (note 90) at 121.

131 G Machel *Impact of armed conflict on children* (1997), cited in Kielland and Tovo op cit (note 129) at 115, endnote 19. See The Secretary-General *Promotion and protection of the rights of children: impact of armed conflict on children*, UN Doc A/51/306 (1996).

132 Ibid. See also the “*Lubanga case*” op cit (note 9) para 878 at 384.

133 US Department of State op cit (note 107) at 129. See The “*Lubanga case*” judgment op cit (note 9) para 890 - 96 at 388-91.

134 Kielland and Tovo op cit (note 129) at 115.

135 See Separate and Dissenting Opinion of Judge Odio Benito, in “*Lubanga case*” judgment op cit (note 9) para 20 at 7.

136 Ibid para 17 at 6.

137 See *Additional Protocols to the Geneva Conventions* (1977); *CRC* (1989); *Optional Protocol to the CRC on the involvement of children in armed conflicts* (2000); *Rome Statute of the ICC* (1998); *ACRWC* (1990); *ILO Convention No 182* (1999).

138 UN Security Council, S.C. Res. 1332, U.N. Doc. S/RES/1332 (2000)].

139 See para 14, cited in Cullen op cit (note 7) at 94.

Nevertheless, some measures have been taken to protect children against recruitment and use in armed conflicts. For instance, 165 child soldiers from Bunia were handed over to UNICEF from a training camp in Uganda to prevent their recruitment by armed groups.¹⁴⁰ Similarly, since January 2012, 194 boys and 21 girls have been separated from armed forces and groups by MONUSCO and local partners.¹⁴¹ Moreover, severe international sanctions were imposed on perpetrators,¹⁴² including travel bans, asset freezes by the United Nations Security Council,¹⁴³ and international arrest warrants.¹⁴⁴

In terms of penal sanctions, the DRC's law prohibits and punishes by imprisonment for 10–20 years the enlistment or use of children below 18 years of age in the armed forces and armed groups or police.¹⁴⁵ But, in reality this legislation is not applicable to most cases concerning members of the national army and the police. Many commanders accused of recruiting and using child soldiers in forced labour remained unpunished and got promoted to leadership positions within the army.¹⁴⁶ As a result of this situation of impunity, children continue to be used in hostilities as forced labourers. Even the referral of some cases to the ICC for prosecution seems to be ineffective in deterring the perpetrators from recidivism in the recruitment and use of children, like in child pornography.

2.5.4 Child prostitution and child pornography

Child prostitution and child pornography are defined not only as worst forms of child labour,¹⁴⁷ but also as crimes of violence against children, and are considered to be

140 The Secretary-General op cit (note 131) para 24; cited in Cullen op cit (note 7) at 95 infra 70.

141 MONUSCO 'MONUSCO denounces recruitment of children and youth by M23 armed group', *Press Release* (7 August 2012).

142 US Department of State op cit (note 107) at 129-130.

143 This sanction was for instance imposed on FARDC Colonel Innocent Zimurinda. See para 13 and 15 of *Resolution 1596* (2005), as renewed by para 3 of *Resolution 1952* (2010).

144 Such an arrest warrant was issued against Bosco Ntaganda on 22 August 2006 by the ICC Pre-Trial Chamber. [ICC Case- *The Prosecutor v. Bosco Ntaganda* (ICC-01/04-02/06)].

145 See specifically *Child Protection Act* (Art 187 (2)); cited in ICRC Advisory Service 'National implementation of international humanitarian law biannual update on national legislation and case law' Vol. 91 (875) *Int'l Rev Red Cross* (2009) at 628.

146 US Department of State op cit (note 107) at 130.

147 *ILO Convention No. 182* (Art 3(b)).

forms of economic exploitation similar to forced labour and slavery.¹⁴⁸ Their legal definitions are provided by the *Optional Protocol to the CRC on the sale of children, child prostitution and child pornography*.¹⁴⁹ Similarly, the *ACRWC*, under Article 27, calls for protection of children from all forms of sexual exploitation and sexual abuse, in particular through preventive measures against their use in prostitution and in pornographic activities, performances and materials.¹⁵⁰

In the DRC, child prostitution, child pornography and obscenity are specifically prohibited by various pieces of legislation.¹⁵¹ In terms of penal law, any distribution or showing in public of a pornographic document or movie to children is punished with a prison sentence of three months to five years and a fine of 50,000 to 100,000 CF.¹⁵²

While the same penalty applies to any broadcasting on television of obscene dances or clothing, which is detrimental to morality,¹⁵³ a harsher penalty of five to 20 years imprisonment is applicable if the victim is under the age of 18 years.¹⁵⁴ A prison sentence of five to 10 years and a fine of 150,000 CF shall be imposed for ‘any representation, by any means whatsoever, of a child engaged in real or simulated explicit sexual activities, or any representation of the sexual parts of a child, the dominant characteristic of which is depiction for a sexual purpose’.¹⁵⁵

Child trafficking or sexual exploitation for remuneration or other consideration is punishable by 10 to 20 years’ imprisonment.¹⁵⁶ The use of a child under the age of 18 in sexual activities for remuneration or any other form of consideration is punishable by five to 20 years’ imprisonment and a fine of 200,000 CF.¹⁵⁷ If the offender is a person exercising parental authority or guardianship, the exercise of such parental

148 ILO *Child labour: targeting the intolerable* (1998) at 31; cited in K Joost ‘Prostitution, pornography and pornographic performances as worst forms of child labour’ in Nesi *et al* op cit (note 90) at 131 infra 12.

149 Art 2 (c).

150 This provision corresponds to Art 34 of the *CRC*.

151 See *Child Protection Code* (Art 53 (c)); *Labour Code* (Art (2)(b)); *Ministerial Order 12/CAB-MIN/ETPS/045/08* (Art 8 (b)).

152 *Penal Code* (Art 174 (b)(1)).

153 Art 174 (b)(2).

154 Art 174 (b)(2)(2).

155 Art 174 (m).

156 Art 174 (j).

157 Art 174 (n)(1)(14).

authority or guardianship shall be deprived pursuant to Article 319 of the *Family Code*.¹⁵⁸

Nevertheless, parents encourage their children to leave school for engaging in prostitution to earn money for their families.¹⁵⁹ This is clearly not in ‘the best interest of the child’, which ‘shall be a primary consideration in all actions concerning children’.¹⁶⁰ In the eastern war-torn zones girls are frequently and forcibly prostituted by loosely organised networks, gangs mining areas’.¹⁶¹

2.5.5 Child mining and quarrying

Due to extreme poverty, ignorance and internecine warfare in the DRC about 30 per cent of schoolchildren are forced to drop out of school and work in the mines and quarries,¹⁶² exposing their lives and health to the constant risk of toxic and radioactive substances, such as coltan (columbite-tantalite).¹⁶³ The extraction of coltan in eastern DRC has indeed contributed significantly to the expansion of the phenomenon of forced child labour.¹⁶⁴ But, coltan mining is hazardous for child labourers¹⁶⁵ as coltan is a highly dangerous, toxic substance that has a particular ability to release electrical energy,¹⁶⁶ and is known to have caused many birth defects where it is mined.¹⁶⁷

158 Art 174 (n)(1)(2).

159 US Department of State *Country report on human rights practices 2006 - DR Congo* (2007).

160 See CRC (Art 3); ACRWC (Art 4); the DRC’s *Child Protection Law* (Art 6).

161 US Department of State op cit (note 128) at 129.

162 Kristi Essick *et al* ‘A call to arms - demand for Coltan causes problems in Congo’ (2001) Vol. 4 (23) *The Industry Standard*. See also M Söderberg *Is there blood on your mobile phone?* (2006).

163 M Taka ‘Coltan mining and the conflict in the eastern DR Congo’ (2010) in M McIntosh and A Hunter (eds) *New perspectives on human security* at 163. See also R Sage *Who should take a stand against abusive child labour being used in Congo to dig out coltan?*

164 S Whitman ‘Sexual violence, coltan and the DR Congo’ in M Schnurr and L Swatuk (eds) *Natural resources and social conflict: towards critical environmental security* (2012) 128 at 128.

165 F Poulsen ‘Children of the Congo who risk their lives to supply our mobile phones’ *The Guardian* (2012). See C Lavery ‘Plight of African child slaves forced into mines - for our mobile phones’ *Sunday Mail* (2008).

166 U Schwela ‘Provenance and established miners’ in ‘Tantalum: a supplement to Mining Journal’, *Mining Journal* special publication (2007) at 3.

167 C Gould *Coltan Speech* (nd). Available at <http://www.povertyprogram.com/docs/Coltan.pdf> [accessed 15 June 2012].

Clearly, instead of being in school child labourers in coltan mining are forced to work in brutal conditions for very low wages.¹⁶⁸ Moreover, the improper work environment, and poor or insalubrious working conditions characterising the mines expose these children to injuries, diseases and even death. In some other cases injuries or deaths occur as a result of accidents, such as the collapse of mining pits walls.¹⁶⁹

Most vulnerable children are abused or exploited as child labourers in the mining sector by companies from developed countries, such as China, the United States of America for low wages, ie US \$3 a day,¹⁷⁰ as well as by South African companies for about US \$ 1 per day.¹⁷¹ Nevertheless, some actions have been taken against companies that use child labour in their mining activities, including bankruptcy¹⁷² and formal complaint before the UK National Contact Point (NCP).¹⁷³

Following the collapse of a uranium mine in 2004 in Katanga, the provincial government launched a public awareness campaign under the theme ‘elimination of child labour in mining’.¹⁷⁴ Despite major decisions taken by the authorities following the campaign to formally forbid the access of children to mines,¹⁷⁵ the efforts to prevent children from working in mines are undermined by the absence of educational opportunities¹⁷⁶ and lack of support for children.¹⁷⁷

A part from working in mining, small children aged between five to 12 are forced work in quarries, particularly rock quarries for a small wage in order to survive.¹⁷⁸ Obviously, working in this informal ‘artisanal’ activity exposes children to dust, sun and harmful chemical toxins and radioactive hazards the rocks may contain.

168 S Turner *Child labour in Congo* (2008). Available at http://www.writing.com/main/view_item/item_id/1412649 [Accessed 20 March 2012].

169 Ibid.

170 M Neil *International law: child labour in Congo benefits Chinese companies - and US consumers* (2008).

171 O Guerin ‘DR Congo's child miner shame’ *BBC News* (2007).

172 J Lasker ‘Inside Africa's playstation war: coltan bloody Coltan’ in *Technoir* (2010) at 65.

173 See Final statement by the UN National Contact Point for the OECD guidelines for multinational enterprises: Afrimex (UK) Ltd, para 53 at 11 & para 57 at 12.

174 S Gunn *Combating child labour in Congo: a case study* (2010).

175 Ibid.

176 Ibid.

177 US State Department Bureau of Democracy, Human rights, and labour ‘country reports on human rights practices - 2010: DR Congo’ (2011) at 87.

178 Ibid at 86. See also S Bloemen *Pounding rock and crushing potential: child labour in DR Congo* (2009).

Yet, the DRC has passed numerous legislations¹⁷⁹ prohibiting child labour in mines and quarries, in compliance with international and labour standards protecting children from harmful, hazardous and unhealthy work.¹⁸⁰ Like many other African countries, the DRC has not ratified the ILO *Convention 123* prohibiting the employment or work of children under the age of 16 in underground mines or in quarries. Article 13 of the *Ministerial Order No.12/CAB.MIN/TPS/045/08* prohibits children from performing hazardous and unhealthy work carried out underground, under water, at dangerous heights or in confined spaces.¹⁸¹

Article 13 (14) of this *Ministerial Order* protects children from work carried out with dangerous machinery, equipment and tools, or which involves the manual handling or transport of heavy loads is also guaranteed.¹⁸² Children are also protected from work carried out in an unhealthy environment which may, for example, expose them to hazardous substances, agents or processes, or to temperatures, noise levels, or vibrations damaging to their health.¹⁸³ Article 13 (17) protects children from performing all types of work generally prohibited by the Labour Inspector on the grounds of their hazardous or unhealthy nature.¹⁸⁴

In terms of penalties, Article 326 of the *Labour Code* provides for imprisonment with hard labour for a term not exceeding six months and a fine of 30,000 CF or one of these penalties.

Moreover, in order to protect children against mining and quarrying in the diamond sector, the DRC agreed to participate in the *Kimberley Process Certification Scheme* (KPCS).¹⁸⁵ KPCS was designed in May 2000 and established in November 2002 to

179 *Ministerial Order No 68/13*.

180 *ILO Convention No. 182* (Art 3 (d)); *CRC* (Art 32 (1) and 36); see ILO (98th Session) *Application of International Labour Standards (I)*(2009) at 291.

181 Art 13 (13) corresponding to s 3 (b) of R190.

182 See s 3 (c) of R190.

183 *Ministerial Order* (Art 13 (15)) similar to s 3 (d) of R190.

184 See also *Ministerial Order No 68/13* (Art 32 (13)).

185 *ILO Report of the Committee of Experts on the Application of Conventions and Recommendations* (2006) at 189.

ensure internal control of diamonds and to certify the origin of rough diamonds from sources which are free of conflict funded by diamond production.¹⁸⁶

Although the DRC legislations relating to child mining and quarrying described above comply with the international and labour standards, the phenomenon remains a big problem in practice,¹⁸⁷ like street children.

2.5.6 Street children

The situation of street children is considered to be an authentic form of forced labour, especially when these children are engaged in hazardous activities, such as portering, ragpicking or begging.¹⁸⁸

Being perhaps the most serious cases of child labour along with trafficked children,¹⁸⁹ street children constitute a considerable group in the DRC, and their life situation is often extremely dramatic.¹⁹⁰ Furthermore, their numbers are on the increase, mainly because of widespread violent conflicts, the AIDS pandemic,¹⁹¹ witchcraft or sorcery stigmatisation,¹⁹² psychological, physical or sexual abuse, poverty, dysfunctional households and modernisation.¹⁹³

For their survival, these children engage in petty crime, begging or prostitution¹⁹⁴ and other serious prohibited activities, such as selling marijuana and alcohol, and stealing, which puts them in trouble with the law.¹⁹⁵ Clearly, these children are working children given that for their daily survival, street children are prepared to do anything

186 See the Kimberley Process Website at:

http://www.kimberleyprocess.com/background/index_fr.html [Accessed 24 February 2012].

187 See ILO op cit (note 180) at 291.

188 Sanna op cit (note 90) at 120.

189 O Agbu (ed) *Children and youth in the labour process in Africa* (2009) at 16.

190 Kielland and Tovo op cit (note 129) at 117.

191 Ibid.

192 See A Cimpric *Children accused of witchcraft: an anthropological study of contemporary practices in Africa* (2010) at 42-43.

193 See P W Kariuki 'Street children and their families in Nairobi', in S Jones and N Nelson (eds) *Urban poverty in Africa: from understanding to alleviation* (1999), cited in UNCHS *Strategies to combat homelessness* (2000) at 84-87.

194 US Department of State *2010 Country reports on human rights practices- DR Congo* (2011) at 80.

195 M Waddington 'Child witches', child soldiers, child poverty and violence: Street children in crisis in the DR Congo (2006) at 7.

to earn some money, or even food or clothes.¹⁹⁶ Consequently, two categories of working street children emerge. On the one hand, those who are lucky enough to carry out benign and harmless work, such as car wash, help at construction sites or other workplaces, portering, shining shoes or selling biscuits, chewing gum, cigarettes, etc.¹⁹⁷ On the other hand, those who are exposed to harmful, forced, exploitative or abusive labour, such as trafficking for enforced labour and forced prostitution within the country itself and into neighbouring territories.¹⁹⁸

These street children in the DRC are clearly victims of abuse and exploitation of a different kind in total impunity despite the enactment of legislations protecting all children from economic exploitation, and the ratification by the DRC of most relevant international, regional treaties and labour standards.¹⁹⁹

2.6 Legal framework for forced child labour

This section focuses on three main perspectives, namely the international (1), regional (2) standards, as well as the DRC domestic legislation (3).

2.6.1 International standards

Forced child labour is particularly covered by two categories of relevant instruments protecting children, namely the ILO (1) and the United Nations instruments (2).

2.6.1.1 ILO instruments

All forms of child labour are defined in *ILO Convention No. 182* which is supplemented by *the ILO Recommendation No. 190*.²⁰⁰ Furthermore, the *ILO Convention No. 138* sets the age at which children may be legally employed to

196 Kielland and Tovo op cit (note 129) at 117.

197 Ibid.

198 Child Sponsorship, DRC Street children: a short video documentary exploring the situation of the 250,000 street children living in the DRC. Available at http://www.child-sponsorship.com/democratic_republic_of_congo_street_children.html [accessed 20 February 2012].

199 See protection rights, ie keeping children safe from harm: *CRC* (Art 4; 11; 19; 20; 21; 22; 32; 33-38; 40; 41); *ACRWC* (Art 5; 13; 15; 16; 19; 20-28; 30).

200 See Art I (2)(b).

prevent child labour, and this *Convention* is supplemented by the ILO *Minimum Age Recommendation No. 146*. The ILO *Forced Labour Convention No. 29* aims at the suppression of the use of forced or compulsory labour in all its forms within the shortest possible period. The ILO *Convention No. 105* aims at suppressing and not making use of any form of forced or compulsory labour.

Moreover, these ILO standards are covered and reinforced by the *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up* to provide the framework for action to combat child labour.²⁰¹ In addition, children are legally and implicitly protected from forced labour by the United Nations treaties.

2.6.1.2 United Nations instruments

There are a significant number of United Nations instruments that protect children against forced child labour. First, the *Universal Declaration of Human Rights (UDHR)* specifically prohibits slavery under Article 4. The term slavery is to be considered broadly to include contemporary forms of slavery, comprising forced labour, child labour, child servitude, trafficking of persons, sexual slavery, children in armed conflict and sale of children.²⁰² This implies the link existing between forced labour and slavery, which was clearly established in the *Slavery Convention of 1926*.

Article 1(1) of this *Convention* defines slavery as ‘the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.’²⁰³ Thus, forcing someone to work against their will, under the threat of violence or some other form of punishment, amounts to restricting their freedom and exerting a degree of ownership over them.²⁰⁴ Forced labour clearly amounts to a form of slavery that the *1926 Convention* calls upon States to abolish.²⁰⁵

201 ILO op cit (note 100) para 220 at 67.

202 Report of the Special Rapporteur on *Contemporary forms of slavery, its causes and consequences*, established in 2007 by Human Rights Council resolution 6/14.

203 C Welch ‘Defining contemporary forms of slavery: updating a venerable NGO’ (2008) *Buffalo L S Res Paper No. 2008-002* at 39.

204 M Kaye (ed) *Forced labour in the 21st century* (2001) at 1.

205 Ibid.

The other important treaty is the *International Covenant on Civil and Political Rights (ICCPR)*, which under Article 8, prohibits slavery and slave trade in all their forms, servitude, and forced or compulsory labour. Similarly, the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*, under Article 7, protects the right of everyone to the enjoyment of just and favourable work condition. Article 10 (3) also guarantees the protection of children from economic and social exploitation; calls for prohibition and penal sanctions against child labour and work that is harmful, hazardous and detrimental to children.²⁰⁶

The *Optional Protocol to the CRC on the sale of children, child prostitution and child pornography* also protects children against forced labour and calls for the criminalisation and punishment of selling children ‘for the purpose of their engagement in forced labour’.²⁰⁷

The *Programme of Action for the Elimination of the Exploitation of Child Labour*²⁰⁸ urges high priority to be given to the elimination of the most odious or degrading forms of child exploitation, including the employment of children in dangerous occupations or for enforced begging and debt bondage.²⁰⁹ It further calls for action to be directed primarily towards the most dangerous forms of child labour and the elimination of work by children under the age of 10 years, with a view to the total elimination of child labour as prohibited by the provisions of the relevant international instruments.²¹⁰ Clearly, all children must enjoy protection from forced labour and sexual exploitation, as well as the right to education and the opportunity to reach their full physical and mental development.²¹¹

The *Rome Statute* of the ICC implicitly prohibits, as a war crime, the conscription or enlistment²¹² of children under the age of 15 into military service for direct and active participation in hostilities. Similarly, participation in military hostilities by children under the age of 15 is prohibited by *Additional Protocols I and II to the 1949 Geneva*

206 See similar provision under Art 32 of *CRC*.

207 Art 3 (1) (a) (i) (c).

208 United Nations Commission on human rights *programme of action for the elimination of the exploitation of child labour* (1993) E/CN.4/RES/1993/79.

209 Para 3.

210 Para 5.

211 Lin Lean Lim (ed) *The sex sector: the economic and social bases of prostitution in Southeast Asia* (1998) 175.

212 Art 8(2)(b)(xxvi) and 8(2)(e)(vii),.

*Conventions*²¹³ and the *CRC*, under Article 38(2). Therefore, in terms of Article 30 (1) of the *Rome Statute*, perpetrators shall be held criminally responsible and liable for punishment for this war crime provided that the moral element is established.

The recruitment and use of child soldiers has also been considered as crime of enslavement in international law. Thus, the recruitment of children was not the objective in itself, but their recruitment by forcible or coercive means (enslavement) and their use for a particular degrading purpose, ie forced or compulsory labour.²¹⁴ Yet, the *Rome Statute* prohibits enslavement,²¹⁵ sexual slavery and enforced prostitution as crimes against humanity.²¹⁶

Clearly, child soldiers are forced into activities which fall under the definition of slavery, or forced or compulsory labour provided in international labour standards and which are in violation of Article 32 of the *CRC*.

2.6.2 Regional standards

At the regional level, most of the African Human Rights instruments²¹⁷ protect children from any form of abuse, including forced labour. By signing and ratifying these regional treaties the DRC has agreed to protect children from forced labour, but in reality no action has been taken.²¹⁸

The *Report of the African Committee of Experts on the Rights and Welfare of the Child*²¹⁹ considers child labour to be a form of abuse neglect and exclusion for children.²²⁰ This *Report* suggests that a distinction must be made between child work

213 Protocol I (Art 77 (2)); Protocol II (Art 4 (3)(c)).

214 M Happold *Child soldiers in international law* (2005) at 136.

215 Art 7(1)(c).

216 Art 7(1)(g).

217 *Banjul Charter* (Art 18 (3)); *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* (Art 12 (c) and Art 13 (g)); *ACRWC* (Art 15 (1)).

218 IBA and ILAC *Rebuilding Courts and Trust in the DR Congo* (2009)15.

219 African Union *Report of the African Committee of Experts on the Rights and Welfare of the Child* (2005).

220 'Dimension of vulnerability - children in conflict situations' in *ibid*.

for socialisation and child labour, and recommends that interventions be carried out at all levels to ensure the protection of children.²²¹

The *Great Lakes Protocol on the Protection and Assistance to Internally Displaced Persons* (2006) provides for the protection of internally displaced persons, in liberty or not, against slavery or any contemporary form of slavery, including sexual exploitation and forced child labour.²²² So far, the *Protocol* has been signed by 11 states, including the DRC,²²³ while the *Pact on Security, Stability and Development in the Great Lakes Region* has been ratified by the required majority of Member States, including the DRC.²²⁴

Similarly, the *African Union Convention*,²²⁵ under Article 7, calls for the prohibition by members of armed groups of the recruitment and use of children in hostilities, and child trafficking. Furthermore, Article 9(1)(d) calls upon States parties to refrain from, and prevent ‘enforced prostitution, sexual exploitation and harmful practices, slavery, recruitment of children and their use in hostilities, forced labour and human trafficking and smuggling’.

However, according to Article 17(1) the substantive obligations enshrined in the *Kampala Convention* will only be effective upon its ratification by 15 Member States, and these ratifications are needed for the *Convention* to come into force. Yet, so far only seven African Union Member States²²⁶ have ratified the *Convention*, although it has been signed by 31 Member States,²²⁷ including the DRC. Upon entering into force, States parties to the *Convention* ‘will undertake [necessary] steps to incorporate the obligations of the *Convention* into their domestic law....’²²⁸

221 Ibid. Summary of deliberations: social development and children in Africa, para (b).

222 Principle 11 (2)(b).

223 B Jaksa and J Smith ‘Africa: from voluntary principles to binding standards’ in M Couldrey & M Herson (eds) ‘Ten years of the guiding principles on internal displacement (‘GP10’) 18 at 19.

224 Internal Displacement Monitoring Centre *et al The Great Lakes Pact and the rights of displaced people* (2008) at 4.

225 *Kampala Convention* (2009).

226 Chad, Central African Republic, Gabon, Sierra Leone, Somalia, Uganda, and Zambia.

227 African Union ‘The African Union calls on Member states to ratify the *Convention for the Protection of Internally Displaced Persons in Africa*’ *Press Release* N°018/2011 (2012).

228 Art 3(2)(a), (b) & (d), cited in L Groth ‘Engendering protection: an analysis of the 2009 *Kampala Convention* and its Provisions for Internally Displaced Women’, *Int’l J Refugee Law* 23(2)(2011) 221 at 250-51 *infra* 184.

All regional instruments analysed above have been either ratified or signed by the DRC, and the country has provided a legal framework for forced child labour.

2.6.3 DRC National legislation

In the DRC, the protection of children's rights, including from forced labour is guaranteed by both the Constitution²²⁹ and several laws.²³⁰ In stipulating that 'no individual shall be held in slavery or in analogous conditions;²³¹ [...] or be obliged to engage in forced or compulsory labour'²³² the Constitution includes children.

The *Child Protection Act* prohibits the worst forms of child labour, including specifically forced or compulsory labour,²³³ as well as all other worst forms of child labour enumerated in Article 3 of *ILO Convention No. 182*. Moreover, the *Act* protects children from all forms of economic exploitation, ie any form of abusive use of a child for economic purposes.²³⁴ Such abuse particularly concerns workload volume in relation to the child's age, duration of work and working hours, insufficiency or lack of remuneration, interference with the child's education, the child's health or physical, mental, moral, spiritual and social development.²³⁵

The *Labour Code* refers to forced child labour, namely participation in armed conflicts, prostitution, pornography, and drug abuse,²³⁶ as well as to any types of work deemed to be harmful to the health, safety, dignity or morals of children.²³⁷ One of the most important innovations contained in the *Labour Code* is the prohibition and immediate action for the elimination of the worst forms of child labour introduced by the National Labour Council to improve its provisions.²³⁸ This shows clearly the DRC's commitments under the *ILO Labour Convention (No 182)*.²³⁹

229 See Art 16.

230 *Child Protection Act* and *Labour Code*. See IBA and ILAC op cit (note 218) at 18 infra 12.

231 Para 3.

232 Para 5.

233 Art 53 (a).

234 Art 58.

235 Art 58 (2).

236 Art 3.

237 s D.

238 See the Preamble of the *Labour Code*.

239 Global Witness *Digging in corruption: fraud, abuse and exploitation in Katanga's copper and cobalt mines* (2006) at 32.

In order to eradicate the worst forms of child labour, the *Labour Code* provides the establishment of a National Committee²⁴⁰ and gives the Minister of Labour and Social Security the responsibility for enforcing the laws prohibiting the worst forms of child labour.²⁴¹ Moreover, *Ministerial Order 12/CAB-MIN/ETPS/045/08* prohibits any employer from using children for work that exceeds their strength, and that exposes them to high professional risks or is likely to harm their morals.²⁴²

In terms of international obligations, the DRC has incorporated most international and regional treaties described earlier by passing domestic legislations. Therefore, having given effect to the treaties in the national legal system, the DRC is obliged to comply with and enforce provisions concerning child labour.

240 Art 4.

241 Art 5.

242 Art 1.

Chapter Three

FORCED CHILD LABOUR IN THE DRC

In order to understand the notion of forced child labour from the DRC perspective, this Chapter focuses on two key points: causes and consequences of forced child labour (1); and compliance with the DRC legislation on forced child labour (2).

3.1 Causes and consequences of forced child labour in the DRC

Forced child labour, which is caused by various factors, has serious consequences on the children's life, health, growth and development. There is no consensus as to what constitutes the root causes of forced child labour and debates continue throughout the world. The United Nations Secretary-General commented that 'no single factor may fully explain the persistence of child labour...'²⁴³ In fact, the root causes of child labour differ depending on the regions, countries, social or economic status, and this raises on-going debates. In general, child labour is caused by various and complex factors, which are mainly economic, social, and cultural,²⁴⁴ and the same factors contribute to its growth and continuation.²⁴⁵

Poverty is universally regarded as the root cause for forced child labour²⁴⁶ mainly in developing countries, and particularly in Africa where it is considered to be 'a major and ubiquitous causal factor' behind child labour.²⁴⁷ Poverty restricts economic opportunities so seriously that families have no other option than to exploit all possibilities to increase their insignificant incomes.²⁴⁸ The poorest and most vulnerable people are likely to be subjected to forced labour or bondages, which they or even their future generations cannot afford to repay despite hard work; this results

243 United Nations General Assembly op cit (note 92) para 43 at 13.

244 R Rena 'The child labour in developing countries: a challenge to Millennium Development Goals' (Spring 2009) 3(1) *Indus J Management & Social Sciences* 1-8 at 5.

245 Children's Legal Centre *Child right, Issue 103* (1995) at 111. Combating Forced Labour: *ILO Q & A on forced labour* at 3.

246 M Pertile 'Introduction: the fight against child labour in a globalised world' in Nesi *et al* op cit (note 90) at 5.

247 R Salah 'Child trafficking in West and Central Africa: an overview' (2001) at 4.

248 E Harsch 'Child labour in Africa is rooted in poverty' (2001) Vol.15 (3) *Africa Recovery* at 14.

in a cycle of poverty and misery throughout generations.²⁴⁹ The eradication of overall poverty would, therefore, be one of the solutions for overcoming forced labour.²⁵⁰

Child labour also causes poverty because it undermines the opportunities for adult employment and decent wages.²⁵¹ In other words, both ‘poverty and extreme poverty may be a direct consequence of forced labour practices’.²⁵²

Furthermore, the current patterns of globalisation have been mentioned as constituting the root cause for forced child labour.²⁵³ Various studies indicate that ill-organised and informal sectors in a globalised economy characterised by low profits rely on child labour for increasing profits.²⁵⁴ Therefore, businesses put more pressure on children to make profits,²⁵⁵ considering that ‘children are ideal employees for producers as they are cheap, obedient, and rarely strike’.²⁵⁶ But, the pressures of economic globalisation make developing and developed countries turn a blind eye to the enforcement of labour regulations and policies prohibiting forced child labour.²⁵⁷

In the United States for instance, the government has failed to implement and enforce its own laws²⁵⁸ protecting American consumers from goods that are the fruits of forced child labour.²⁵⁹ These laws include the *Trafficking Victims Protection Reauthorisation Act (TVPRA)* requiring publication of lists of goods that are believed

249 Ibid.

250 Ibid.

251 G Oonk *Child labour, trade relations and corporate social responsibility: what the European Union should do?* (2008).

252 ILO op cit (note 81) para 132 at 30.

253 Id para 72 at 18. See also Aaronson S A ‘Globalisation and child labour: the cause may also be a cure’ (2007) *YaleGlobal Online*; cited in M Sackett ‘Forced child labour and cocoa production in West Africa’ in *Topical research digest: human rights and contemporary slavery* (1993) at 94.

254 M Neil Browne *et al* ‘Universal moral principles and the law: the failure of one-size-fits-all child labour laws’ (2004) 27 *Hous. J. Int’l L.* 1 at 27.–28; cited in S Baradaran and S Barclay ‘Fair trade and child labour’ (2011) 43 *Colum. Hum. Rts. L. Rev.* 1 at 16 infra 69.

255 J Forero ‘In Ecuador’s banana fields, child labour is key to profits’ *N.Y. Times*, July 13, 2002, at A1; cited in Baradaran and Barclay op cit (note 254) at 17 infra 76.

256 A Smith, Comment ‘Child labour: the Pakistani effort to end a scourge upon humanity. - is it enough?’ (2005) 6 *San Diego Int. l L.J.* 461, 465; cited in Baradaran and Barclay op cit (note 254) 17 infra 77.

257 L Ronconi *Globalisation, domestic institutions and enforcement of labour law* (2010) at 10.

258 *Smoot-Hawley Tariff Act of 1930*, 19 U.S.C. § 1307 (1997) and its 2000 Amendment (2000 - Pub. L. 106-200).

259 ILRF *Chocolate manufacturers join bush administration in effort to prevent enforcement of US laws banning importation of goods made W - ILRF Press Release* (2005) 1.

to be produced by forced labour or child labour,²⁶⁰ including specific minerals produced in the DRC.²⁶¹

Similarly, these laws include the *Dodd-Frank Wall Street Reform and Consumer Protection Act*²⁶² referring to minerals determined by the Secretary of State to be financing conflict in the DRC or an adjoining country as ‘conflict minerals’.²⁶³ This *Act* further requires American firms to ensure that the minerals they purchase in the region are ‘DRC conflict free’.²⁶⁴ Nevertheless, these legislations remain ineffective in the United States and only a small number of enforcement actions have been taken mainly due to political or economic concerns.²⁶⁵

The other important root causes of forced child labour are based on human rights issues, including discrimination and social subordination,²⁶⁶ social and gender discrimination, labour market failures, and poor people’s exclusion from equitable financial services and social protection.²⁶⁷ The lack of fundamental civil liberties and freedoms²⁶⁸ is also considered to be a cause of forced labour. Therefore, a fundamental strategy to eliminate forced labour would be the social empowerment of actual and potential victims.²⁶⁹

Other root causes of forced child labour include lack of education and educational infrastructure, lack of resources, lack of the rule of law and good governance.²⁷⁰ In the

260 US Department of Labour’s ILAB - OCFT 2011 *US Department of Labour’s list of goods produced by child labour or forced labour* (2011).

261 See *Ibid* at 15-16.

262 Pub. L. No. 111-203, 124 Stat. 1376 (July 21, 2010).

263 S 1502(e)(4)(B).

264 L Yager *U.S. Agencies should take further actions to contribute to the effective regulation and control of the minerals trade in Eastern DR Congo* (2010) 24.

265 M Ellenbogen, Note, ‘Can the tariff act combat endemic child labour abuses? the case of Cote d’Ivoire’ 82 *Tex. L. Rev.* 1315, 1334 (2004); cited in K Mustapha ‘Taste of child labour not so sweet’ (2010) Vol. 87(5) *Wash. U. L. Rev.* 1163 at 1173 *infra* 77.

266 ILO op cit (note 81) para 360 at 78. See ILO and League of Nations *Record of proceedings* Vol. 1 (2005) at 78.

267 ILO op cit (note 81) para 379 at 81.

268 See ILC, Ninety-seventh Session (2008) *Record of proceedings*, at 19.

269 ILO op cit (note 91) para 379 at 81.

270 Business Council for Global Development -Written Submission to US Department of Agriculture, Consultative Group to eliminate the use of child labour and forced labour in imported agricultural products (2010) 4.

DRC, the root causes for forced child labour are basically the same as those mentioned in the Secretary-General's report.²⁷¹

Forced child labour in the DRC also emanates from political instability,²⁷² particularly the war that ravages the country for many years. Many children affected and orphaned by war have been manipulated into forced labour by different armed groups.²⁷³ Child labour also produces tremendous social and political instability given that child labourers are kept in ignorance and bondage, lacked maternal 'naturalness' and 'sensitiveness,' and knew only the routines of 'work and sleep'.²⁷⁴

The use of forced child labour raises questions about the DRC's compliance with the law, as will be discussed in the following subsection.

3.2 Compliance with the DRC legislation on forced child labour

Despite the existence of a comprehensive legal framework and ratification by the DRC of international and regional treaties prohibiting forced child labour, there has been a lack of promptitude in the implementation and an institutional incapacity to enforce the laws.²⁷⁵ Non-compliance or wide disparity between the law on the rights of the child and its effective application in the DRC has been confirmed by some workers and trade union representatives.²⁷⁶ To illustrate this, the dissertation considers the case of the mining industry, and particularly its informal or 'artisanal' sector, where forced child labour is prevalent.²⁷⁷

In terms of the *Mining Code*,²⁷⁸ children do not have legal capacity for artisanal mining. Accordingly, children are not eligible to apply for and obtain mining and/or quarry rights, artisanal miners' cards, traders' cards, as well as the approval as

271 These include poverty, lack of education, public indifference, discrimination, social exclusion, the impact of the HIV/AIDS pandemic on children, violence against children, migration and mobility. See United Nations General Assembly op cit (note 92) para 43 at 13-14.

272 Bass op cit (note 105) at 164.

273 US Department of State *Country report on human rights practices 1999 - DR Congo* (2000) cited in Bass op cit (note 105) at 164 infra 59.

274 Zipf K *Labour of innocents: forced apprenticeship in North Carolina, 1715-1919* (2005) at 134.

275 Coalition to Stop the Use of Child Soldiers 'Mai Mai child soldier recruitment and use: entrenched and unending' (2010) 12.

276 ILCCR *Examination of individual case concerning Convention No 182: worst forms of child labour, DR Congo* (2009).

277 Global Witness op cit (note 239) at 4.

278 Art 27(b).

authorised traders for mineral substances from artisanal mining.²⁷⁹ For the control and inspection of the artisanal mining exploitation, the law refers to the Directorate of Mines as the only authorised entity.²⁸⁰ The law also requires any holder of an artisanal miner card to comply with the regulations regarding safety, health, use of water and the protection of the environment.²⁸¹ Failure by the holder of an artisanal miner card to conduct mining operations in accordance with the code of conduct of the artisanal miner shall cause him the withdrawal of the artisanal miner card.²⁸²

In practice, however, the artisanal mining sector is affected by ‘institutionalised’ corruption and extortion involving officials from the various government departments, who are not prepared to challenge the practice initiated by some miners who enjoy impunity.²⁸³ Even the Inspectorates of Labour who are employed by the Ministry of Labour in each province²⁸⁴ to ensure compliance in the workplace fail to exercise their legal prerogatives and take concrete action against the practice of child labour. The labour unions have also failed to effectively enforce child labour laws,²⁸⁵ and such inactivity confirms the DRC’s failure to respect the *Guiding principles of the Stop Child Labour* campaign.²⁸⁶

The DRC’s failure to comply with these international obligations not only results in impunity, but is likely to cause recidivism or multi-recidivism. It is therefore not surprising that forced child labour is still prevalent in the country, and even encouraged by adults, including parents in total impunity. Consequently, the DRC Government is required to take major steps to adequately enforce the legislation, provide necessary mechanisms and resources for dealing with the phenomenon, and to address the underlying causes of child labour.

279 Ibid.

280 Art 14(3).

281 Art 112(1).

282 Art 416 (2) of the *Mining Regulations*.

283 Global Witness op cit (note 239) at 14.

284 US Department of Labour 2009 *Findings on the worst forms of child labour - DR Congo* (2010) 164-169 at 165.

285 US Department of State Bureau of Consular Affairs, *DR Congo: human rights report* (2010).

286 See detailed *Guiding principles of the Campaign ‘Stop child labour – school is the best place to work’* online at <http://www.stopchildlabour.org/Repository/Policy-documents-and-recommendations> [accessed 12 February 2012]; see also G Oonk and J van der Schatte (eds) ‘*Out of work and into school*’ - *action plan for companies to combat child labour* (2008); or Oonk op cit (note 251) at 23.

Chapter Four

LEGAL PROTECTION AND ENFORCEMENT AGAINST FORCED CHILD LABOUR IN THE DRC

As the legal protection of children against forced labour is not effectively implemented in the DRC, it is important to explain the main reasons thereof. Given that weak enforcement mechanisms are the main obstacle to effective legal protection,²⁸⁷ adequate legal enforcement of child labour is likely to decrease the rate of child labour in the DRC.²⁸⁸

Nevertheless, there are those who, while approving the importance of strong legislation and effective enforcement, suggest that there is a need to supplement them with efforts on other fronts as well.²⁸⁹ Three durable solutions are therefore suggested for dealing with the worst forms of child labour: development of an understanding of the harmful and abusive aspects of child labour (1); consolidation of normative guidelines into national, regional and international legal frameworks in order to define and mandate basic child protection, ie legal reforms (2); and enforcement of legal protection of children (3).²⁹⁰

4.1 Understanding of the harmful aspects of forced child labour

As described throughout this dissertation, forced child labour is so prevalent in the DRC that one may wonder whether the Congolese people in general, the children and the offenders in particular, understand the harmful aspects of it. Furthermore, other key questions would be whether the people are informed of the seriousness of the issue and whether the State has taken the responsibility to inform, educate, and communicate adequately with the nation in an effort to combat the phenomenon and promote a change in behaviour.

287 V Forastieri *Children at work: health and safety risks* (2002) at 146.

288 Bass op cit (note 105) at 67.

289 M Lansky 'Child labour: How the challenge is being met' (1997) Vol. 136 (2) *Int'l Lab. Rev.* 233 at 241.

290 Kielland & Tovo op cit (note 129) at 146.

In other literature this strategy is known as ‘advocacy, mobilisation and empowerment,’ which is used - as the first step towards protecting children from exploitative labour – ‘to bring their situation to the attention of both government and public, mobilising a concerned constituency to assist them and defend their rights.’²⁹¹ Also, a number of ILO instruments provide similar measures, namely ‘information, sensitisation and mobilisation’ of the ‘general public,’²⁹² ‘the public opinion and concerned groups, including children and their families’.²⁹³

In the DRC these strategies seem to be far from effective, as the majority of citizens live in ignorance and indifference about forced child labour.²⁹⁴ The absence of an awareness raising campaign and the provisions of the *Child Protection Act* and other legislative texts is one the causes of the DRC government’s failure to implement the *Act*’s and other legislative provisions.²⁹⁵

Nevertheless, the *Katanga Provincial Worst Forms of Child Labour Committee* has successfully conducted awareness raising campaign to combat child labour.²⁹⁶

Moreover, a tripartite dialogue on child labour between unions, enterprises, and the ILO, with the Government was organised in 2009 upon the ILO’s initiative in Katanga province, to discuss the eradication of child labour.²⁹⁷ But, the cooperation between the ILO and the DRC government was seriously impaired by the closure of the ILO office in Lubumbashi due to a lack of funding following the tripartite dialogue.²⁹⁸

Nevertheless, the DRC has put into place strategies aimed at providing information on the nature and extent of child labour in the country: the *Committees to Combat the Worst Forms of Child Labour* (1); and a joint commission (2).

291 Myers W ‘An agenda for action’ in Myers (ed) *Protecting working children* (1991) at 154 & 158.

292 See *ILO Recommendation No 190* (Art 15 (a)).

293 *ILO Recommendation No 190* (Art Art 2 (e)).

294 CRC 2009, [CRC/C/COD/CO/2] para 10 at 3. See also US State Department *2010 human rights report: DR Congo* at 77.

295 Ibid.

296 US Embassy- Kinshasa, *reporting* (2011) para 12 at 20; cited in US Department of Labour *2010 Findings on the worst forms of child labour - DR Congo* (2011) at 192 infra 1495.

297 US State Department op cit (note 294) at 87.

298 Ibid.

4.1.1 The Committees to Combat the Worst Forms of Child Labour.

The *Committees to Combat the Worst Forms of Child Labour* was established in 2006 by the Government both at national and provincial levels for coordinating a number of responsibilities. These include the compilation of data on the nature and extent of child labour; the prevention and withdrawal of children from engaging in the worst forms of child labour; public awareness campaigns; and capacity building of government officials and civil society to combat exploitative child labour.²⁹⁹

Moreover, the Government authorised the establishment of the *Provincial Worst Forms of Child Labour Committees* with the exact same responsibilities,³⁰⁰ operating in Katanga, Kasai-Oriental, and Orientale (Ituri District) Provinces.³⁰¹ These Committees which are responsible for combating the Worst Forms of Child Labour at the provincial level are composed of staff from several provincial ministries and community members.³⁰²

In supporting the *National Committee to Combat the Worst Forms of Child Labour (NCCL)*, the Minister of Labour suggested members for its permanent secretariat through a Decree issued in 2010; but paradoxically the Government failed to finance the NCCL's approved work plan.³⁰³ Similarly, the Government failed to provide financial support to a 3-year work plan and budget created by the *Provincial Worst Forms of Child Labour Committee*, which was established in Mbuji Mayi in 2010 upon the same government's authorisation.³⁰⁴

299 CRC op cit (note 50) para 188; cited in US Department of Labour op cit (note 296) at 191 infra 1467.

300 Save the Children and Solidarity Centre *Combating exploitative child labour through education in the DRC (REETE)* (2010) 4 at 13; cited in United States Department of Labour op cit (note 296) at 191 infra 1471.

301 United States Department of State op cit (note 107) at 132.

302 Ibid.

303 Save the Children and Solidarity Centre op cit note (300) at 13. See also US Embassy- Kinshasa op cit (note 296) para 8.

304 United States Department of Labour op cit (note 296) at 191.

4.1.2 A joint commission

A joint commission³⁰⁵ was established by the Government for coordinating child protection interventions, with particular focus on orphans and vulnerable children.³⁰⁶ The commission's target is relevant given that orphans and vulnerable children are ones of the most exposed to forced child labour and a significant number of these children are found among street children, as stated elsewhere in this dissertation.

However, these strategies have proved insufficient to inform and educate the Congolese people on forced child labour and its harmful effects on children's health and development. Practical experience shows that reliable statistical data and adequate information on forced child labour have been missing for many years in the DRC. It is also likely that neither the *Committees to Combat the Worst Forms of Child Labour* nor the joint commission have done much in this regard. Yet, the lack of comprehensive data and information on the subject constitutes a serious gap in the effective implementation of any national programme on the elimination of child labour.³⁰⁷

In order to address this lack of information the Government pledged to organise social sensitisation and mobilisation at all levels in cooperation with the ILO on the harmful effects of child labour, and to conduct investigations into obtaining reliable statistical data.³⁰⁸ Furthermore, the Government has used various strategies to disseminate the CRC and raise public awareness of children's rights. These strategies include, 'the translation of the Convention into the four national languages; the distribution of leaflets, posters and cartoons strips on the Convention; the training of public and private actors (judges, civil servants, police officers, members of NGOs, children); the integration of the Convention into the school programme; radio and television programmes, through the "Friends of Children" journalists' network'.³⁰⁹

305 Working Group on juvenile justice composed respectively of members of the Department of Justice, Social Affairs, Internal Affairs and other ministries concerned, as well as donors and child protection agencies.

306 World Bank *Project Appraisal Document* 10; cited in op cit (note 296 at 191 infra 1470).

307 Uganda Bureau of Statistics (UBOS) '*Child labour in Uganda*' (2001) at v.

308 ILCCR op cit (note 276).

309 CRC *Written replies by the Government of the DRC concerning the list of issues to be taken up in connection with the consideration of the 2nd periodic report of the DRC (CRC/C/COD/2)* (2008) at 5.

The Government efforts towards understanding forced child labour and its consequences are undermined by major challenges that characterise poor countries. These include widespread illiteracy, poor access to communication, limited public outreach, lack of ownership, trust and confidence in the Government and its institutions, namely the police and the justice system.³¹⁰

Many, including civil society and Human Rights organisations are constantly calling for comprehensive institutional reform, as well as social and economic transformation in the DRC.³¹¹ In this regard, the DRC's international partners are invited to prioritise democratisation and institutional reform in their dialogue with the current government and to link these to the conditions for development aid.³¹² Obviously such calls for comprehensive transformation include legal reforms or consolidation of normative guidelines.

4.2 Consolidation of normative guidelines into national (1), regional (2), and international legal frameworks (legal reforms) (3).

4.2.1 At internal/domestic or national level

Like any human society, the DRC needs normative standards for the protection of children's rights in the context of forced labour and in addressing their needs for their best interest. All children, without exception, are entitled to equal access to first and second generation rights and shall be viewed and protected as children first and foremost.³¹³ The principal normative standards of child protection are equally applicable to victims of forced labour.³¹⁴

The enactment by the DRC of new child labour laws and policies has resulted in a long and progressive process, which required hard work and perseverance, and faced with various challenges and obstacles. The process consisted mainly in developing and ratifying international treaties, charters, declarations, and conventions, and then

310 Kielland and Tovo op cit (note 129) at 153.

311 M Dizolele *DRC needs security sector reform not Dodd-Frank* (2012).

312 ICG *Congo: A stalled democratic agenda* (2010).

313 Human Rights Council *Thematic study of the Office of the U.N. High Comm'r for Human Rights on discrimination against women* U.N. Doc. A/HRC/15/40 (2010) at 5.

314 Ibid.

incorporating them into national legislation.³¹⁵ For this to happen, the DRC legislators had to amend existing legislations, carry out legal reforms and consolidate normative guidelines.

Concerning protection of children against forced labour, the promulgation of the *Child Protection Act* in January 2009 marks a significant turning point in the DRC legislative history. This *Act* has significantly strengthened legal protection for children from harm, abuse and exploitation in the DRC³¹⁶ and has also recognised the importance of the CRC.³¹⁷

As mentioned before, the DRC has taken measures to harmonise legislation relating to child labour and adapt it to the international and labour standards. For instance, the harmonisation of domestic legislation with the *CRC* in the provisions of the *Labour Code*, which *inter alia* raised the minimum employment age from 14 to 16. It is argued that significant harmonisation has been achieved with the passing of the *Child Protection Act*.³¹⁸

Furthermore, the consolidation of normative guidelines into the national framework has been effective through judicial decisions. Thus, international human rights conventions and labour legislations have been invoked directly by judges and magistrates in their judgements rendered in domestic courts and tribunals. For instance, a magistrate in the Magistrate's Court of Assossa³¹⁹ in Kinshasa rejected criminal proceedings against a 17 year old child by invoking articles 2 and 17 of the *ACRWC*.³²⁰ The minor in question was then returned to the Prosecutor's Office for referral to the juvenile court.³²¹

315 See comments in Kielland and Tovo op cit (note 129) at 153.

316 Coalition to Stop the Use of Child Soldiers op cit (note 275) at 11-12.

317 See Human Rights Council (2010): A/HRC/15/29 at 6.

318 CRC op cit (note 309) at 3.

319 See Magistrate's Court of Kinshasa/ Assossa, R.P. 4215/IV of 3 April 2006; cited in Ibid.

320 These provisions of the *African Charter*, as published in the Official Journal of the DRC following ratification under *Decree-Law No 007/01* of 28 March 2001, establish 18 years as the minimum age of criminal liability.

321 CRC op cit (note 309) at 3.

Since the DRC is a monist legal system, the international agreements and treaties to which it has ratified take precedence over domestic laws,³²² and this is clearly stipulated in the Constitution.³²³ Therefore, international agreements and treaties duly ratified by the DRC are directly incorporated into domestic legislation and automatically applicable by the national judicial system.³²⁴ Consequently, the DRC judges have directly applied international treaties and cited international case law in their rulings, as illustrated in numerous decisions rendered by the courts. The most notable examples are two cases³²⁵ in which the accused was convicted in accordance with the provisions of the *Rome Statute* of the ICC.³²⁶

4.2.2 At regional level

The *ACRWC*, described as the first regional binding instrument, endorses the *CRC*. Both instruments, therefore, complement each other in contributing to the legal framework for promoting and protecting children's rights in Africa³²⁷ and particularly in this context for prohibiting and eliminating forced child labour. From a legal point of view the *African Charter* was adopted to deal with issues of particular interest and importance to children in Africa, and which the *CRC* omitted, such as a compulsory minimum age for military service.³²⁸ Under Article 1, the *Charter* obliges State Parties to incorporate the provisions into their national legislations, and this, in most cases, requires legal reforms or constitutional amendments. In terms of this provision, being an effective party to the *Charter*, the DRC is obliged to recognise children's rights, freedoms and duties enshrined therein and undertake the necessary legislative and other measures to give effect to its provisions.

322 H Kritzer 'Democratic Republic of Congo (Kinshasa)' in H Kritzer (ed) *Legal Systems of the World: A political, social, and cultural encyclopedia* – vol I (2002) 332 at 335.

323 Art 215.

324 2006 Constitution (Art 153 (4)).

325 See *Ituri District Military Prosecutor v Kahwa Panga Mandro* (2006); *Military Prosecutor v Bongu Massaba* (2006); cited in M Killander (ed) *International law and domestic human rights litigation in Africa* (2010) at 8 infra 33.

326 Avocats sans Frontières 'Case study: the application of the Rome Statute of the ICC by the courts of the DRC' (2009) at 10 infra 16.

327 Olowu D 'Protecting children's Rights in Africa', *Int'l J Child. Rts* (10)(2002); cited in Gallinetti op cit (note 111) at 30 infra 101.

328 Viljoen F *International Human Rights Law in Africa* (2007) at 262.

Similarly, the *Banjul Charter* calling for the protection of children's rights as stipulated in international declarations and conventions³²⁹ obliges State parties to recognise the rights, duties and freedoms enshrined in it and to undertake the necessary legislative or other measures to give effect to its provisions.³³⁰

Furthermore, in order to ensure fulfilment by States parties in their obligations regarding the protection of children's rights against forced labour, two oversight and accountability mechanisms have been established. On the one hand, the *African Commission on Human and Peoples' Rights* was established by the *Banjul Charter* to ensure the promotion and protection of human and peoples' rights throughout Africa.³³¹ On the other hand, an *African Committee of Experts on the Rights and Welfare of the Child* (the Committee) was established within the former OAU (now AU) to promote and protect the rights and welfare of the child as articulated in the *ACRWC*.³³²

Furthermore, an agreement exists between the *Southern African Development Community (SADC)* and its member States³³³ to take necessary measures aimed at combatting and eventually eliminating child labour.³³⁴ The member States having, therefore, identified four main causes of child labour in their region, namely poverty; lack of adequate educational facilities; demographic and migratory patterns; and the HIV/AIDS pandemic, expressed the need to take urgent action against these causes.³³⁵ Thus, a number of SADC member States adopted policies and took policy initiatives, such as the request of technical cooperation with the ILO's *IPEC*.³³⁶ Four countries³³⁷ in particular have made and are making the effort of conducting surveys on child

329 Art 18 (3).

330 Art 1.

331 Gallinetti op cit (note 111) at 34.

332 Ibid at 35.

333 SADC Member States are: Angola, Botswana, DRC, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, United Republic of Tanzania, Zambia and Zimbabwe; see online at <http://www.sadc.int/english/about-sadc/#> [accessed 13 March 2012].

334 Record of proceedings of the meeting of ministers and social partners of the ELS (1997) 2.6; cited in J Kooijmans *Definitions and legal provisions on child labour in Southern Africa* (1998) at 8 infra 9.

335 Kooijmans op cit (note 334) at 8-9.

336 Ibid at 9.

337 Malawi, Namibia, South Africa and Zimbabwe.

labour, which form the basis for the development of comprehensive child labour policies.³³⁸

Moreover, a number of SADC Governments, including Zimbabwe, have established an interdepartmental steering committee aimed at streamlining government policies on child labour.³³⁹ However, there is still fragmentation and a lack of adequate comprehensiveness of that policy approach and only Tanzania has so far adopted the stated policy objectives aimed at addressing the child labour issue on the basis of national governmental and non-governmental platforms.³⁴⁰ Given the complexity of the causes of child labour, there is a necessity to involve all sectors of society in policy development and implementation.³⁴¹

In order to combat child labour in the region and considering the commonalities in approaches to child labour in the region, the following recommendations have been made to SADC member States:

- To adopt a common definition and approach in their respective legislations, particularly regarding the definition of a child.³⁴²
- To strengthen their respective legislative framework, with focus on the minimum age for admission to employment, the question of dangerous work, special provisions to address the most hazardous forms of child labour, strengthening of enforcement of legislation.³⁴³
- To strengthen their cooperation in the area of exchange of information; of development of a SADC Code of Conduct on Child Labour; of harmonisation of legislation; and of strengthening of the effectiveness of labour inspectorates.³⁴⁴

338 Kooijmans op cit (note 334) at 9.

339 Ibid.

340 Ibid.

341 Ibid.

342 Id at 15

343 Id at 16-19

344 Id at 19-20

4.2.3 At international level

Regarding the fight against forced child labour, international law has progressively completed reforms and consolidated normative guidelines in order to facilitate the implementation of international legal provisions by State parties.³⁴⁵ One of the most important and notable reforms is the parallel made between the prohibition on forced [child] labour and the prohibition on slavery.³⁴⁶ Moreover, the institutional division of competence between the ILO dealing with forced labour and the United Nations dealing with slavery has been addressed.³⁴⁷ This has resulted in the United Nations significantly integrating, expanding and inspiring ILO standards, and consequently including the fight against child labour in the United Nations human rights instruments, as a real human rights issue.³⁴⁸

With regard to the implementation of ILO standards on the worst forms of child labour, the *ILO Convention 182* is based on other ILO instruments³⁴⁹ and on the *CRC*.³⁵⁰ The *ILO Convention 182* calls for prohibition and elimination of the worst forms of child labour.³⁵¹ Similarly, the *1926 Slavery Convention* calls upon State Parties to ‘take all necessary measures to prevent compulsory or forced labour from developing into conditions analogous to slavery,’ and to eliminate compulsory or forced labour except for public purposes.³⁵²

As described above, national, regional and international legal frameworks protecting children against forced labour are broadly in place, and have established mechanisms for imposing their enforcement. The key question is therefore whether the DRC has the political will to implement these and strong institutional capacity to enforce them so that children may effectively be protected against forced labour. This is indeed a

345 L Henkin; cited in M Wabwile *Legal protection of social and economic rights of children* (2010) at 79 infra 10.

346 ILO Global Report 2001, at 9-12; cited in Cullen op cit (note 7) at 24.

347 Cullen op cit (note 7) at 32.

348 Fodella A ‘Freedom from child labour as a human right’ in Nesi *et al* op cit (note 90) at 204.

349 In particular *ILO Convention 138*.

350 *ILO Convention 182*, Preamble; cited in Fodella loc cit at 212 infra 55.

351 Art 1; cited in Fodella op cit (note 348) at 213 infra 56.

352 Art 5 (1)

crucial aspect in the fight against worst forms of child labour that the DRC has to consider.³⁵³

4.3 Enforcement of legal protection of children

With the ratification of most of international and regional treaties as well as key ILO conventions, and the adoption of legislations and regulations prohibiting forced child labour, the DRC seems to be in compliance with these instruments.³⁵⁴ The ratification of international law and labour instruments is indeed a positive development in the fight against forced child labour because these instruments provide the international framework for enforcement of child labour laws.³⁵⁵

Furthermore, the DRC legislation, like most national legislations, contains specific measures to facilitate the enforcement of child labour provisions, as well as strategies for enforcement.³⁵⁶ However, even with such comprehensive enforcement mechanisms the DRC encounters serious difficulties in enforcing child labour laws,³⁵⁷ and these obstacles or challenges are developed in this section.

As legislation is not the only solution to child labour and for proper enforcement of child labour laws, other aspects of life need to be considered, such as compulsory schooling.³⁵⁸

International treaties, including the *ILO Convention No. 182*, require States Parties to take a wide range of actions,³⁵⁹ including: the criminal prosecutions of violators (1); protective measures for children caught up in exploitative child labour (2); education (3); respect and enforcement of core labour standards in the workplace (4); legislative changes (5), and labour inspection (6).³⁶⁰ In order to critically analyse the DRC's response to international law positive obligations addressing the issue of forced child labour, an elaborate discussion is needed for each of these actions.

353 Coalition to Stop the Use of Child Soldiers op cit (note 275) at 12.

354 Bass op cit (note 105) at 67.

355 ILC op cit (note 148) at 81.

356 Ibid.

357 Ibid.

358 Basu K and Van P H 'The economics of child labour: Reply' (1999) 89 (5) *Am Econ R* 1386-8; cited in Kielland and Tovo op cit (note 129) at 143 infra 4.

359 Cullen op cit (note 86) at 100.

360 Ibid.

4.3.1 Criminal prosecutions

Criminal prosecutions have generally a privileged status in international human rights law³⁶¹ as appropriate responses to human rights violations. Moreover, the impact of international law has been very strong over the past years in the area of prosecution of perpetrators of abusive child labour and the imposition of clear obligations on states to prosecute.³⁶² This is obvious considering the detailed manner in which criminal laws obligations are drafted in the relevant treaties, such as treaties on trafficking in persons, commercial sexual exploitation of children and child soldiers.³⁶³ Consequently, there seems to be a stronger commitment by states to address the criminal law aspects of child labour rather than the protective ones.³⁶⁴

Most ILO treaties call for the provision and application of penal sanctions for the use of forced child labour,³⁶⁵ which member States are required to consider as a criminal offence.³⁶⁶

Does the DRC child labour legislations relating to penalties in compliance with international labour instruments? The Constitution obliges the Government to bring to justice the perpetrators and their accomplices for acts of violence against children.³⁶⁷ Moreover, the *Labour Code* prohibits the worst forms of child labour, including forced child labour and imposes a penalty of imprisonment for a maximum of six months and a fine of 30,000 CF³⁶⁸ and some statutes provide for prosecution of the worst forms of child labour.³⁶⁹

In practice, despite the Juvenile Court (TPE) President's statement³⁷⁰ that there is no record of any penalties imposed by DRC jurisdictions for forced child labour, there have been a few court cases on the matter. In 2007 people from across the DRC came

361 See Cullen op cit (note 86) at 122.

362 Cullen op cit (note 7) at 268.

363 Cullen op cit (note 86) at 100.

364 Ibid.

365 See ILO *Convention 182* (Art 7(1)); ILO *Convention 29* (Art 25); ILO *Convention 138* (Art 9(1)).

366 ILO *Recommendation No 190* (Art 12).

367 Art 41(6).

368 Art 326.

369 US Department of Labour 2005 *Findings on the worst forms of child labour - DR Congo* (2006) at 123.

370 Statement made via a telephonic conversation in Kinshasa on Friday, 6 July 2012.

to Goma to plead their cases before a panel of justices and the court registered 105 cases concerning *inter alia* forced child labour, but the outcome is unknown to date.³⁷¹ In another case, a Congolese woman was arrested by child protection police in Bukavu and transferred to court for prosecution for allegedly tricking a 13-year-old girl to Burundi to force her into prostitution.³⁷² In March 2009, a nightclub owner was arrested in Bukavu for alleged forced prostitution of 10 girls and 7 boys in his facility. Despite arresting the suspect, no one knows anything about the outcome of this case to date, but the nightclub has reopened.³⁷³ In June 2009, a military tribunal in Kisangani charged, but did not convict five members of Mai-Mai militia group for allegedly perpetrating acts of forced labour against the local population, including children.³⁷⁴

Cases concerning forced enrolment and conscription of children as soldiers and their use in forced labour during hostilities have been dealt with by DRC's courts while some others have been referred to the ICC.³⁷⁵ At the national level, on 3 June 2009 the Kisangani military tribunal convicted and sentenced five former *Mai-Mai* combatants charged *inter alia* with forced labour considered as a crime against humanity committed in the province in 2007.³⁷⁶ With regard to civilian courts, a by-law was signed by the Prime Minister in 2010 creating juvenile courts for children in conflict with the law and victims of abuse, including the worst forms of child labour. The first such court was opened in Lubumbashi and heard 190 cases between March and September 2010.³⁷⁷

However, DRC has not shown complete compliance with the minimum standards for the elimination of forced child labour nor significant efforts to do so.³⁷⁸ Furthermore, there is no evidence of any progress from the State in prosecuting and punishing forced child labour offenders, particularly members of the national army; providing protective services for the vast majority of victims; or raising public awareness of

371 Terzieff J 'Rights & wrongs: China, Congo, Darfur and Uganda' (2007) *Wld Pol R Excl.*

372 US Department of State *Trafficking in persons report 2010 - DR Congo* (2010) at 118.

373 *Ibid.*

374 *Ibid.*

375 See for instance, *Prosecutor v. Thomas Lubanga Dyilo* op cit (note 11).

376 United States Department of State op cit (note 372) at 118.

377 U.S. Embassy- Kinshasa op cit (note 296) at 192 infra 1496.

378 US Department of Labour op cit (note 369) at 123.

forced child labour.³⁷⁹ In fact, some FARDC commanders accused of forced recruitment and abuse of hundreds of children in forced labour³⁸⁰ kept their leadership positions within the army,³⁸¹ and were not investigated, disciplined in any way, or brought to justice.³⁸²

Clearly, the Ministry of Labour and all other governmental departments in charge of children's protection have failed to fulfil their respective mandates.³⁸³ On the one hand, the Ministry of Labour has failed to come up with a comprehensive national action plan to deal with child labour, and lacks dedicated child labour inspection service.³⁸⁴ On the other hand, other government agencies responsible for combating child labour have failed to conduct inspections and investigations because of insufficient budget.³⁸⁵

The culture of impunity prevails in the DRC considering consistent violation of laws prohibiting forced child labour by many local and foreign companies and individuals. The reasons for this impunity include poor training of Government inspectors who are easily suborned or overruled³⁸⁶ and the ineffectuality of governmental institutions responsible for regulating and supervising the mining sector.³⁸⁷ Moreover, while it is vital to fight impunity through national judicial mechanisms, the DRC justice system is limited to achieve this goal due to major flaws, such as corruption, nepotism, lack of human and material resources, interference from the authorities, etc.³⁸⁸

Although prosecuting perpetrators is considered to be an appropriate response to exploitative forms of child labour, it is not a complete response to the needs of

379 Ibid.

380 US Department of State op cit (note 11) at 15.

381 Id at 12.

382 UN Security Council *Final Report UN Group of Experts – DRC*, para 321-22; cited in US Department of Labour op cit (note 284) at 164-69 infra 1222.

383 See in Department of Labour op cit (note 284) at 165 infra 1220 & 1221.

384 US Department of State op cit (note 11) at 43.

385 Ibid.

386 RAID (2009) 'Chinese mining operations in Katanga DR Congo' (2009) 2; cited in J-P Okenda (ed) 'Report on the violation of the rights of workers in the Chinese companies in Katanga and the imbalance in the DRC- China Consortium Agreement', in S Marks (ed.) *Strengthening the civil society perspective: China's African impact* (2009) 5-27 at 5.

387 World Bank 'DRC: growth with governance in the mining sector' (2008); cited in RAID loc cit infra 20.

388 Borello F 'A first few steps: the long road to a just peace in the DRC' (2004) at 16.

children who are the victims of human rights violations.³⁸⁹ There must also be protective measures for children caught in exploitative child labour.

4.3.2 Protective measures

The protective measures in this context concern children involved in (or victims of) abusive or exploitative child labour. As such, they shall be distinguishable from protective measures concerning child victims and witnesses in criminal justice processes.³⁹⁰

In fact, there is a wide range of protective measures for children trapped in abusive or exploitative forms of child labour. Some of these measures may be identified as social protection measures, such as social protection systems provided by the Government to support vulnerable families, especially in times of crisis and to ensure that adults have a chance at decent work.³⁹¹

For a complete eradication of child labour these measures need to be combined with the effective enforcement of laws that protect children.³⁹² In fact, protective measures are provided for by international (1), regional (2), international labour standards (3), as well as the DRC domestic legislation (4).

4.3.2.1 International United Nations treaties

The *UDHR* makes provision of protective measures in the form of social protection measures under Article 25, as its core child protection activities considerably overlap with social protection.³⁹³ This provision contains the right to a standard of living adequate for health and well-being, including food, clothing, housing and medical care and necessary social services, and the right to security in specific events.³⁹⁴ It

389 Cullen op cit (note 86) at 123.

390 Ibid at 114-15.

391 L Cox 'Combat exploitative child labour with human rights demand dignity, economic, social & cultural rights' (2010).

392 Ibid.

393 L Blank *et al* 'The case for social protection for children' (2011) in Handa S *et al* (eds) *Social protection for Africa's children* 15-27 at 23.

394 Art 25 (1).

also contains the right of motherhood and childhood to special care and assistance, and the right of all children to the same social protection.³⁹⁵

The *CRC* provides protective measures (legislative, administrative, social and educational) for the child from economic exploitation and hazardous or harmful work.³⁹⁶ The *Convention* also provides all appropriate national, bilateral and multilateral measures for protecting the child from all forms of sexual exploitation, child prostitution and child pornography.³⁹⁷ Similarly, the same measures are provided for to prevent child trafficking.³⁹⁸ The *Convention* further calls for feasible protective measures for children under the age of 15 years from recruitment into State's armed forces and from direct participation in hostilities, for those who are affected by an armed conflict.³⁹⁹ Physical and psychological recovery and social reintegration are called for as protective measures from child exploitation, abuse, or child soldiering.⁴⁰⁰

Furthermore, the *Convention* provides for social protection measures, namely benefits from social security, including social insurance.⁴⁰¹ For children temporarily or permanently outside of their family environment, such as street children, the *Convention* provides for special protection and assistance, and alternative care including, foster placement, *kafalah* of Islamic law, adoption or placement in suitable institutions for the care of children.⁴⁰²

Protocol to Prevent, Suppress and Punish Trafficking in Persons provides for victims of child trafficking the following protective measures: the physical, psychological and social recovery, including appropriate housing; counselling and information in a language that the victims may understand; medical, psychological and material assistance, and educational opportunities; care; physical safety within national territory; possible compensation for damage suffered.⁴⁰³ In case of transnational child

395 Art 25 (2).

396 Art 32.

397 Art 34.

398 Art 35.

399 Art 38.

400 Art 39.

401 Art 26(1).

402 Art 20.

403 Art 6.

trafficking, protective measures include temporary or permanent residence;⁴⁰⁴ voluntary repatriation within a reasonable time;⁴⁰⁵ travel documents or other authorisation for ill-documented victims.⁴⁰⁶

Article 6 of *Optional Protocol to the CRC on the involvement of children in armed conflict* mentions all necessary legal, administrative and other measures as protective measures for child soldiers.⁴⁰⁷

The *ICCPR* provides more general protective measures as required by the child's status as a minor.⁴⁰⁸ *United Nations Human Rights Committee*⁴⁰⁹ implicitly suggests a link between the provision and a more general prohibition of child labour exploitation.⁴¹⁰

The *ICESCR* also calls for special protective measures for all children from economic and social exploitation.⁴¹¹

4.3.2.2 Regional instruments

The *ACRWC*, under Article 15 (1) provides protection measures (legislative and administrative)⁴¹² for every child from all forms of economic exploitation and hazardous or harmful work. Article 16(1) provides for specific legislative, administrative, social and educational measures for protecting children from abuse and torture.⁴¹³

Furthermore, the *Ouagadougou Action Plan to Combat Trafficking in Human Beings, Especially Women and Children (The Ouagadougou Action Plan)* provides a number

404 Art 7 (1).

405 Art 8 (1).

406 Art 8 (4).

407 Para 3.

408 Art 24 (1).

409 HRC *CCPR* General Comment No 17: Art 24 (Rights of the Child), cited in Fodella op cit (note 348) at 205 infra 12.

410 See HRC *Concluding observations on Uganda, A/59/40 vol. I (2004) 47*, § 70(20); cited in Fodella op cit (note 348) at 205-6 infra 14.

411 Art 10(3).

412 Art 15 (2).

413 Art 16 (2).

of protective measures for victims of child trafficking in Africa. Article I (10) calls for the establishment by States of rehabilitation centres to assist victims of child trafficking, and the facilitation of their recovery and social reintegration. Article II further calls for their identification, repatriation,⁴¹⁴ short and long-term, appropriate, psychological medical and social assistance for full recovery,⁴¹⁵ temporary or permanent residence on humanitarian and compassionate grounds.⁴¹⁶

The *Banjul Charter* also makes provision for social protection measures and calls for State parties to take the necessary protective measures for people's health, including children.⁴¹⁷ The *Charter* calls not only for protection of the family and its physical and moral health, for protection of children's and women's rights, but also for special protection measures for the disabled, including children.⁴¹⁸

4.3.2.3 International labour standards

ILO *Convention (No.182)* requires ratifying States to take all necessary measures for effective implementation and enforcement of the *Convention*.⁴¹⁹ Such measures should include the rehabilitation, social integration, and free basic education or vocational training for the children concerned.⁴²⁰ The *ILO Recommendation No. 190* mentions 'the programmes of action aimed at, *inter alia*, removing children from the worst forms of child labour, protecting them from reprisals and providing for their rehabilitation and social integration through measures which address their educational, physical and psychological needs'.⁴²¹

Other fundamental and widely ratified ILO Conventions, which are crucial in protecting children from forced labour are silent on protective measures for children exposed to exploitative child labour.

414 Para 4.

415 Para 7.

416 Para 8.

417 Art 16.

418 Art 18.

419 Art 7 (1).

420 Art 7 (2) (b) and (c).

421 Art 2 (b).

4.3.2.4 DRC domestic legislation

Protective measures for children caught up in forced labour are guaranteed by various domestic legal texts (1), and practical steps (2) have been taken in this regard.

4.3.2.4.1 Domestic legal texts

First of all and as stated earlier, the Constitution obliges the Government to protect children in difficult situations.⁴²²

The definition of ‘children in difficult situations’ who need special protection, is provided in Article 62 of the *Child Protection Act*, which specifically or implicitly refers to following categories: street children;⁴²³ rebellious children;⁴²⁴ unprotected children;⁴²⁵ abused children; child victims of economic or sexual exploitation; children accused of witchcraft; abused child mothers or pregnant children;⁴²⁶ children without family or other support; children with disabilities; drug addicted children; and orphaned children.

For the protection of these children, the *Child Protection Act* provides special measures, including internment (or placement), rehabilitation and social reintegration.⁴²⁷ The *Code* specifies that the State has the responsibility to ensure rehabilitation and reintegration of children in difficult and /or exceptional situations.⁴²⁸ In terms of the implementation, this *Code* provides that special protection is realised through State's supervision mechanisms as provided by law, social placement and other appropriate support mechanisms.⁴²⁹

Social placement, in particular, is regulated by an *Order* signed by the Minister of Social Affairs with special emphasis on the regularity of its inspection and minimum

422 Art 41(6).

423 See para 1 and para 3.

424 See para 2.

425 See para 4.

426 Para 8.

427 Art 64 (1).

428 Art 73.

429 Art 63 (1).

child support standards.⁴³⁰ It is carried out either within an extended family or into foster care,⁴³¹ either within an accredited public or private institution⁴³² of a social nature; or even in an autonomous centre,⁴³³ if the child is at least 15 years old.⁴³⁴ Furthermore, social placement is carried out by a social worker who shall take into account the opinion of the child according to his/ her level of maturity and age, and the social worker shall immediately report to the children's judge who then ratifies the social placement.⁴³⁵ Social placement in institutions should only be a measure of last resort and for a maximum duration of six months.⁴³⁶

With regard to exceptional protection measures, the *Child Protection Act* calls upon the State to ensure demobilisation and reintegration of child soldiers into society.⁴³⁷ To this effect, the *Disarmament, Demobilisation and Reintegration (DDR)* programme was developed in the DRC with the funding support from the World Bank and the Multi-country Demobilisation and Reintegration Programme.⁴³⁸

Nevertheless, the children's DDR programme was not implemented in time due to continued hostilities, lack of political and military will, mismanagement of funds and poor co-ordination and timetabling.⁴³⁹ Moreover, the FARDC high command failed to impose compliance by commanders with orders to release child soldiers, or to prevent ground troops from recruiting more children or subjecting them to forced labour.⁴⁴⁰

The State is also called upon to guarantee protection, education and care to children affected by armed conflict, civil unrest or tension, especially those found, but not identified in relation to family environment,⁴⁴¹ as well as children displaced by natural disaster or deteriorating socio-economic conditions.⁴⁴² The law enumerates nine

430 Art 63 (4)

431 Art 65.

432 Art 67.

433 Art 66.

434 *Child Protection Act* (Art 64 (1)).

435 Art 63 (2).

436 Art 64 (2).

437 Art 71 (2).

438 Coalition to Stop the Use of Child Soldiers *Child soldiers global report 2008* at 109.

439 Amnesty International 'DRC, Children at war: creating hope for their future' (2006) cited in Coalition to Stop the Use of Child Soldiers op cit (note 438) at 109 infra 54.

440 United States Department of State op cit (note 107) at 132.

441 Art 72 (1).

442 Art 72 (2).

bodies in charge of social protection for children,⁴⁴³ which are organised and called to work closely with the Government for the promotion and protection of children's rights.⁴⁴⁴

Clearly, the DRC legal instruments described above cover the same policies and strategies prescribed by *Convention 182*, which requires ratifying nations to remove children from abusive labour and provide them with rehabilitation, social reintegration, free basic education, and vocational training.⁴⁴⁵ The key question at this stage would be whether any practical steps have been taken to ensure protection measures for children caught up in forced labour. This question will be discussed in the following subsection.

4.3.2.4.2 Practical steps

Practical experience shows that the DRC has taken effective steps at governmental (1) and non-governmental (2) levels to ensure these protection measures for abused children, as discussed below.

4.3.2.4.2.1 At the governmental level

The government has provided appropriate institutions to insure rehabilitation, social reintegration, and vocational training both at national and provincial levels. For instance, the Minister of Social Affairs, financially supported by the World Bank, established a project named 'Enfants dits de la Rue' (EDR) (So-called Street Children) for reintegrating 16,000 street children.⁴⁴⁶ At provincial level, the Katanga's government, funded by international NGOs, managed a centre for vulnerable children in Lubumbashi to keep them away from the mining sector and reintegrate them into formal education.⁴⁴⁷ Similarly, in 2008 the provincial government opened two Kasapa

443 These include: the National Council for Children; the School and Vocational Guidance Counsellors Body; the Social Workers Body; the Special Brigade for Child Protection; the Labour Inspectors Body; the Primary, Secondary and Vocational Education Inspectors Body; the National Committee Against Worst Forms of Child Labour; the accredited organisations and institutions of civil society children sector; the Parliament and Children Committees. (Art 74).

444 Art 75 to 83.

445 Art 7; see Bass op cit (note 105) at 66.

446 Kalikat Y et al 'Dix millions de dollars pour donner un avenir aux enfants de la rue' in *RDC Society* No 2 (2012) at 26

447 US Department of State *2009 Country reports on human rights practices- DR Congo* (2010).

residential ‘welcome centres’ in Lubumbashi to provide ‘protective services and educational programming to street children and trafficking victims,’ while another child care centre was opened for girls engaged in street prostitution in 2010.⁴⁴⁸

4.3.2.4.2.2 At the non-governmental level

A number of local and international NGOs have taken steps to insure rehabilitation, social reintegration, and vocational training for abused children. For instance, a demobilisation and reintegration campaign was initiated in Katanga Province to get children out of the mining sites.⁴⁴⁹ This project was designed to sensitise and train these children to small paid work not exceeding eight hours of service, to be performed from Monday to Friday only.⁴⁵⁰

Moreover, the International Catholic Child Bureau (BICE) has started, in collaboration with the National Catholic Child Bureau of the DRC, a project aimed at social reintegration of 300 street children through education and vocational training in Kinshasa.⁴⁵¹ BICE has also established the ‘rescue centre’ in Kinshasa to host about 40 abandoned and at risk children to prepare them for their successful reintegration into society.⁴⁵² Similarly, the Diocesan child-care programme for street children – PEDER in Kinshasa focuses on social and professional reintegration of street children through re-education and professional training.⁴⁵³ Moreover, the Psycho-Social Centre Reverend TSHISUMPA was created in Kinkole in 1998 to provide accommodation, rehabilitation, social reintegration and vocational training for street children or abandoned children who are exposed to forced labour.⁴⁵⁴

See also US Department of State *2008 Country reports on human rights practices - DR Congo*, Vol.1 (2009) at 149.

448 United States Department of State op cit (note 107) at 131.

449 Kazadi J ‘La Banque Mondiale et les droits des femmes et enfants dans les mines de cuivre du Katanga’ *Mining News Magazine* 061 (2012) at 18.

450 Ibid.

451 ‘BICE alongside street children in Kinshasa’ (2012).

452 BICE *La protection légale et judiciaire des enfants en RDC* (2004) at 12.

453 See PEDER Website at <http://www.bice.org> [accessed 7 December 2012].

454 See at <http://www.kinkole.com/fnpc/organisation.html> [accessed 7 December 2012]. See also F.N.P.C *National brotherhood of prisons in DRC*. Available at <http://www.akvo.org/rsr/organisation/348/> [accessed 7 December 2012].

Similarly, an Italian NGO Dokita has organised a residential and daytime shelter that includes psycho-social recovery, education and vocational training for street children, orphans and abandoned minors in Kinshasa.⁴⁵⁵ UNICEF and its partners also provide financial and technical assistance to ensure social reintegration, basic education, and vocational for abused children.⁴⁵⁶ In the Kivu provinces, the Transit Family model (or FAT: Famille d'Accueil Transitoire) focuses on informal education, including alphabetisation, moral education, and vocational training for children at risk of being used in forced labour by armed groups.⁴⁵⁷ All these projects give priority to education of abused children, which is an important factor in a child's growth and development as discussed in the following subsection.

4.3.3 Education

Education is globally recognised as the most powerful instrument for removing children from the labour market and the most effective deterrent to the worst forms of child labour.⁴⁵⁸ Education is also widely considered to be 'the single most important factor in the fight against forced child labour'.⁴⁵⁹ While harmful child labour is considered to be a factor preventing children from benefiting from education,⁴⁶⁰ education is accepted and provided as part of a solution to the problem.⁴⁶¹ Therefore, 'the establishment of compulsory education is a necessary condition for the reduction and abolition of child labour'.⁴⁶² In other words, 'without compulsory education government is unable to enforce child labour laws'.⁴⁶³ But the question remains whether this is really the case in the DRC.

455 See at http://www.dokita.org/eng/dokita.php?DOC_INST=10 [accessed 7 December 2012].

456 UNICEF RD Congo: *2 914 enfants soldats demobilisés* (2009); see also Lee Harrison *Small steps for child soldiers* (2012).

457 Independent evaluation of special projects for child soldiers in the DRC final report presented to the World Bank's MDRP (2007) 113 at 77.

458 Jo Boyden *et al* *What works for working children* (1998) at 246 & 282

459 T Lee 'Child slaves in modern India: the bonded labour problem' *Hum. Rts. Q.* 19.3 (1997) 572 at 628.

460 Cullen *op cit* (note 7) at 150.

461 See *ILO Convention 182* (Art 7(2)).

462 Weiner M 'child labour in developing countries: the Indian case' *2 Int'l J. Child. Rts* 121 (1994), cited in H Steiner *et al* *International human rights in context: law, politics, morals: text and materials* (2007) at 296.

463 *Ibid.*

As demonstrated elsewhere in this dissertation, although the DRC law guarantees free and compulsory primary education in public schools for all children,⁴⁶⁴ there is no practical indication of this being the case. Even policies established by the Government to promote access to education and other social services to impact child labour have not been addressed, including the Poverty Reduction Strategy Paper and Five Pillars programme.⁴⁶⁵

There is also no indication of sufficient enforcement or social protection capacity from the Government to protect children against abusive labour.⁴⁶⁶ It is true that without adequate school facilities and proper educational infrastructure any legislation on compulsory education would produce no effective result.⁴⁶⁷ The DRC's education system is indeed disastrous. Most primary and secondary public schools lack proper infrastructure, buildings, furniture, and equipment, except schools run by churches that have more resources, but suffer overcrowding.⁴⁶⁸

Moreover, the State has failed to prioritise the educational sector in its budget and government expenditure on education is insignificant. Numerous reports have, for instance, revealed a decrease in budgetary allocation to the sector to 10 per cent of the national budget in 2011, down from 25 per cent in the 1960s.⁴⁶⁹ In addition, such budgetary allocation is undermined by late disbursements and high incidences of corruption, which result in the introduction of illegal forms of fees by schools.⁴⁷⁰ This, ultimately, is likely to increase the vulnerability of children being exposed to the worst forms of child labour, including forced child labour.⁴⁷¹

The State's lack of importance and interest in education's role is not exactly new; already under former President Mobutu's rule, education used to be compared to the

464 See Constitution (Art 43); *Child Protection Code* (Art 38).

465 World Bank (2007) 13, 18; See also International Monetary Fund *DR Congo: poverty reduction strategy paper- progress report* (2010) 39. See also US Embassy- Kinshasa op cit (note 296) para 18; cited in US Department of Labour op cit (note 296) at 192 infra 1484.

466 US Department of Labour op cit (note 296) at 189.

467 ILO Fundamental rights at work and international labour standards (2003) at 94.

468 A Hansen *et al* (eds) *Planning educational response strategies for the reintegration of demobilised child soldiers in the DRC - final report* (2001) at 9.

469 W Nkhoma *Cursed by conflict: Education in DRC* (2012).

470 Ibid.

471 United States Department of Labour op cit (note 284) at 165.

‘fifth wheel or replacement tire’ of a motor vehicle.⁴⁷² Today, viable primary and secondary schools are administrated by private and religious institutions. But, the majority of the schools are public and State-run institutions, which operate under extremely difficult conditions given the current disastrous socio-economic situation of the country. Both private and ‘State-run’ schools depend mainly on the students’ tuition fees through which teacher salaries are financed.⁴⁷³

In order to make education a viable and real tool for fighting abusive child labour, the DRC government would need to radically reform the education system, by allocating realistic budgets to the sector; improving the curriculum; providing learning materials, rehabilitating the infrastructures, buildings and equipment.⁴⁷⁴ UNICEF has been assisting in this regard by providing learning tools and teacher training to selected schools around 20 schools per province.⁴⁷⁵

Furthermore, Creative Associates International has been conducting Education to Combat Abusive Child Labour (ECACL) Activity aimed at ‘building bridges’ to education for children who have been in abusive child labour situations.⁴⁷⁶ These reforms alone have proven to be insufficient to tackle the problem of forced child labour. Therefore, reforms of the legal framework become necessary to allow national laws to comply with international standards and the implementation of an education policy.⁴⁷⁷ In addition to education, forced child labour may be effectively eradicated through respect and enforcement of core labour standards in the workplace.

4.3.4 Respect and enforcement of core labour standards in the workplace

The core labour standards are provided for by the *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up*, which call on Member States to

472 E Mwamba ‘RD Congo 50 ans d’indépendance: Education nationale, 5ème roue de la voiture?’ (‘DR Congo 50 years of independence: national education, fifth wheel of the car?’) in *Africa Media 21* (2010).

473 Stiftung B *BTI 2010 - DR Congo, country report* (2009) 14.

474 G Mokonzi *DR Congo: effective delivery of public services in the education sector* (2010) at 6.

475 Hansen *et al* op cit (note 468) at 9.

476 Id at iii.

477 Mokonzi op cit (note 474) at 11.

respect and promote principles and fundamental rights. Article 2 provides for four core labour standards, which are specifically defined in a series of ILO core standard conventions.⁴⁷⁸ But, this dissertation has mainly focused on the elimination of all forms of forced or compulsory labour; and the effective abolition of child labour in previous chapters.

Respect for children's rights constitutes such an important issue and its implementation sometimes requires 'introduction of the necessary legislative changes'.⁴⁷⁹

4.3.5 Legislative changes

Legislative and policy reforms play a powerful constitutive and transformative role in improving and changing the lives of children used in forced labour.⁴⁸⁰ Legal reforms constitute a possible cure for the worst forms of child labour, including forced child labour.⁴⁸¹ In this regard, the DRC took significant steps by adopting the *Child Protection Act* as well as three Presidential Decrees pertaining to the creation of institutions in charge of the DDR process.

However, an effective practical implementation of these new legislations is still, at least partly, lacking.⁴⁸² National labour legislation has not been applied nor enforced due to an insufficient number of labour inspectors coupled with lack of material infrastructure for the labour inspectorate.⁴⁸³

4.3.6 Labour inspection

Labour inspection is the system through which any State enforces provisions on child labour, and the inspectors have the duty to enforce the legal provisions protecting

478 OECD *Policy framework for investment user's toolkit* (2011) at 10.

479 G Lansdown (ed) *A framework for measuring the participation of children and adolescents* (2009) at 8.

480 R De Silva-de-Alwis *Legislative reform on child domestic labour* (2007).

481 Kielland and Tovo op cit (note 129) at 151-155.

482 ILCCR *loc cit*

483 ILO op cit (note 148) at 105.

children from employment.⁴⁸⁴ Yet, improvement of the enforcement of legislation constitutes ‘one of the main priority areas for action to eliminate the worst forms of child labour’.⁴⁸⁵ In this regard, States are urged to,

‘not only strengthen labour inspection services and train labour inspectors for detecting and dealing with the most serious cases of hazardous and abusive child labour - often in collaboration with the police - but also to develop new approaches to the problem’.⁴⁸⁶

Labour inspectors obtain the support and cooperation of families and local communities to fulfil of their duties of ‘policing the workplace and providing advice and assistance to child workers, their parents and employers’.⁴⁸⁷

The DRC’s labour legislation is inspired by the *Labour Inspection Convention*, 1947 (No. 81). Thus, the *Labour Code* provides that the Labour Inspectorate's mission is to, *inter alia*, enforce the legal provisions relating to working conditions and the employment of women, children and persons with disabilities.⁴⁸⁸

Considering the number of children being used in forced labour, it is clear that the labour inspectorate’s mission has not been fulfilled in the DRC. The CEACR has therefore called upon the DRC Government to expand the labour inspectorate’s authority in the area of law enforcement and the regularity of unannounced visits by labour inspectors to ensure prosecution and sufficient effective and dissuasive sanctions against the violators of the *Convention*.⁴⁸⁹

Nevertheless, as required by Article 20 of *Convention No. 81* the General Labour Inspectorate published an annual general report for 2007 on the work of the services under its control.⁴⁹⁰ The report contains detailed information and statistics as per Article 21 of the *Convention* for four of the country’s 11 provinces.⁴⁹¹ Practical experience shows that in some areas, particularly in Katanga Province labour

484 See ILO *Labour Inspection Convention* (No 81); cited in ILO op cit (note 148) at 86.

485 Inter-Parliamentary Union and ILO *Eliminating the worst forms of child labour: a practical guide to ILO Convention no 182* (2002) at 45.

486 Ibid.

487 Ibid.

488 Art 187 (1).

489 ILCCR op cit (note 276).

490 ILC op cit (note 180) at 459.

491 Ibid.

inspectors perform their duties, but are failed by the national government.⁴⁹² The absence of government support and interest, and the failure by the judiciary to take legal action ‘have discouraged inspectors from investigating cases in any systematic way’.⁴⁹³

4.4 Conclusions and Recommendations

4.4.1 Conclusions

Forced child labour constitutes a real and serious human rights issue as it violates fundamental children’s rights and has negative consequences on children’s health, physical, intellectual and moral stability, and the DRC is no exception to this.

This dissertation shows that because of political, social and economic reasons, including the lack of rule of law and good governance, lack of education, lack of resources, children are forced to work as labourers in different informal sectors. These include mining, agriculture, fishing, hunting, and some children are forced to engage in prostitution, beg in the streets to support themselves and / or their family or to act as labourers in illegal exploitation of natural resources. Most of these activities are detrimental to children’s welfare, benefit either to their families, companies or armed groups denying them schooling.

Yet, the DRC has signed and ratified most of the international, regional standards as well as international labour standards protecting children against forced labour, which is defined and classified as one the worst forms of child labour. Under the Congolese law, forced child labour is defined as the worst form of child labour and is punishable by imprisonment. However, those responsible for fighting and preventing forced child labour, namely the Government claim not to have budgets for conducting inspections and investigations.

492 Global Witness op cit (note 239) at 30.

493 Ibid.

Therefore, due to the absence of political will, lack of budgets, etc, the DRC Government and its agencies are unable to implement relevant legislations, leaving room for impunity and recidivism. Clearly, there is a gap between the law and practice, and the children pay a heavy price of this discrepancy. It has therefore been suggested that the remedies against worst forms of child labour in general and forced child labour in particular would be those prescribed under Article 7 of *ILO Convention 182*. These include rehabilitation, social reintegration, free basic education, and vocational training.

In the DRC, compulsory and free education constitutes one of the strongest and most effective remedies to the problem of child labour. But, access to elementary school education constitutes a nightmare for many children and their parents given that it is not compulsory, free nor universal. Many children are unable to attend school because their families cannot afford the costs. Moreover, the government educational policy is in shambles and the infrastructure is lacking and teachers are not properly and regularly remunerated. Consequently, many children remain vulnerable and extremely exposed to exploitation and abuse in forced child labour.

4.4.2 Recommendations

For the DRC to affectively deal with this harmful phenomenon of forced child labour, a set of recommendations need to be made holistically, particularly to the DRC Government (1); trade unions (2); civil society organisations (3); parents and educations (4); local communities (5); the international community (6); and children themselves.

4.4.2.1 Recommendations to the DRC Government

First, the DRC Government should take immediate and concrete measures to ensure compliance with international, regional and national standards of protection against forced child labour. The Government should therefore make significant progress in

the areas of 'prosecution, protection and prevention'.⁴⁹⁴ It is also important for the DRC lawmakers to adopt a new legal provision allowing the children under 18 to institute legal proceedings, without express permission of the minor's parent or guardian.⁴⁹⁵ The DRC Government ratify the ILO *Minimum Age (Underground Work) Convention 123* prohibiting the employment or work of children under the age of 16 in underground mines or in quarries.

Second, the Government should invest in education in making it effectively free, compulsory and universal. In this regard, children shall be taken care of in terms of uniforms, books and other relevant items. Moreover, school infrastructures, including classrooms must be prioritised. Acceleration learning processes should be organised before reintegration of children affected by forced labour back into school.

Third, the Government should promote public awareness of the problem of force child labour through public debate and active participation of civil society organisations and the media.

Fourth, the Government should adequately use labour inspection and take proper care of labour inspectors in order to enforce and give effect to policy and law against forced child labour.

Fifth, the Government should continue to work in synergy with the international community for putting an end to the cycle of violence and wars. In this regard, tough actions need to be taken to eradicate different armed groups that use children in forced labour, particularly in the eastern part of the country, and severe sanctions must be imposed on the FARDC soldiers involved in forced child labour. The police should also contribute in the fight against forced and premature marriages.

494 United States Department of State op cit (note 410) at 117-120.

495 M Bonyi *Droit du travail* (2008) 135 at 165-66.

4.4.2.2 Recommendations to trade unions

First, trade unions should actively get involved in the fight against force child labour by raising public awareness of the phenomenon and by ‘campaigning for free, basic, compulsory and quality education for all children.’⁴⁹⁶

Second, trade unions should offer support to the children affected by forced labour, as well as their families and communities.

4.4.2.3 Recommendations to civil society organisations

First, civil society organisations should promote protection of children against forced child labour and facilitate regular contact between vulnerable children, their parents, employers and other relevant parties.

Second, civil society organisations should assist children exposed to forced child labour with shelter, educational tools, protection and financial assistance.

Third, civil society organisations should raise public awareness of forced child labour through social surveys and research reports.

Fourth, civil society organisations should lobby for good quality education and change of education policies by the Government.

4.4.2.4 Recommendations to parents and educators

First, parents should protect their children from forced labour and should abstain from encouraging or forcing them to work, even for survival reasons.

Second, parents should send their children to school and for this they should take every necessary precaution to guarantee proper education for their children.

⁴⁹⁶ ILO *Employers’ and workers’: handbook on hazardous child labour* (2011) at 1.

Third, educators in schools should monitor children's attendance in school, report and follow up on the reasons why children drop out of school.

4.4.2.5 Recommendations to local communities

First, local communities should remain vigilant to insure protection of their children from forced labour and community members should be able to report any case of forced child labour to local authorities.

Second, local communities should be creative and find ways of fighting poverty by means other than use of forced child labour.

Third, local communities should be getting involved in projects aimed at renovating or rebuilding school infrastructures and lobby for improving the quality of education in community, including school feeding programmes.

4.4.2.6 Recommendations to the international community

First, the international community should assist the DRC as a nation to tackle the problem of forced child labour through partnerships with the Government, civil society and other relevant bodies.

Second, the international community should impose peace in the DRC in accordance with to the United Nations mandate and effectively contribute to the implementation of accountability measures against perpetrators of forced child labour.

Third, the international community, particularly UNESCO should provide technical assistance in changing educational policies.

Fourth, the international community should assist the DRC in tackling food insecurity, particularly for children.

4.4.2.7 Recommendations to the children themselves

First, children should stay attached to their respective communities and take every opportunity offered to them for learning different forms of forced child labour.

Second, children should prioritise their education more than anything else.

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B. Legislation

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