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APPLICATION OF THE INTERNATIONAL PROHIBITION ON CHILD LABOUR IN AN AFRICAN CONTEXT:

Lesotho, Zimbabwe and South Africa

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This thesis is dedicated to

my devoted parents-

Potiphar and Elizabeth Nhenga

for propelling me to the sky and beyond.

TABLE OF CONTENTS

Contents	Page
Acknowledgements	vi
Abbreviations	ix
Statutory and other instruments	xi
Abstract	xv
Chapter I	
THE PROBLEM OF CHILD LABOUR IN SOUTHERN AFRICA	
1. Description of the problem	1
(a) Prevalence	2
(b) Forms	5
(c) Causes	5
2. The international regime on child labour	9
3. The conflict between international law and the reality in Southern Africa	10
(a) Defining child and childhood	12
(b) Defining child labour	14
4. Importance and purpose of the research	15
Chapter II	
THE ORIGINS AND DEVELOPMENT OF THE LAWS ON CHILD LABOUR	
1. The historical development of the law on child labour	17
2. International campaign	22
(a) ILO Conventions up to 1973	23
(b) Convention on the Rights of the Child	28
(c) Worst Forms of Child Labour Convention	31
3. Regional Instruments: The African Charter on the Rights and Welfare of the Child	34
4. Conclusion: An overall assessment of the international child labour legal regime	36

Chapter III

EFFECTIVENESS OF THE INTERNATIONAL LAW ON CHILD LABOUR

1. Creation of treaty obligations	40
(a) Drafting and negotiation: Participation of African states	40
(b) Reservations to children's rights treaties	43
(c) Non/low and slow ratification of treaties	44
2. Diluting the force of the legal obligations	49
(a) Claw-back, derogation and denunciation clauses	49
(b) Contradictions within the text	52
3. Incorporation of international law into domestic law	53
(a) Status of international law	53
(b) Children's rights in the Constitution	57
(c) Legislative measures	58
(d) Coda: Problems created by the plural legal systems	63
(i) Legal pluralism	63
(ii) Court structure	66
(iii) Choice of law rules	69
4. Treaty monitoring and implementation	73
(a) Backlog in state reporting	75
(b) Delays in processing reports and communications	76
(c) Limited political support from states	77
5. Conclusion	79

Chapter IV

DEFINING CHILDREN AND LABOUR

1. The definition of child	83
(a) Historical debate	85
(b) Modern conception	88
(c) African conception	92
(d) Legal conception	94
2. Child labour	97
(a) Commonly accepted assumptions	98
(b) Definitional problems	99
(i) Labour/work dichotomy	101
(ii) Light work, hazardous/worst forms of labour	105
(iii) Exploitation	109
(iv) Age, education and school attendance	111
(v) Health	118
(vi) Rest, leisure and play	121

3. Conclusion 123

Chapter V

CHILD DEVELOPMENT IN SOUTHERN AFRICA FROM PRE-COLONIAL TIMES TO THE PRESENT

1. Pre-colonial period	125
(a) The Bantu-speaking peoples	125
(i) Family structure	127
(ii) The economy	129
(iii) Division of labour	132
(b) The child	133
(iv) Activities	133
(v) Socialisation	137
2. Colonial occupation	139
(a) Arrival of missionaries and colonists	139
(b) Colonial impact	142
(i) Economic changes	142
(ii) The Labour migration	143
(iii) Fragmentation of the family	145
(c) Impact of colonisation on children	149
(i) Introduction of education	149
(ii) Child labour	152
3. Post-colonial period	156
(a) The rural/urban dichotomy	158
(b) Analysis of child work according to the controlling agent	164
(i) Own household	164
(i) Foster household	165
(ii) Child traffickers	168
(iii) Employers	171
(iv) The children themselves	173
(c) Analysis of child work according to cause and influences	175
(i) Culture	175
(ii) Poverty	175
(iii) Illness (HIV and Aids)	177
(iv) Political conflict	179
4. The debate: economic exploitation or beneficial socialisation	180

Chapter VI

IMPLEMENTATION OF THE INTERNATIONAL LEGAL REGIME ON CHILD LABOUR: AN ASSESSMENT

1. The international regime on child labour	184
(a) Participation of developing countries	185
(b) Monitoring and enforcement	186
(c) State compliance	187
(d) Definition of child	190
(e) Definition of child labour	192
(i) Minimum Age	193
(ii) Education	193
(iii) Labour/work dichotomy	196
(iv) Child development	196
(v) Harm and hazard	197
2. Culture	198
(a) Western versus African forms of child rearing	198
(b) Problems with the ideologies underlining international human rights	201
(i) Childhood	201
(ii) Child labour and development	202
(iii) Duty bearers	205
(c) Language	206
3. Conclusion	208

Chapter VII

FINDINGS AND RECOMMENDATIONS

1. An overview	212
2. The need for new approaches	215
(a) Further research	215
(i) Culture	216
(ii) Causes of child labour	217
(iii) The impact of work on child development	218
(iv) Social and economic dynamics of child work	220
(v) Methodologies of research	221
(b) Revision of the legal regime	223
(i) De-universalising international law	223
(ii) Sub-regionalising the child rights regime	225
(iii) Re-evaluation and amendment of child labour standards	230
3. Commitment	233
4. The best interests of the child- the ultimate consideration	235

5. Conclusion	240
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BIBLIOGRAPHY	242
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University of Cape Town

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-Tendai Charity Nhenga-Chakarisa

ABBREVIATIONS

1. Entities

AU	African Union
GA	General Assembly
ILO	International Labour Organisation
IPEC	International Programme on the Elimination of Child Labour
LLC	Lesotho Law Commission
NGO	Non-governmental organisation
OAU	Organisation of African Unity
SALC	South African Law Commission
UN	United Nations
UNICEF	United Nations Children's Fund
UNHCHR	United Nations High Commission for Human Rights
WHO	World Health Organisation

2. Legal instruments

ACHPR	African Charter on Human and People's Rights
ACRWC	African Charter on the Rights and Welfare of the Child
BCEA	Basic Conditions of Employment Act
CEDAW	Convention on the Elimination of Discrimination against Women
CRC	Convention on the Rights of the Child
ICESCR	International Convention on Economic, Social and Cultural Rights
ICCPR	International Convention on Civil and Political Rights
LAMA	Legal Age of Majority Act
LRA	Labour Relations Act
UDHR	Universal Declaration of Human Rights

3. Short names for international instruments

Minimum Age Convention: Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour

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

<i>Comp</i>	<i>Comparative</i>
<i>Emp</i>	<i>Employment</i>
<i>Eur</i>	<i>European</i>
<i>Fam</i>	<i>Family</i>
<i>Int</i>	<i>International</i>

<i>J</i>	<i>Journal</i>
<i>L</i>	<i>Law</i>
<i>Q</i>	<i>Quarterly</i>
<i>Rts</i>	<i>Rights</i>
<i>Rev</i>	<i>Review</i>
<i>SAJHR</i>	<i>South African Journal of Human Rights</i>
<i>SALJ</i>	<i>South African Law Journal</i>

5. Short names to law provisions

art	Article
C	Convention
para	Paragraph
Proc	Proclamation
Reg(s)	Regulation(s)
Res	Resolution
s	Section
ss	Sections
subsec	Subsection

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STATUTORY AND OTHER INSTRUMENTS

1. International instruments

(In the order of year of adoption)

(a) United Nations

- Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 of 1948.
- Declaration of the Rights of the Child, G.A. res. 1386 (XIV), 14 U.N. GAOR Supp. (No. 16) at 19, U.N. Doc. A/4354 of 1959.
- International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 993 U.N.T.S. 3. Adopted on 16 December 1966 and entered into force on 3 January 1976.
- International Covenant on Civil and Political Rights G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316, 999 U.N.T.S. 171. Adopted on 16 December 1966 and entered into force on 23 March 1976.
- Convention on the Elimination of All Forms of Discrimination against Women, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, Adopted on 18 December 1979 and entered into force on 3 September 1981.
- Convention on the Rights of the Child, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49. Adopted on 20 November 1989 and entered into force on 2 September 1990.
- Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679. Adopted on 22 May 1969 and entered into force on 27 January 1980.

(b) International Labour Organisation

- Convention Fixing the Minimum Age for Admission of Children to Industrial Employment (C 005). Adopted on 28 November 1919 and entered into force on 13 June 1921. (Convention revised in 1937 by Convention No. 59, and in 1973 by Convention No. 138)
- Convention concerning the Night Work of Young Persons Employed in Industry (C 006). Adopted on 28 November 1919 and entered into force on 13 June 1921. (Convention revised in 1948 by Convention No. 90.)
- Convention Fixing the Minimum Age for Admission of Children to Employment at Sea (C 007). Adopted on 09 July 1920 and entered into force on 27 September 1921. (Convention revised in 1936 by Convention No. 58 and in 1973 by Convention No. 138.)
- Convention concerning the Age for Admission of Children to Employment in Agriculture (C 010). Adopted on 16 November 1921 and entered into force on 31 August 1923. (Convention revised in 1973 by Convention No. 138.)

- Convention Fixing the Minimum Age for the Admission of Young Persons to Employment as Trimmers or Stokers (C 015). Adopted on 11 November 1921 and entered into force on 20 November 1922. (The Convention was revised in 1973 by Convention No. 138.)
- Convention concerning the Compulsory Medical Examination of Children and Young Persons Employed at Sea (C016). Adopted on 11 November 1921 and entered into force on 20 November 1922.
- Convention concerning Forced or Compulsory Labour (C 029). Adopted on 28 June 1930 and entered into force on 1 May 1932.
- Convention concerning the Age for Admission of Children to Non-Industrial Employment (C 033). Adopted on 30 April in 1932 and entered into force on 06 June 1935. (Convention revised in 1937 by Convention No. 60 and in 1973 by Convention No. 138. Following the coming into force of Convention No. 60, Convention No. 33 is no longer open to ratification.)
- Convention Fixing the Minimum Age for the Admission of Children to Employment at Sea (Revised 1936) (C 058) Adopted on 24 October 1936 and entered into force on 11 April 1939.
- Convention Fixing the Minimum Age for Admission of Children to Industrial Employment (Revised 1937) (C 059) Adopted on 22 June 1937 and entered into force 21 February 1941. (Convention revised in 1973 by Convention No. 138.)
- Convention concerning the Age for Admission of Children to Non-Industrial Employment (Revised 1937) (C 060). Adopted on 22 June 1937 and entered into force 29 December 1950. (Convention revised in 1973 by Convention No. 138.)
- Convention concerning the Restriction of Night Work of Children and Young Persons in Non-Industrial Occupations (C 079). Adopted on 09 October 1946 and entered into force 29 December 1950.
- Convention concerning the Abolition of Forced Labour (C 105). Adopted on 25 June 1957 and entered into force on 17 January 1959.
- Convention concerning the Minimum Age for Admission to Employment as Fishermen (C 112). Adopted on 19 June 1959 and entered into force on 7 November 1961. (Convention revised in 2007 by Convention No. 188.)
- Convention concerning the Minimum Age for Admission to Employment Underground in Mines (C 123). Adopted on 11 June 1965 and entered into force on 10 November 1967. (Convention revised in 1973 by Convention No. 138.)
- Convention concerning Minimum Age for Admission to Employment (C 138). Adopted on 16 June 1973 and entered into force on 19 June 1976.
- Recommendation 146 concerning Minimum Age for Admission to Employment, 1973 adopted on 26 June 1973.
- Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (C 182). Adopted on 17 June 1999 and entered into force on 19 November 2000.
- Recommendation 190 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour adopted on 17 June 1999

(c) African Union

African Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58. Adopted on June 27 1981 and entered into force on 21 October 1986.

African Charter on the Rights and Welfare of the Child OAU Doc. CAB/LEG/24.9/49. Adopted in 1990 and entered into force on 29 November 1999.

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa CAB/LEG/66.6. Adopted 13 September 2000 and entered into force on 25 November 2005.

(d) Domestic laws

(In the order of year of becoming law)

(i) United Kingdom

Better Regulation of Chimney Sweepers and Their Apprentices Act of 1788.

Health and Morals of Apprentices Act of 1802.

Cotton Mills and Factories Act of 1819.

Factory Act of 1833.

Elementary Education Act of 1870.

Education Act of 1876.

Education Act of 1880.

(ii) Lesotho

General Law Proclamation No. 2B of 1884.

The Laws of Leretholi of 1903.

Administration of Estates Proclamation 19 of 1935.

Central and Local Courts Proclamation 62 of 1938.

Interstate Succession Proclamation 2 of 1953.

The Deserted Wives and Children Proclamation Order 60 of 1959.

High Court Act 5 of 1978.

Lesotho Labour Code Order No. 24 of 1992.

The Constitution Order No. 5 of 1993.

Children's Protection and Welfare Bill of 2004.

The Legal Capacity of Married Persons Act 9 of 2006.

(iii) Zimbabwe

African Law and Tribal Courts Act of 1969.

Children's Protection and Adoption Act of 1972.

Customary Law and Tribal Courts Act 6 [Cap 8:05] of 1981.

Labour Relations Act 16 [Cap 28:01] of 1985.

Constitutional Amendment Act No. 7 of 1987.

Customary Law and Local Courts Act 2 [Cap 7:05] of 1990.

Manpower Planning and Development Act 24 [Cap 28:02] of 1994.

Education Act [Cap 25:04] of 1996.

Labour Relations Regulations of 1997 Statutory Instrument 72 of 1997.

Constitution as amended to (No. 16) Act of 20 April 2000.
 Children's Act 5 [Cap 5:06] of 2001.
 Labour Relations Amendment Act [Cap 20:01]17 of 2002.
 Constitution of Zimbabwe Amendment (No. 18) Act of 2007.

(iv) South Africa

Black Administration Act 38 of 1927.
 Magistrates' Courts Act 32 of 1944.
 Sexual Offences Act 23 of 1957.
 Child Care Act 74 of 1983.
 Special Courts for Blacks Abolition Act 34 of 1986.
 Law of Evidence Amendment Act 45 of 1988.
 The Interim Constitution Act 200 of 1993.
 Mine Health and Safety Act 29 of 1996.
 South African Schools Act 84 of 1996.
 Final Constitution Act 108 of 1996.
 Basic Conditions of Employment Act 75 of 1997.
 Non Profit Organisations Act 71 of 1997.
 Prevention of Organised Crime Act 121 of 1998.
 Children's Act 38 of 2005.
 Children's Amendment Bill of 2006.

(e) Case law

(In alphabetical order)

(i) Lesotho

Maseela v Maseela (1954) H.C.T.L.R. 48.

(ii) Zimbabwe

Deputy Sheriff, Harare v Mafukidze & Anor 1997 (2) ZLR 274 (H).
Magaya v Magaya [1999] 3 LRC 35 200.

(iii) South Africa

Bhe v Magistrate, Khayelitsha 2004 (2) SA 544 (C), 549.
Govuzela v Ngavu 1949 NAC 156 (S).
Mahlaba v Mdladlamba 1946 NAC (C&O) 51.
Mthembu v Letsela 1998 (2) SA 675 (T) 688.
Mthembu v Letsela 2000 (3) SA 867 (SCA).
Mabuza v Mbatha 2003 (7) BCLR 743 (C) paras 30 32.
Rubushe v Jiyane 1952 NAC 69 (S).
Thibela v Minister van Wet en Orde 1995 (3) SA 147 (T).
S v Makwanyane 1995 (3) SA 391 (CC).

ABSTRACT

The international community's overwhelming support for the United Nations Convention on the Rights of the Child of 1990 and the International Labour Organisation's Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour of 1999, implies a high degree of international concern for the welfare of the child. This backing is based on an assumption that the institutionalisation of children's rights and the abolition of child labour at a global level will result in the improvement of the lives of all children.

Despite this display of concern, there are considerable differences between the North and the South on the child rearing methods and attitudes towards the work of children. With this in mind, can a world that is so diverse socially and culturally effectively implement the international law on child labour? This research therefore set out to examine the efficacy and appropriateness of the universal standards on child labour in the context of the indigenous societies of Lesotho, Zimbabwe and South Africa.

The discussion was initiated by tracing the development of the law on child labour in Britain, where the campaign against the exploitation of children began. It described how events in that country influenced the beginnings of the global movement against child labour, and the subsequent development of international law.

The thesis scrutinises the process of treaty-making, the texts of the instruments, the monitoring procedures and state compliance, with specific reference to the three countries selected. It identifies the following major flaws in the system: lack of participation and representation of developing countries at the drafting stages of the conventions; conceptual ambiguities in the texts (particularly with regards to the definition of child and labour); ineffective monitoring and reporting systems; lax enforcement procedures; and poor state compliance aggravated by only partial incorporation of international law into the domestic arena, constitutional limitations on human rights and pluralistic legal systems.

An examination of the evolution of the concept of childhood in Europe and an analysis of indigenous Southern African societies from the pre-colonial era to the present illuminated the differences in the conceptualisation of childhood and the child rearing methods. The West views childhood as a distinct and separate stage of innocence, physical weakness, mental immaturity and general vulnerability. Children are thus excluded from work. International law embodies this approach to childhood and imposes a universal criterion for differentiating between appropriate and inappropriate forms of childhood activity.

African societies, on the other hand, deem childhood as a time for character building and acquiring the social and technical skills necessary to perform the future roles of adulthood. Children represent lineage continuity and, most importantly, the material survival of families and the community at large. Today, these traditional norms retain power and influence over their communities.

The drafters of international instruments clearly did not consider the challenges involved in applying international laws on child labour in African cultural settings. Instead, they assumed a universally applicable model of childhood, which is based on the notion that children everywhere have the same basic needs that can be met with a standard set of responses. They overlooked the fact that culture is a major influence on the activities of African children and determines the context in which they work, the prevailing opinions about the value of that work and the attitudes to childhood and the raising of children. As a result, the international law on child labour lacks relevance and meaning to most of the target audience in Lesotho, Zimbabwe and South Africa.

The thesis therefore advocated new approaches to the prohibition on child labour in the Southern African region. Taking a 'weak' cultural relativist stance, the thesis called for the 'de-universalisation' of the child rights norms by emphasising the importance of maintaining cultural integrity. In this way children can be raised to appreciate and fit into their own social milieu, as well as into an expanding world. The best way of going about it was by sub-regionalising the regime on children's rights, which entails the further breakdown of the current African regime to smaller and more manageable areas.

Lesotho, Zimbabwe and South Africa and other members of the Southern African region already share a commitment to some agreed concepts and processes which are advantageous to the creation of such a sub-regional regime (evidenced by their membership to the Southern African Development Community). They share a common colonial history, which has had the same impact on their social, economic, political and cultural structures. Significant in this regard is a shared Roman-Dutch legal heritage system, together with a system of legal pluralism. The three countries also employ the same approach to the incorporation of international law. The geographical proximity of these countries enables close, efficient and cost effective monitoring of compliance with the laws of the regime. Most important, however, is the fact that the various ethnic groups here fall within a general category of Bantu-speaking peoples, and thus have similar languages and cultures.

The children's right laws that would come out of such a combination of countries would most likely articulate the shared values and principles of the societies in this region. The new approach would require a common respect for and sensitivity to the integrity of indigenous cultures. In coming up with the new laws on child labour, the drafters would need to consider carefully various child development theories and values, the dynamics of social forces, the relevance of education, the impact on health and the pressures of global, regional and domestic economics in the region.

The thesis concluded that, for any intervention on child labour to be effective, it must always be guided by considerations of the best interests of the child at any given time, place and circumstance.

Chapter I

THE PROBLEM OF CHILD LABOUR IN SOUTHERN AFRICA

1. Description of the problem

'The term "child labour" is an emotive one.'¹ For most people it conjures up images of dirty, malnourished children shackled in chains and barely able to walk under the burdens they are carrying on their backs, while a large fierce-looking man looms over them cracking a whip. Such images, often shown in the media, have prompted a global explosion of interest in the activities of children.

Human rights activists, health and educational professionals describe child labour as abusive. They say it involves working for long hours under 'dangerous' and 'unhealthy' conditions, with a lack of physical and social security, and minimal remuneration. Labouring children are deprived of the freedom to play, rest and the time to devote to their education.² All these factors cause irreversible physical and psychological damage to a child or even death. Social scientists and economists argue that child labour is a 'dis-investment in human capital formation which has detrimental effects on the private and social returns from investment in education and health'.³

The last two decades have thus seen the emergence of an international movement, representing a multiplicity of forces, to abolish or seriously reduce child labour, particularly in sub-Saharan Africa.⁴ In recent years, a number of international organisations have thus taken up the cause, particularly in Southern Africa, of reducing the number of children trapped in the worst forms of child labour.⁵ Lesotho, Zimbabwe and South Africa fall within this region which accounts for significant

¹ McKechnie and Hobbs (1999) 8 *Child Abuse Rev* 87.

² 'Child Labour', available at <http://hrw.org/children/labor.htm> [accessed on 14 June 2007].

³ Admasie (2002) 14 *African Development Rev* 251 at 253.

⁴ Bachman (2000) 53 *J of Int Affairs* 545 at 546.

⁵ For instance, the ILO and RECLISA (Reducing Exploitative Child Labour in Southern Africa), an organisation funded by the United States Department of Labour, and Save the Child Fund, SOS Children's Villages and Africa International, available at <http://www.reclisa.org/content/index.cfm?navID=9&itemID=45> [accessed on 20 August 2007].

numbers of children considered by international organisations to be engaged in some form of labour.

(a) Prevalence

No one or any entity, however, has presented any accurate data on the current extent of child labour in the world. This may be attributed to the fact that the practice is most prevalent in countries which do not have the necessary resources to collect reliable statistics, the reluctance of various parties (including governments and employers) to admit that the problem even exists, and discrepancies in the definition of child labour. Most public and private agencies are vague about the numbers and geographic and demographic distribution of child labourers. Nevertheless, the International Labour Organisation's (ILO) estimates clearly suggest that the practice is widespread.⁶

In 2006, the ILO announced that the number of child labourers in world had fallen by about 11 percent over the previous four years and the number of those in hazardous work had decreased by 26 percent. While these statistics may be encouraging, there are, nevertheless, about 218 million child labourers worldwide, of which 126 million are engaged in hazardous work.⁷

Although found in all regions of the world, child labour is concentrated in developing countries. About 60 percent of child workers are found in Asia, 30 percent in Africa and about 7 percent in Latin America. Africa, however, has the highest incidence of child labour. Close to 120 million African children aged between 5 and 14 are engaged in full time work. This figure constitutes at least 40 percent of the total population of children on the continent. Half of these children combine economic and non-economic work. Among school-going children at least one third of boys and two fifths of girls are engaged in part-time economic activities.⁸

Sub-Saharan Africa has the greatest incidence of economically active children: 26.4 percent of all 5 to 14-year-olds, compared to the 18.8 percent for Asia and the

⁶ Creighton (1996-1997) 18 *Comp Lab L J* 362.

⁷ 'Child labour by sector' ILO's International Programme on the Elimination of Child Labour (IPEC), available at <http://www.ilo.org/ipec/areas/lang--en/index.htm> [accessed on 20 August 2007].

⁸ Admasie (note 3) 255.

Pacific and 5.1 percent for Latin America. It ranks second behind Asia in absolute terms, with 49.3 million children working.⁹

The ILO considers child labour particularly exploitative and critical in Southern Africa due to the socio-economic, cultural and developmental circumstances of the region. Children living in, for instance, Lesotho, Zimbabwe and South Africa can be found working in agricultural and domestic labour and in informal economic sectors. Much of the work is done within household systems of production but it is increasingly intersecting with the channels of global commerce. Of particular concern are child trafficking, small-scale mining, hazardous work in agriculture and commercial sexual exploitation.¹⁰

UNICEF estimated that, in 2000, 29.5 percent of children aged between 5 to 14 years in Lesotho were working.¹¹ Here, the rate of child work continues to increase due to poverty and the scourge of HIV/AIDS.¹² Boys as young as 4 years are employed either by their families or are hired out by their parents to work in hazardous conditions as livestock herders in the highlands. Children also work as domestic servants, car washers, taxi fare collectors and street vendors.¹³ Due to the high unemployment rate for adults, children are more likely to be found labouring in the informal sector. Commercial sexual exploitation of children is also a growing problem.¹⁴

In 1999, the Central Statistics Office of Zimbabwe estimated that 33.2 percent of children aged 5 to 14 years were working in almost all economic and non-economic sectors of the country, such as subsistence and commercial farming,

⁹ ILO/ IPEC 'Africa', available at <http://www.ilo.org/ipec/Regionsandcountries/Africa/lang--en/index.htm> [accessed on 20 August 2007].

¹⁰ Ibid.

¹¹ Bureau of International Labour Affairs US Department of Labour - Lesotho, available at <http://www.dol.gov/ilab/media/reports/iclp/tda2004/lesotho.htm> [accessed on 3 October 2006].

¹² In January 2004 UNICEF, Save the Children, and the Ministry of Health and Social Welfare estimated the number of HIV/AIDS orphans to be 92,000. 'Complementary Report on the Implementation of the UN Convention on the Rights of the Child in Lesotho', available at http://www.crin.org/docs/resources/treaties/crc.26/lesotho_ngo_report.pdf [accessed on 20 October 2006].

¹³ Ibid.

¹⁴ Bureau of International Labour Affairs US Department of Labour - Lesotho (note 11).

forestry and fishing, domestic service, small-scale mining, gold panning, quarrying, construction, micro industries, manufacturing, trade, restaurants and begging.¹⁵

Over 90 percent of these children reside in rural areas where they work for long hours in the fields, often in exchange for education at farm boarding schools. Due to the 2001 land redistribution exercise, the incidence of child labour in the agricultural sector decreased.¹⁶ This, however, resulted in more children engaging instead in informal employment in the urban areas.¹⁷

The HIV/AIDS pandemic has further compounded the child labour problem. In Zimbabwe alone, the disease has orphaned close to one million children.¹⁸ Most of these children have dropped out of school in order to take care of sick parents and become the principal wage-earners for their families. The burden of feeding for the surviving siblings has often fallen on the oldest child.¹⁹

In 1999, a survey conducted in South Africa also estimated that 36 percent of children aged between 5 and 17 years were working in the country.²⁰ Child labour was most prevalent in the rural agricultural sector and the informal economy. In the urban areas where there was high human and vehicle traffic, children worked as street hawkers and car guards. They also worked as domestic servants.²¹ South Africa has, in recent years, not only become a popular tourist destination, but also a transit point

¹⁵ Bureau of International Labour Affairs US Department of Labour – Zimbabwe, available at <http://www.dol.gov/ilab/media/reports/iclp/tda2004/zimbabwe.htm> [accessed on 3 October 2006].

¹⁶ By 2002 at least 3 178 farms with a settler capacity of 160 340 households had been sub-divided by the government under the fast track land resettlement programme. An additional 5 326 commercial farms covering 10 million hectares had been gazetted for acquisition. Weber (2003) 2 *Colombia Political Rev.* available at http://www.cpreview.org/issues/2/3/mugabes_land.html [accessed on 18 September 2007].

¹⁷ In 1999, the Zimbabwe had about 12,000 street children, and the number has since increased. As of 2001, a growing number of children under the age of 17 years were engaged in prostitution. There is cross-border trafficking of children for farm labour and commercial sexual exploitation. Within Zimbabwe, children from rural areas are often recruited to work as domestics in the houses of distant kin or unrelated employers for long hours with little free time. Ibid.

¹⁸ As of 2000, 87 percent of all orphans in Zimbabwe had lost their mothers or both parents as a result of HIV/AIDS. Rau 'Intersecting Risks: HIV/AIDS and Child Labour' (2002) Working Paper 8 ILO 4.

¹⁹ Global March against Child Labour–Zimbabwe 2007, available at http://www.globalmarch.org/events/zimbabwe_march07.php [accessed on 18 September 2007].

²⁰ 'The Definitions and Extent of Child Labour' in 'Surveys of Activities of Young People' Survey conducted by the Statistics South Africa, in co-operation with ILO-IPEC (1999). Available at <http://www.ilo.org/public/english/standards/ipec/simpec/southafrica/report/page9.htm> [accessed on 17 March 2006].

²¹ Children work in commercial agriculture and on subsistence farms of their own families, as well as on small farms planting and harvesting vegetables, picking and packing fruit, and cutting flowers.

for trafficking children for prostitution. HIV/AIDS has also driven orphaned children into 'exploitative' work.²²

(b) Forms of labour

Child labour comes in many forms. In Lesotho, Zimbabwe and South Africa (and other developing countries), it may be classified into three categories:

- (i) work within the family;
- (ii) work within the family but outside the home;
- (iii) and work outside the family.²³

Children working within the family are usually engaged in domestic household tasks, agricultural and pastoral work, and handicraft industries. Such work is unremunerated but is a contribution to the functioning of the family.

Work within the family, but outside the home, includes agricultural and pastoral work which consists of seasonal or full-time migrant labour, local agricultural work, domestic service, construction work and informal occupation (for instance recycling waste, vending, polishing shoes and washing cars). This work is remunerated and the money is for the benefit of the family.²⁴

Children working outside the home are usually employed in plantations, apprenticeships, skilled trades (carpet, embroidery, and metal work), industrial unskilled occupations, mines, domestic work, commercial work in shops and restaurants, begging, guiding tourists, prostitution, pornography and child soldiering. There are usually very few returns to the family, if any at all.²⁵

(c) Causes

Social scientists have attributed child labour to a variety of causes. In developed countries, children work mainly to earn some pocket money and to provide extra hands in agriculture, particularly during the sowing and harvesting seasons.²⁶ In the developing world, however, the causes include poverty, struggling national

²² ILO/IPEC (note 9) paras 15 and 18.

²³ 'Types of child labour', available at <http://www.tnchildlabour.tn.gov.in/forms.htm> [accessed on 20 August 2007].

²⁴ Ibid.

²⁵ Ibid.

²⁶ Mendelievich (1979) 118 *Int Lab Rev* 557 at 560.

economies, inadequate school facilities, the cheap costs of employing children, customary traditions and practices, and ineffective legislation outlawing child labour it.²⁷

Scholars, activists, and various organisations have often considered family poverty as the single most important cause of child labour in Africa. Children have to provide domestic services to their households, help on the family farm or business, or work on the formal labour market to ensure income security and survival of themselves, their siblings and even the entire family. In some cases, poor families place their children in bonded labour in return for meagre advance payment from employers.²⁸

Child labour is also a consequence of a country's socio-economic situation. An unstable economy (such as that of Zimbabwe) often results in widespread unemployment of adults, forcing them to pull their children out from school and into informal employment to augment the family income.²⁹ Moreover, poor countries lack the financial resources to effect compulsory or quality school education.³⁰ Children are thus left with few options but to work.

For many families, sub-standard school facilities do not merit the income spent sending their children to school. Poor parents often find the schools irrelevant in meeting their needs.³¹ They always have to weigh a child's economic contribution against investment in the child's future. In fact, educating a child can be a significant financial burden. Where the education is free, a poor family would still have to pay for the basic school necessities, such as books, stationery, uniforms and even levies.³²

The political situation of a country may also be said to be a direct cause of child labour. Since time immemorial, children have been extensively involved in military operations. When war breaks out, there is often a massive recruitment of

²⁷ Edmonds (2005) 19 *J of Economic Perspectives* 21.

²⁸ Ibid.

²⁹ Since the late 1990s Zimbabwe has been struggling with the resolution of fiscal problems and the result has been an upsurge in child labour figures. Reported in *The Herald* (Harare) on 27 June 2007.

³⁰ Weiner (1994) 2 *Int J of Children's Rts* 121.

³¹ Ibid.

³² 'Elimination of Child Labour: Causes' ILO (IPEC), available at <http://www.ilo.ru/ecl/cause.htm> [accessed on 20 August 2007].

children into the armies of the belligerents. In 2001 the ILO estimated that 300,000 children were serving with armed units around the world, of which 120 000 were in Africa.³³ Today, children under the age of 18 are fighting in approximately 20 countries worldwide, as part of government armies, paramilitaries and armed opposition groups.³⁴

In Southern Africa, the prevalence of HIV/AIDS is increasingly driving children to work. The death of parents and guardians inevitably results in the loss of adult economic support and supervision. Children are thus left to fend for themselves. Girls, in particular, have had to drop out of school to take care of sick parents and to find work to support themselves and their orphaned siblings.³⁵

In urban areas, child welfare experts blame the emergence of child labour not only on economic hardships but also on family dysfunction. In socially disadvantaged or morally dysfunctional families, pecuniary challenges are often coupled with destructive dynamics in the relationships. Such factors tend to drive children into the streets, temporarily or permanently, in pursuit of income. Children thus enter a vagrant existence at ages too young for them to make rational and independent decisions.³⁶

The ILO has often pointed to unscrupulous employers as another major cause. Manufacturing, mining and agricultural establishments often actively recruit children to whom they can pay lower wages than adults. After all, children are easier to manage than adults: they are less skilled, unaware of their rights, obedient, unlikely to organise themselves, flexible and ultimately expendable. This is more so in cases of sexual exploitation and other illicit businesses.³⁷ For some employers, children constitute a reserve of casual labour to be hired and fired at will. When the type of

³³ Children can take part directly in armed conflict, or they can be used by the armies in support roles, such as porters, spies, messengers, look outs, and sexual slaves. They can also be used for political advantage either as human shields or in propaganda. 'Child labour by sector: Armed conflict (child soldiers)' ILO (IPEC) website <http://www.ilo.org/ipecc/areas/Armedconflict/lang--en/index.htm> [accessed on 23 August 2007].

³⁴ 'The Use of Child Soldiers Worldwide' Human Rights Watch, available at http://hrw.org/children/child_soldiers_map.html [accessed on 24 August 2007].

³⁵ Case et al (2004) 41 *Demography* 483 at 485; Kempe (2005) 11 *J Children & Poverty* 19 at 23.

³⁶ 'Elimination of Child Labour: Causes' ILO (note 32).

³⁷ *Ibid.*

employment is illegal, the children and their parents are less likely to complain to the authorities for fear of losing whatever meagre income the children bring to their families.³⁸ Employees value child employees for their ‘nimble fingers’ which can make fine, hand-knotted carpets or pick delicate flowers or tea leaves. Similarly, only physically small individuals are able squeeze through mine tunnels.³⁹

Most significantly, social scientists attribute child labour in non-Western countries to entrenched local customs and traditions. They argue on the basis of statistics, which reveal that children are actually more likely to work side by side with their parents than is the case with manufacturing establishments or other forms of wage employment.⁴⁰ For instance, the societies in question believe that, from a very young age, a child should not expect to be fully supported by others, but should make a contribution to the family income.⁴¹ Such peoples view work as an integral part of the socialisation process of a child. Asian societies believe that children should learn and participate in the trade of their parents no matter how strenuous or hazardous it may be. Thus it is not unusual for Asian families to borrow money to finance social occasions or religious events and then bond their children to pay off the debts.⁴²

In developing countries, cultural traditions of gender discrimination also play a significant role in child labour. Where parents have to decide which children to educate, they usually choose their sons over their daughters. They believe that, upon marriage, daughters will no longer contribute to the family income and are therefore not worth investing in. Girls are, thus, often uprooted from school at a young age and sent out to work.⁴³

³⁸ Moreover, some employers genuinely consider that they are doing a favour to the children whom they employ by offering them work and income. Thus, declaring child labour to be illegal may in some cases have the perverse effect of depriving child workers of much of the protection provided by labour legislation to adults. ‘Children’s Employers’ ILO, available at <http://www.ilo.ru/ecl/chempl.htm> [accessed on 21 August 2007].

³⁹ Canagarajah and Nielsen HS (2001) 575 *Annals of the American Academy of Political and Social Science* 71 at 74.

⁴⁰ In 2000 and 2001, UNICEF reported that less than 3 percent of children aged between 5 and 14 in developing countries worked outside their household for pay. Edmonds and Pavcnik (2005) 19 *J of Economic Perspectives* 199 at 202.

⁴¹ Mendelievich (note 26) 560.

⁴² ‘Elimination of Child Labour: Causes’ ILO (note 32).

⁴³ Rau ‘Combating child labour and HIV/AIDS in sub-Saharan Africa: A review of policies, programmes, and projects in South Africa, the United Republic of Tanzania and Zambia to identify good practices’ (2002) Paper No. 1 ILO International Programme on the Elimination of Child Labour (IPEC) 2.

2. The international regime on child labour

Since the beginnings of the ILO in 1919, the problem of child labour has been high on the international agenda. This is evidenced by the enactment of numerous ILO Conventions regulating the employment of children. From the early 1980s, international concerns about children's rights produced a plethora of instruments on children's issues which brought a new understanding of the phenomenon of child labour.

In November 1989, the United Nations General Assembly adopted a Convention on the Rights of the Child (CRC), an instrument providing a wide range of entitlements for children.⁴⁴ By September 1990, the Convention had entered into force and, by the turn of the century, a record 191 states had ratified it.⁴⁵ In June 1999, the ILO adopted the Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (Worst Forms of Child Labour Convention),⁴⁶ and by November 2000, it had entered into force. To date, 165 of the 175 member states of the ILO have ratified the instrument.⁴⁷

Africa became the first continent to adopt a treaty specially adapted to the conditions of the region. In July 1990 the Assembly of Heads of State and Government of the Organisation of African Unity (OAU) adopted the African Charter on the Rights and Welfare of the Child (ACRWC). (However, it took another nine years before the instrument entered into force.)⁴⁸

⁴⁴ G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989). Entered into force 2 September 1990.

⁴⁵ Office of the High Commission for Human Rights 'Status of ratification of the Convention on the Rights of the Child'. Available at <http://www.unhcr.ch/html/menu2/6/crc/treaties/status-crc.htm> [accessed on 27 August 2007].

⁴⁶ ILO Convention 182.

⁴⁷ List of ratifications for ILO Convention 182, available at <http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C182> [accessed on 20 August 2007].

⁴⁸ To date, only 21 countries out of the 53 members of the AU have ratified the Charter. 'African Charter on the Rights and Welfare of the Child: Status of Ratifications', available at <http://www1.umn.edu/humanrts/instreet/afchildratifications.html> [accessed on 26 May 2007]; Lloyd (2002) 10 *Int J of Children's Rts* 179, Chirwa (2002) 10 *Int J of Children's Rts* 157.

3. The conflict between international law and the reality in Southern Africa

The international community's apparently overwhelming support for the CRC and the Worst Forms of Child Labour Convention implies a high degree of international agreement on children's rights. This backing is based on an assumption that the institutionalisation of children's rights and the abolition of child labour at a global level will result in the improvement of the lives of all children. While states have displayed an obvious consensus of concern for children, they nevertheless disagree on the laws and policies needed to bring about an improvement in child welfare, particularly those designed to tackle child labour.

The parents and educators in many Western societies value an underlying 'individualistic' culture in the developmental goals of childhood. Such thinking promotes the individual's acquisition of competence and independence.⁴⁹ The ILO Conventions, the CRC and, in part, the ACRWC are based on such Western theories of child development. Accordingly, drafters of international laws have assumed a universally applicable model of childhood. This model rests on the notion that children everywhere have the same basic needs which can be met with a standard set of responses.⁵⁰ The international instruments hence emphasise the role of individualism and professional interventions on childhood and de-emphasise the influence of the wider social, economic, political and cultural circumstances.⁵¹

Non-Western societies, on the other hand, are often characterised by more collectivist or inter-dependent cultural scripts. Africans value collective goals highly, such as learning to live in harmony with one another, competent participation in social events, obedience to authority, and a cooperative and altruistic orientation.⁵² Child work is therefore often considered part of ordinary socialization and human

⁴⁹ Wise and Sanson (2000) 22 *Australian Institute of Family Studies* 3.

⁵⁰ Steiner and Alston *International Human Rights in Context: Law, Politics, Morals* 517.

⁵¹ *Ibid.*

⁵² Wise and Sanson (note 49) 3.

development. By virtue of being African, one assumes obligations to contribute to the sustenance of the family and the community at large.⁵³

In this regard, the girl child has a duty to clean the house, cook, fetch firewood, wash clothes and take care of younger siblings. All these burdens are meant to prepare her for motherhood. The boy child has a duty to work in the fields, to harvest and to herd livestock. These jobs are meant to groom the children to play appropriate roles when they become adults. In addition, however, both boys and girls work to contribute to the sustenance of the family. Although, today, the traditional ideals have often been lost, the duty to contribute to the survival of the family and community remains.

The prohibitions and stipulations contained in children's rights treaties inevitably conflict with African customary laws and practices, because the international instruments disregard fundamental differences in the experience and perceptions of childhood between countries and cultures. As with the broader international human rights movement, however, the campaign against child labour seeks to modify various cultural practices and attitudes. International law thus pathologises the African expectation that children should contribute economically to their families, together with related cultural beliefs about gender roles and child work as appropriate preparation for adult life. The child labour movement seems to blame these attitudes for the prevalence of child labour, thereby suggesting that the plight of children in non-Western countries is due to those countries' moral, social and economic failings. This type of thinking, however, is short-sighted. No culture should be condemned out of hand, since, in order to achieve the long term happiness and development of the child, it may be preferable to the Western system of regulation.⁵⁴

The conflicts evident between the Western and African theories of child development cast doubt on the wisdom of applying the international law on children's rights universally. The questions that arise are: Can contemporary international human rights instruments, given their Western preconceptions, apply effectively to peoples from non-Western cultures? Can non-Western peoples identify with the

⁵³ Ncube *Law, Culture, Tradition and Children's Rights in Eastern and Southern Africa* 203.

⁵⁴ Smolin (1988-89) 16 *Hofstra Lab & Employment L J* 383 at 401-2.

notions of child labour contained in the international human rights instruments? If non-Western cultures do not possess the Western conception of human rights, should their customs and norms on child development be dismissed as bad?⁵⁵

The best way to begin answering these questions is to consider child labour within the context of both Western and African cultural perspectives. This involves analysing certain contentious issues: the definition of a child, the definition of child labour and the difference between what is considered acceptable and unacceptable work.

(a) Defining child and childhood

International law presents two potentially conflicting conceptions of childhood. The first conceptualises it as a period of dependence on adult care and concern. This understanding is reflected in the CRC's presentation of children's rights as obligations owed to children by the state and adults generally.⁵⁶ The second allows children a high degree of autonomy with regard to decisions affecting themselves and the community.⁵⁷

While African customary laws are not insensitive to the vulnerability of children, the laws, nevertheless, do not accord them preferential treatment as required by international law and Western legal systems.⁵⁸ The rights of children or any other individual are submerged into those of a group, whether family or community.⁵⁹

African societies generally link individual rights to those of a group, which is evident in everyday life, particularly in times of economic hardship. Children thus provide a solution for the survival of their families and their communities. For instance, children in Zimbabwe are sent to work in the fields of their own families, their neighbours or surrounding commercial farms to augment the family income. Children are also placed in fostering arrangements with relatives or strangers in return

⁵⁵ Cobbah (1987) 9 *H Rts Q* 309.

⁵⁶ For example, children's right not to be discriminated against is presented in Article 2 as a duty of the State to protect children from discrimination of any kind.

⁵⁷ Children's Rights Alliance, available at <http://www.childrensrights.ie/convention.php> [accessed on 29 May 2004].

⁵⁸ Bennett *Customary Law in South Africa* 295.

⁵⁹ *Ibid.*

for money to sustain the remaining family.⁶⁰ Some end up working in the household of a creditor family to offset a debt while others enter formal employment.

African culture thus conceptualises childhood in terms of intergenerational obligations of support and reciprocity, and regards it as a period of rigorously enforced obedience to persons in authority. The intergenerational dependency of African families ensures that the discharge of parental obligations towards children in tender years creates reciprocal obligations for the children to support their parents at all times. In this respect, a child is a resource to be utilised, a view that is fundamentally at odds with international laws on child labour.⁶¹

Statutes, written law and international conventions make reference to age-specific regulations. The CRC generally defines a ‘child’ as anyone below the age of 18⁶² but international law is flexible in the application of age limits.⁶³ For instance, the CRC sets the upper limit for childhood at 18, but gives state parties permission to set their upper limit of childhood at any age lower than 18. The ILO Minimum Age Convention defines child labour in terms of a minimum age of employment, and establishes that age as not less than 15 years.⁶⁴ For developing countries, where the economies and educational facilities are underdeveloped, the Convention sets the minimum age of employment at 14.⁶⁵

The arbitrary fixing of the upper limit of childhood by international conventions, however, is problematic in Africa where age has no particular relevance in determining childhood or adulthood.⁶⁶ African societies generally measure the duration of childhood by factors such as the physical development of the child,⁶⁷

⁶⁰ Ibid.

⁶¹ Ncube (note 53) 12.

⁶² Article 1.

⁶³ Hanson and Vandaele (2003) 11 *Int J of Children’s Rts* 73 at 99.

⁶⁴ Article 2(3).

⁶⁵ Article 2(4). See Children’s Rights Alliance (note 57).

⁶⁶ Ncube (note 53) 100.

⁶⁷ According to Lesotho culture the definition of a child for purposes of child work is dependent on physical ability to carry out a task. The capabilities of the child are left to the discretion of the person giving the task, who may be influenced by his or her economic status, education, and location (whether rural or urban). Ncube (note 53) 207.

ceremonies associated with puberty, circumcision, procreation and marriage.⁶⁸ These apparent variations in the conceptions of childhood complicate attempts at reaching a universally acceptable definition of child labour and significantly impede the application and reception of international laws on child's rights.

(b) Defining child labour

Neither the CRC nor the ILO Conventions define child labour in explicit terms. The ILO itself often describes it as work that deprives children of their childhood, their potential and their dignity.⁶⁹ It is work that is harmful to physical and mental development, in other words, work that is mentally, physically, socially or morally dangerous and harmful to children, and interferes with their schooling. The CRC, on the other hand, distinguishes between child work, which is a general term including work that is unlikely to damage educational opportunities, and child labour, which is any harmful form of work that denies children opportunities to fulfil their other rights.⁷⁰

In light of these supposed effects of labour on the child, it is surprising how few empirical studies have been devoted to the impact of typical work situations on the physical and mental development of children in developing countries. Child rights activists therefore make assumptions that may not withstand closer scrutiny. For instance, some NGO programmes have assumed that children who work with their families are far less likely to be exploited and endangered than those who work away from home. While this proposition may be true in some cases, it should not be presumed valid for all cultures or communities until confirmed by reliable evidence.⁷¹

Although international law attempts to draw a distinction between normal family obligations and work giving rise to exploitation, grey areas nevertheless remain. International law pays no attention to the lack of distinction between child-work and child-labour in African cultural settings or the absence of a vernacular

⁶⁸ A person may cease to be a child, regardless of age, and be deemed to be an adult responsible for running a family. The fact that such a person is still physically and mentally immature is often overlooked. *Ibid.*

⁶⁹ 'Elimination of Child Labour', available at <http://www.ilo.ru/ecl/def.htm> [accessed on 13 May 2006].

⁷⁰ Child Labour, Policy Planning and Implementations, Department for International Development (DFID), available at http://www.keysheets.org/red_5_child_rev.pdf [accessed on 13 May 2004].

⁷¹ Myers (ed) *Protecting Working Children* 8.

equivalent in some African languages. According to most African cultures, child work is not 'work' as such. Rather, child work is 'errands', even if it is excessive by international standards.

4. Importance and purpose of the research

Since the beginnings of the ILO, child labour has been on the global agenda. With the advent of the CRC, activists have intensified their efforts in ensuring the universal application and implementation of all children's rights conventions and the eradication of child labour. Recent statistics in the Southern African region (and other parts of the world), however, bring to the fore the crucial question: How effective is the international child labour regime in African cultural, social and economic settings?

While acknowledging some advantages of universal standards, this research seeks to test the efficacy of the laws on child labour and identify the problems of applying international norms on child labour in the selected African countries, Zimbabwe, Lesotho and South Africa, whose cultural (and economic, social and political) realities often differ significantly from those in the West. It questions whether international law, as it stands, accommodates the diverse circumstances of the developing world.

I have singled out these three states for the following reasons. At a personal level, I am a citizen of Zimbabwe and am therefore well versed in its cultures, particularly that of the Shona ethnic group of which I am a member of. I did my undergraduate studies in Lesotho and became conversant with the laws and customs of the country in the process. I am currently stationed South Africa where I have been doing postgraduate work and have similarly become conversant with its laws and cultures.

At an academic level I selected these countries because of certain similarities: they are all located in the Southern African region and are neighbours. The ethnic groups fall within a general category of Bantu-speaking peoples and thus have

common languages, and cultures.⁷² The countries also share a common colonial history, which has had the same impact on their social, economic, political and cultural structures. Significant in this regard is a shared Roman-Dutch legal heritage system,⁷³ together with a system of legal pluralism.

Lesotho, Zimbabwe and South Africa have all ratified the same international instruments on children's rights and child labour. They all employ the same common law rules of incorporation of international law. By ILO standards, the prevalence of child labour in these countries is exceptionally high

However, the state of their economic, administrative and judicial structures differs: Lesotho is poor and dependent on South Africa and its legal structures exist within the matrix of the 19th century. Until recently, Zimbabwe had an excellent economy but is going through its worst economic and political crisis and is presently teetering on the brink of a civil war. Its administrative and judicial structures are dysfunctional. South Africa, on the other hand is currently enjoying a relatively healthy economy with fairly solid judicial and administrative structures. These differences between the countries translate to the disparity in the extent of their incorporation of relevant international instruments into domestic legislation. The existing commonalities and variations thus make these three countries suitable candidates for the study of the conflict between human rights principles and cultural norms.

This thesis will thus begin by tracing the historical development of the international law regulating the work of children with a view of testing its efficacy, and compatibility with the realities of countries under study.

⁷² For instance, the Sotho peoples are found in both Lesotho and South Africa while the Ndebeles and the Vendas (Vatsonga) are found in Zimbabwe and South Africa.

⁷³ Lesotho was a protectorate of Britain in 1868 and gained its independence in 1966. Zimbabwe was colonised by the British in the late 1880s and gained its independence in 1980. As for South Africa, prior to 1910, parts of the country such as the Cape and Natal (now known as KwaZulu Natal), were under British colonial rule. In 1910, after the Anglo-Boer war, the Union of South Africa incorporated all four territories into what the country is today. In 1934, the Union became a dominion within the British Empire and, in 1961, declared itself a republic (which also marked the end of formal ties with Britain). Mouton (2006) 51 *Historia* 29-48; Lambert (2000) 43 *South African Historical J* 198-9.

Chapter II

THE ORIGINS AND DEVELOPMENT OF THE LAWS ON CHILD LABOUR

1. The historical development of the law on child labour

Any meaningful discussion of child labour requires acquaintance with the relevant laws. To understand the policies that inform such legal interventions, however, one must, first, trace their history. Hence this chapter will lay the ground for an informed and comprehensive assessment of the efficacy of the law in Lesotho, Zimbabwe and South Africa.

Britain was the first state to experience the industrial revolution and to acknowledge the horrors of child labour. The development of British legislation in this regard is what eventually prompted an international movement to eradicate the exploitation of children.¹ However, even before the advent of the industrial revolution, children were already vital players in national economies. Society expected them to begin working at a young age, whether it was in a family enterprise or a cottage industry. Only the children's physical and mental abilities regulated access to work.² Although children worked under the tutelage of their parents, they laboured for long hours, often in arduous and exacting work.³ Indeed, in the 14th century, when plagues had ravaged Europe, employers were concerned about the shortage of labourers. Consequently, in 1388, England enacted a statute preventing children under the age of 12 from abandoning their agricultural obligations.⁴

Towards the end of the 16th century, the state gave justices of peace the power to apprentice pauper children from the age of 7 years. They were sent in batches of about 80 to their masters, who undertook to clothe, feed and lodge them until they

¹ Nardinelli (1980) 40 *J of Economic History* 739-55.

² Scrupf *Encyclopaedia of Children & Childhood* 159-62.

³ Thomas *Young People in Industry 1750-1945* 12.

⁴ After 1500 the British came up with a policy of giving children training in various forms of work and crafts so that they could be self-supporting in future. Fyfe *Child Labour* 28-9.

reached the age of 21.⁵ In theory, it was necessary for the justices of the peace to first secure the children's consent. Not surprisingly, however, these recruiters enticed these pauper children with attractive prospects of good food and plenty of money.⁶

Between 1750 and 1850, Europe underwent profound economic changes. This was the age of the Industrial Revolution, complete with a cascade of technical innovations, a vast increase in industrial production, a boom in world trade and an explosion of urban populations.⁷ The period brought with it the first widespread and impersonal exploitation of children. By the 19th century, 13 percent of the labour force was under the age of 15.⁸ Apprentices who had been herded into work houses worked 14-hour shifts, on their feet with no rest. If the machinery of the mills needed to be stopped for repair, the children had to work for even longer periods to make up for lost time.

The introduction of the steam engine increased child labour in the factories. Parents sent their children out to work in various industrial enterprises to augment meagre family income.⁹ These ironically named 'free children' worked just as long and hard as the apprentices. At that time, a typical cotton mill-owner considered that 'nothing is more favourable to morals than habits of early subordination, industry and regularity'.¹⁰

Up to the mid 19th century, child labour in British textile factories was the most prevalent and visible form of labour.¹¹ The coal mines, however, also absorbed many children. Although the advent of the industrial revolution had intensified coalmining, the technology employed remained primitive and most mines refused to implement advanced means of mechanical conveyance. They therefore remained

⁵ It was these children who would in latter years provide the first convenient supply of labour for new textile mills at the advent of the industrial revolution. Thomas (note 3) 13; Fyfe (note 4) 28.

⁶ On arrival, however, the children soon realized that they were complete slaves of their masters, who often treated them with utmost recklessness and brutality. Fyfe (note 4) 29.

⁷ Reed 'Child Labour and the British Industrial Revolution', available at <http://www.libertyhaven.com/countriesandregions/britain/childlaborbritish.html> [accessed on 1 December 2005].

⁸ Scrupf (note 2) 159-62.

⁹ Thomas (note 3) 14.

¹⁰ Ibid.

¹¹ Chung et al 'Industrial Child Labour in Britain', available at <http://www.zum.de/whkmla/sp/dabin/Industrial%20Child%20Labor%20in%20Britain.htm> [accessed on 25 September 2006].

inefficient and labour-intensive. Children as young as 5 years old worked in underground haulage operations for at least 12 hours a day.

In other industries, it was the dangerous processes involved that seriously affected the health of the children rather than the long hours of work. For example, those employed by potters were exposed to glaze, which consisted of white lead, a poisonous substance which, when absorbed by the body, produced colic and paralysis. The chimney sweeps were another example of children engaged in hazardous employment. During the 18th century, coal replaced wood, and long narrow chimneys replaced the wide ones. Children from the ages of 5 were employed to climb to the top of the chimney in order to sweep soot on their way down. The training of chimney sweeps was cruel, involving the hardening of the skin around the elbows and knees by rubbing in brine close to a hot fire.

Before the end of the 18th century, many people in Europe were already disturbed about the living and working conditions of children. The image of the slaving child became one of the most powerful psychological tools used by the early campaigners against child labour.¹² Chimney sweeps were the first to attract the attention of British reformers. In 1788, these activists successfully pushed for the passing of the Better Regulation of Chimney Sweepers and their Apprentices Act. The legislation prohibited the apprenticeship of boys under the age of 8 or the sending of any child out to sweep a chimney between 7 am and 12 pm in winter and between 5 am and 12 pm in summer. However, as with subsequent measures designed to improve the lot of working children, this Act was a dead letter largely because it lacked enforcement machinery.¹³

The conditions of children working in the textile mills were the next to attract attention. In 1802, Parliament passed the Health and Morals of Apprentices Act, which, inter alia, abolished night work and limited the working day in cotton mills to 12 hours.¹⁴ To ensure compliance, the state appointed clergymen and magistrates to

¹² Fyfe (note 4) 29.

¹³ Thomas (note 3) 43.

¹⁴ Section IV. Sections VI, III, and VII respectively provided for schooling, proper clothing and sleeping arrangements. Thomas (note 3) 29; 'Factory Legislation 1802-1878', available at <http://www.historyhome.co.uk/peel/factmine/factleg.htm> [accessed on 26 September 2006].

inspect factory premises.¹⁵ The relentless efforts of labour reformers kept the textile factories in the spotlight and prompted Parliament to enact subsequent instruments, such as the Cotton Mills and Factories Act of 1819 and its Amendment of the same year.¹⁶ Like the 1802 Act, however, these pieces of legislation were largely ineffective because they lacked an independent inspectorate to ensure enforcement (most inspectors either owned these establishments or were related to the owners).¹⁷

In 1833, Parliament enacted the Factory Act which also set minimum ages for work in textile mills and maximum hours for child workers.¹⁸ As there was no civil registration of births, however, evasion by factory owners remained fairly easy.¹⁹ A provision in the Act for the appointment of four independent factory inspectors to police 3 000 textile establishments, eventually introduced some semblance of respect for the regulations.²⁰

A significant provision in the 1833 Act was a requirement for factory children to attend school for two hours a day, for six days in the week, as a condition of employment.²¹ Although the Act of 1802 had insisted that apprentices should receive some measure of instruction during working hours, this affected only a small proportion of children employed in mills and factories. This was the first recognition that it was not enough to simply regulate hours of work without providing for education.²²

¹⁵ Section IX.

¹⁶ The Act forbade cotton mills from employing children under the age of 9 and those above 9 from working for more than 12 hours a day. The law entitled children to a one and a half hours' break for meals between 11 am and 2 pm. In 1820, an amendment to the Cotton Mills and Factories Act of 1819 was passed which provided that longer hours could be worked if time had been lost due to failure of water power or other accident. The break for meals could also be taken at any time between 11 am and 4 pm, so that children could legally be compelled to work for a considerably longer continuous period than that permitted by the Act of 1819. Thomas (note 3) 29; Fyfe (note 4) 30; 'Factory Legislation 1802-1878' (note 14).

¹⁷ Although the Act of 1802 failed to achieve its purpose, it was yet of great importance, for Parliament had come to realise that it had a duty to supervise and control factory conditions and, once the initial inertia had been overcome, further reforms followed. Thomas (note 3) 28 and 30; Fyfe (note 4) 30.

¹⁸ Children between the ages of 9 and 13 were to work for a maximum time of 48 hours a week. The maximum time for those from the ages of 13 to 18 was 69 hours a week. Two eight-hour shifts per day for children were allowed but night work was outlawed for anyone under the age of 21. Thomas (note 3) 38; 'Factory Legislation 1802-1878' (note 14).

¹⁹ Thomas (note 3) 38-9.

²⁰ Fyfe (note 4) 30; Thomas (note 3) 39.

²¹ Thomas (note 3) 55.

²² Unfortunately, the Act did not apply to industries closely linked to the textile trade. These were the industries devoted to the printing, dyeing and bleaching of fabrics which involved the exposure of

The Elementary Education Act of 1870 proved to be a real turning point in the Victorian campaign against child labour.²³ It had taken nearly 30 years for those who had been concerned with improving the working conditions of factory children to realise that it was futile to enact laws regulating hours and conditions of labour, unless due provision was made for education. The Act set the framework for the schooling of all children between the ages of 5 and 13 in England and Wales.²⁴ It made provision for a national system of basic education, administered through local school boards (which kept track of school attendance).²⁵ A further Education Act of 1876 outlawed the employment of children under the age of 10 in agricultural work.²⁶

These two Education Acts, however, did not immediately make education compulsory. It was the Education Act of 1880 which finally made school attendance mandatory for children up to the age of 10. Children with a poor attendance record could not leave school until they were 13. Despite these laws, children continued to work in factories until well into the 20th century.²⁷

2. International campaign

In the late 19th century, after the working conditions of children in British mines had been exposed, European countries placed child labour on an international agenda.²⁸ In 1890, Germany hosted the first international labour conference, which was a precursor to the establishment of the International Labour Organisation (ILO).²⁹ From its inception in 1919, the ILO placed child labour high on its list of priorities,

children to dangerous substances and unhealthy working conditions. As for the other industries, in 1842 the Children's Employment Commission was set up to investigate the working conditions of children in the mines. In its first report it reported horrific stories which spurred Parliament to pass the Mines Act the same year. The Act prohibited the employment of women and children under the age of 10 from working underground. Thomas (note 3) 55; Chung (note 11); Heeson (1981) 24 *Historical J* 69.

²³ 'Factory Legislation 1802-1878' (note 14); Elementary Education Act 1870.

²⁴ *Ibid.*

²⁵ Fyfe (note 4) 31.

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ Grimsrud 'The Next Steps, Experiences and Analysis of how to Eradicate Child Labour', available at <http://www.fafu.no/pub/rapp/932/932.pdf> [accessed on 30 April 2004].

²⁹ This was created by the Treaty of Versailles in the aftermath of the First World War in 1919.

and adopted several conventions to set the minimum employment age for children in specific industries and places of employment. During the course of the 20th century, it adopted more conventions, which expanded the application of the minimum age principle to a wider spectrum of economic sectors.³⁰

The early approach to regulating child employment was flexible, and several exceptions could override the basic age limits. Children of lower ages could work in the course of educational pursuits, in family activities or when cultural or economic conditions in certain countries required it.³¹ The conventions, nevertheless, explicitly provided that the school obligation for children could not be compromised.³²

With the passage of time, the ILO took an increasingly strict line on the employment of children. It gradually raised the minimum age for employment, and tolerated fewer forms of child work, as evidenced by the totally abolitionist attitude apparent in later ILO Conventions.³³

In 1989, the child labour debate entered a new phase with the entry into force of the United Nations Convention on the Rights of the Child (CRC).³⁴ The instrument obliged member states to observe a whole package of children's rights and to create proper mechanisms for implementation.³⁵ It revolutionised the concept of child labour, and subsequently influenced the adoption of the ILO Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (Worst Forms of Child Labour Convention).³⁶ The latter

³⁰ These international instruments were advocated for by crusaders against child labour in Europe and North America, where it was one of the most burning social issues of the time. Boyden et al *What Works for Working Children* 189.

³¹ For instance arts 2 and 3 of the Minimum Age (Industry) Convention 5 of 1919 provided that its minimum age regulations could not apply to child work in family enterprises and technical schools. All the subsequent Minimum Age Conventions up until 1973 had similar provisions.

³² For instance art 1 of the Minimum Age (Agriculture) Convention 10 of 1921.

³³ In 1973, a general labour market minimum standard (ILO Convention on Minimum Age Standards No. 138), aimed at combining and improving all the preceding child labour Conventions, was adopted. Age limits set forth in this Convention still form the basis for national and international legislation in the area. Raghavan 'Convention on Worst Forms of Child Labour readied' Third World Network, available at <http://www.twinside.org.sg/title/forms-cn.htm> [accessed on 18 September 2005].

³⁴ G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989). Entered into force 2 September 1990.

³⁵ Grimsrud (note 28).

³⁶ C182 of 1999. Adopted on 17 June 1999 and entered into force on 19 November 2000.

reflected widespread recognition that there should, at least, be an end to the worst forms of child labour.³⁷

(a) ILO Conventions up to 1973

The early ILO Conventions concentrated on setting minimum ages of employment for children rather than abolishing the practice altogether. In 1919, a Commission on the employment of children reported to the first ILO conference that its objectives were to achieve real improvements on existing conditions and to make proposals which would meet with general acceptance. The Commission proposed 14 years as the minimum age for all industrial employment, with a possibility for some states to be granted a period of transition.³⁸

In the same year, the first child labour instruments—the Convention Fixing the Minimum Age for Admission of Children to Industrial employment (ILO Convention 5),³⁹ and the Convention Concerning the Night Work of Young Persons Employed in Industry⁴⁰ – set 14 as the minimum age of employment in industries. A discussion of the temporary exemption of some Eastern countries from the application of the ILO Convention 5 concentrated on India, where child labour was rampant.⁴¹ A British workers' delegate moved an amendment stating that, in the application of the Convention by India, children under the age of 12 should not be employed in factories employing more than 10 persons, in mines and quarries, on railroads and on docks. The amendment, which was opposed by the Indian government, but supported by the Indian workers' delegate, was nevertheless adopted.⁴²

Initially, the ILO considered extending the internationally agreed standards to all forms of employment. However, as the agricultural, commercial and other economic sectors had not been fully examined, and there were no representatives of

³⁷ Noguchi (2002) 10 *Int J of Children's Rts* 355.

³⁸ Betten *International Labour Law* 291.

³⁹ C5 adopted on 28 November 1919 and entered into force on 13 June 1921. The Convention was revised in 1937 by Convention No. 59 and in 1973 by Convention No. 138.

⁴⁰ C6 adopted on 28 November 1919, and entered into force on 13 June 1921. The Convention was revised in 1948 by Convention No. 90.

⁴¹ Japan, India, China, Iran and Thailand. Betten (note 38) 291.

⁴² *Ibid.*

these industries present at the first Conference, the ILO simply exempted them from application of the Conventions.

Subsequent years, however, saw the adoption of more instruments dealing with the minimum ages of employment in various sectors. In 1920, the Convention Fixing the Minimum Age for Admission of Children to Employment at Sea⁴³ stipulated that children under the age of 14 could not be employed on vessels, other than those on which only members of the same family were employed.⁴⁴ This provision did not apply to work done by children on school ships or training ships, provided that such work was approved of and supervised by a public authority.

The following year, a Convention concerning the Age for Admission of Children to Employment in Agriculture was adopted.⁴⁵ This stipulated that only children from the age of 14 could be employed in private or public agricultural undertakings and that they could be employed in such establishments only outside school hours. It also allowed for the rearrangement of school hours for purposes of practical vocational training, and the employment of children in light agricultural work, particularly that connected with the harvest.⁴⁶

Other ILO instruments relating to child work included the Convention concerning the Age for Admission of Children to Non-Industrial Employment of 1932,⁴⁷ the Convention Fixing the Minimum Age for the Admission of Children to Employment at Sea (Revised) of 1936,⁴⁸ the Convention concerning the Minimum Age for Admission to Employment as Fishermen of 1959,⁴⁹ and the Convention concerning the Minimum Age for Admission to Employment Underground in Mines

⁴³ C7 adopted on 9 July 1920, and entered into force on 27 September 1921. The Convention was revised in 1936 by Convention 58 and in 1973 by the Minimum Age Convention 138.

⁴⁴ Article 1.

⁴⁵ C10 adopted on 16 November 1921, and entered into force on 31 August 1923. The Convention was revised in 1973 by C138.

⁴⁶ Article 1. Article 2 also provided that this was on condition that such employment did not reduce the total annual period of school attendance to less than eight months.

⁴⁷ C33 adopted on 30 April 1932, and entered into force on 6 June 1935. The Convention was revised in 1937 by Convention No. 60 and in 1973 by Convention No. 138. Following the coming into force of Convention No. 60, Convention No. 33 is no longer open to ratification.

⁴⁸ C58 adopted on 24 October 1936, and entered into force on 11 November 1939.

⁴⁹ C112 adopted on 19 June 1959, and entered into force on 7 November 1961.

of 1965.⁵⁰ Some of these instruments were later revised to raise the minimum age of employment to 15. Some ILO Conventions regulating child work prohibited the night work of children⁵¹ and/or required compulsory and thorough medical examinations before admission to employment (and thereafter periodic examinations).⁵²

In 1973, the international crusade against child labour reached an important milestone with the adoption of the Convention concerning Minimum Age for Admission to Employment (Minimum Age Convention).⁵³ For the first time, the ILO committed itself to achieving the total abolition of child labour, and thus urged member states to institute national policies in order, ultimately, to bring an end to children's involvement in employment. The ILO obliged states to raise progressively the minimum age for admission to work, 'consistent with the fullest physical and mental development of young persons'.⁵⁴

By applying its provisions to all areas of economic activity, the Minimum Age Convention expanded prior sectoral coverage to include 'all employment or work'. The minimum age standards expressed an ideal of childhood as 'a privileged phase of life, properly dedicated only to play and schooling, and with an extended period of dependence during which economic activity is discouraged or actually denied'. It would seem that the Minimum Age Convention was motivated by an assumption that, if the minimum age were raised, the physical and mental development of children would be enhanced, since they would not be allowed to work until middle adolescence. It set the minimum age at 15.⁵⁵ Countries with relatively undeveloped

⁵⁰ C123 adopted on 22 June 1965, and entered into force on 10 November 1967. It provided for conditions of employment of persons under 18 years of age working in underground in mines and quarries.

⁵¹ The Night Work of Young Persons (Non-Industrial Occupations) Convention, 1946 (C79) and the Night Work of Young Persons (Industry) Convention (Revised), 1948 (C90). Along with the earlier Night Work of Young Persons (Industry) Convention, 1919 (C6), these Conventions will be revised. 'Five approaches in international labour standards to child labour' ILO, available at <http://www.ilo.org/public/english/standards/norm/whatare/standards/childs.htm> [accessed on 21 September 2005].

⁵² These included the Medical Examination of Young Persons (Industry) Convention, 1946 (C77), the Medical Examination of Young Persons (Non-Industrial Occupations) Convention, 1946 (C78), and the Medical Examination of Young Persons (Underground Work) Convention, 1965 (C124). Conventions 77 and 78 are supplemented by Recommendation No. 79.

⁵³ C138 adopted on 26 June 1973 and entered into force on 19 June 1976. Hanson and Vandaele, (2003) 11 *Int J of Children's Rts* 73 at 99.

⁵⁴ Article 1, Boyden et al (note 30) 188.

⁵⁵ Article 2(3). The Convention was supplemented by Recommendation 146 which advocated for the raising of the minimum age to 16 years. In general, the recommendation provides the broad framework

economies and educational facilities were allowed temporarily to adopt a lower standard of 14, as long as employers' and workers' organisations were in agreement.⁵⁶

The Convention also applied different minimum ages to light and hazardous work. It set the minimum age for light work at 13,⁵⁷ but that could be lowered to 12 in developing countries on condition that it did not impede schooling.⁵⁸ For dangerous work, the Convention set a limit of 18 and allowed children aged 16 to undertake such work only if their safety and morals were fully protected and they received sufficient specific instruction or professional training.⁵⁹

Standards set in this Convention, like those preceding it, were linked to schooling. The treaty expressed this tradition by stipulating that 'the minimum age specified in pursuance of paragraph 1 of this Article shall not be less than the age of completion of compulsory schooling'.⁶⁰ Where the maximum age of compulsory schooling was above 15 years, the minimum age of employment was accordingly raised.⁶¹

It is apparent that all ILO Conventions dealt with the problem of children only in relation to the labour market.⁶² The Preamble of the ILO Constitution itself declared that the Organisation's aim was to 'improve the existing conditions of labour'. The Conventions illustrated the use of children in employment as not inherently problematic provided that the work they did was educationally beneficial. Hence art 1 of the Minimum Age Convention (Agriculture) provided that no age limit was required for work in an agricultural undertaking 'outside the hours fixed for school attendance'.⁶³ Article 2(2) of the Minimum Age Convention (Sea) (Revised) even allowed the minimum age of 15 to be lowered to 14 when an educational or an

and essential policy measures for both the prevention of child labour and its elimination. It however recommends that the 'minimum age' should be fixed at the same level for all sectors of economic activity.

⁵⁶ Article 2(4). Boyden et al (note 30) 195 and 188.

⁵⁷ Article 7(1).

⁵⁸ Article 7(4).

⁵⁹ Article 3(1) and (3)

⁶⁰ Article 3. Hanson and Vandaele (note 53) 99.

⁶¹ Article 2(3).

⁶² Grimsrud (note 28).

⁶³ ILO Convention 10 of 1921.

appropriate authority considered that such employment would be beneficial to the child.⁶⁴

It was also generally accepted that any child work within the domestic sphere was permissible. The Minimum Age Convention of 1973 allowed countries to exclude limited categories of work, particularly those which raised substantial problems of application, and were thus difficult to inspect. Examples of such work included the employment of children in family undertakings, together with domestic service in private households and in educational establishments.⁶⁵ The ILO excluded non-economic work by definition. Whereas previous Conventions explicitly exempted such work, the Minimum Age Convention made it possible for states to make such exclusions.⁶⁶

The language used in all ILO Conventions implied a general acceptance of work done by adolescents.⁶⁷ The use of the phrase 'young people', instead of children, and the absence of the word 'child labour' in the Conventions may be viewed as indicative of such approval.⁶⁸

The instruments also provided more lenient rules for non-Western countries. For instance, the Minimum Age Convention (Non-Industrial Employment) 33 of 1932 allowed for the employment of children as young as 11 in non-industrial work in India, while the minimum age was 14 for the rest of the world.⁶⁹

⁶⁴ ILO Convention 58 of 1936. Grimsrud (note 28).

⁶⁵ Article 4(1). Previously, the Minimum Age Convention (Non-Industrial Employment) 33 of 1932 allowed state members to exempt domestic work from its application. Article 1(3)(b) provided that 'it shall be open to the competent authority in each country to exempt from the application of this Convention, (a) employment in establishments in which only members of the employer's family are employed, except employment which is harmful, prejudicial or dangerous within the meaning of Articles 3 and 5 of this Convention; (b) domestic work in the family performed by members of that family.' Hanson and Vandaele (note 53) 98.

⁶⁶ Article 4.

⁶⁷ Hanson and Vandaele (note 53) 99.

⁶⁸ Ibid.

⁶⁹ Article 9. Hanson and Vandaele (note 53) 99.

(b) Convention on the Rights of the Child

The year 1989 ‘heralded a new era of activism and global awareness of children’s rights as human rights’.⁷⁰ Children’s rights activists worldwide, together with the United Nations, considered this more interventionist approach essential to achieving better progress.⁷¹ The CRC went down in history as the most widely accepted human rights treaty. It is the most complete statement of children’s rights ever made, and it provides an internationally agreed framework of minimum standards necessary for the well-being of the child, to which every child and young person under 18 is entitled.⁷² The wide variety of rights contained in the CRC reflects a broad international concern with the multi-dimensional development of children.⁷³

The Convention emphasised that the ‘best interests of the child principle’⁷⁴ was to be the standard underlying the application of all children’s rights. The principle first mentioned in the Declaration of the Rights of the Child,⁷⁵ and subsequently reflected in two provisions of the 1979 Convention on the Elimination of all forms of Discrimination against Women (CEDAW),⁷⁶ governs the interrelations between law, society, the family and children.⁷⁷ It appears at least eight times in CRC, in relation to, for instance, the separation of the child from the family;⁷⁸ adoption and comparable practices;⁷⁹ the child’s involvement with the police and justice;⁸⁰ and, most relevant to this thesis, parental responsibility for the upbringing and development of the child.⁸¹

⁷⁰ Libal (2001) 3 *Hum Rts Rev* 35 at 39.

⁷¹ *Ibid.*

⁷² ‘UN Convention on the Rights of the Child’ Children’s Rights Alliance, available at <http://www.childrensrights.ie/Convention.php> [accessed on 17 September 2005].

⁷³ Boyden et al (note 30) 194.

⁷⁴ This principle is reflected in Article 3 of the CRC which provides that ‘[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration’.

⁷⁵ *Ibid.*

⁷⁶ Article 5(b) of CEDAW obligates all state parties to take all appropriate action measures: ‘[t]o ensure... the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases’.

⁷⁷ Breen *The Standard of the Best Interests of the Child: A Western Tradition in International and Comparative Law* 1.

⁷⁸ Article 9

⁷⁹ Articles 20 and 21.

⁸⁰ Articles 37 and 40; Alston (ed) *The Best Interests of the Child: Reconciling of Culture and Human Rights* 3.

⁸¹ Article 18. See further below.

This principle suggests that when dealing with issues of child work, policy makers are to plan their initiatives not only in accordance with the provisions dealing with child labour,⁸² but also with the full range of rights enshrined in the Convention. These rights include: the right to health and health facilities;⁸³ the right to an education that develops the child's personality and talents to its greatest potential;⁸⁴ the right to rest and leisure;⁸⁵ the right of rehabilitation from exploitation and abuse;⁸⁶ the right of children to express themselves on matters which affect them;⁸⁷ the right to be free from sexual abuse and trafficking;⁸⁸ and the protection of the child against all other forms of exploitation prejudicial to any aspects of the child's welfare.⁸⁹

The African Charter on the Rights and Welfare of the Child (ACRWC) follows in the footsteps of its UN predecessor by providing for the best interests of the child principle. Article 4(1) of the ACWRC states that the best interests of the child are 'the' primary consideration.

For several reasons, this principle has often come under fire. Firstly, both the CRC and the ACRWC do not define it. Some academics have strongly argued against use of the standard on the basis that it was too indeterminate to be of value.

'[T]he phrase is so idealistic, virtuous and high sounding that it defies criticism and can delude us into believing that its application is an achievement itself. Its mere utterance can trap us into believing that we are doing something effective and worthwhile. However, the flaw is that what is, best for any child or even children in general is often indeterminate and speculative and requires a highly individualised choice between alternatives.'⁹⁰

⁸² With regards to child work, Article 32(1) of the CRC specifically provided that: 'State Parties [are to] recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.' The term 'child labour' is not used in the text, but it can be inferred in context to imply any work done by children which presents the hazard specified in the clause. Defining child labour requires going beyond immediate threats to health and safety to encompass concerns for a child's education and overall physical, mental and social development.

⁸³ Article 24.

⁸⁴ Articles 28 and 29.

⁸⁵ Article 31.

⁸⁶ Article 39.

⁸⁷ Article 12.

⁸⁸ Articles 34 and 35.

⁸⁹ Article 36.

⁹⁰ Robert Mnookin as cited in Breen (note 77) 54.

Secondly, it may be argued that the principle could yield unjust decisions by neglecting the needs and rights of parents. Attempting to ensure that the best interests of each particular child are safeguarded may in some instances actually leave such children generally worse off.⁹¹

Thirdly, others have argued that the principle is 'unjust, self-defeating and likely to be overridden by more general policy considerations'.⁹² It is unclear on the degree of weight to be given to the different and numerous standards for the resolution of issues which deal with, for instance, child labour. What is the best or least detrimental for a particular child is normally based on speculative and subjective deduction, (an issue revisited in Chapter VII).

Fourthly, people faced with the task of making a decision on the best interests of the child are inevitably guided by their own preferences. Society, however, lacks a clear-cut consensus on the values which should be used in determining what is best or least detrimental. The principle provides a convenient cloak for bias, paternalism and capricious decision-making. Even worse, the open-endedness of the standard can legitimate practices that some cultures regarded as positively harmful to children, while other cultures would see them as benign or beneficial.⁹³

Finally, interpreting the best interests of the child is complicated by the diversity of world cultures, the relativity in the application of the principle and the differing economic realities of families. At a certain level, the debate over the nature of the relationship between or universal human rights standards and different cultures can never be resolved. At another level, the examination of the best interests of the child principle, as reflected in the CRC, provides insights which could help to respond to at least some of the criticisms that have been made of the universalist aspirations of human rights.⁹⁴

⁹¹ Mnookin (1975) 39 *Law & Contemporary Problems* 226

⁹² Breen (note 77) 54.

⁹³ *Ibid.*

⁹⁴ Alston (note 80) 16. See below in Chapter VII.

Any attempt to provide a definition of the best interests of the child should be viewed against the larger framework of discussion concerning the tension that lies between the notions of protectionism and autonomy in children's rights.⁹⁵ There seems to be a paternalistic way of interpreting and applying the best interests principle. Such paternalism, whereby adults acting in either a private or public capacity make decisions concerning a child, justifies 'interference with a person's liberty of action...by referring exclusively to the welfare, good, happiness, needs, interests or values of the person being coerced'.⁹⁶ Difficulties therefore arise when the essentially paternalistic standard comes into contact with the concept of the child's right to autonomy.

(c) Worst Forms of Child Labour Convention

In June 1999, at the 87th annual International Labour Conference, ILO Member States unanimously adopted the Worst Forms of Child Labour Convention, together with supplementing Recommendation No 190. In November 2000, the Convention entered into force with 132 ratifications. This was the fastest pace of ratification in the history of the ILO.⁹⁷

The Worst Forms of Child Labour Convention reflects a global consensus that there should be an immediate end to the worst forms of child labour. It seeks to complement existing international instruments on child labour. Unlike the Minimum Age Convention, which aimed at the overall abolition of child labour, the Worst Forms of Child Labour Convention rather focuses on its most offensive forms.⁹⁸

The Convention came up with two categories of unacceptable labour: the worst forms of child labour and work hazardous to the physical, emotional and moral wellbeing of the child. These are considered to be in serious conflict with the basic rights of children, the worst forms, of which include slavery, debt bondage, prostitution, pornography, forced recruitment of children for use in armed conflict,

⁹⁵ See Chapter VII.

⁹⁶ Breen (note 77) 68.

⁹⁷ Noguchi (note 37) 355.

⁹⁸ It also stipulates the minimum age for admission to employment which must not be less than the age of completion of compulsory schooling.

use of children in drug trafficking and other illicit activities, and all other work harmful or hazardous to the health, safety or morals of children. Some forms of labour are absolutely prohibited for all persons under the age of 18.⁹⁹

Often, of course, the worst forms of child labour are also illegal and unacceptable even for adults. These activities cannot be altered, no matter what is done to improve conditions of work.¹⁰⁰ For example, no possible improvements to working conditions could make slavery, recruitment in armed conflict and the commercial sexual exploitation of children acceptable.¹⁰¹ Hence there is no scope for national discretion.¹⁰²

Conversely, the ILO leaves national legislation to define hazardous forms of child labour.¹⁰³ Such types of work are usually conducted in legitimate sectors of economic activity and are thus called 'worst forms by condition'.¹⁰⁴ These forms may be improved if, for example, they are currently affecting the health and safety of the children who engage in them.¹⁰⁵

The kinds of hazardous work in question can either be an occupation or specific tasks. The latter tends to be easier to deal with, in that it is often specific tasks and working conditions that make the work hazardous.¹⁰⁶ Some situations, however, are hazardous wherever they occur, but each country needs to determine what children under the age of 18 should be prohibited from doing in relation to conditions in that particular country.¹⁰⁷

⁹⁹ Article 3(a)-(c).

¹⁰⁰ IPEC *Child Labour* 46.

¹⁰¹ Other examples of worst forms of child labour include use of children in pornography, trafficking, debt bondage.

¹⁰² IPEC (note 100) 46.

¹⁰³ Article 4(1).

¹⁰⁴ Raghavan (note 33).

¹⁰⁵ A good example is adolescents above the minimum working age engaged in conditions of work which are inherently hazardous or too arduous for them. If a young person works in a factory using machinery without safety guards, then fitting a protection device to the machine may make it non-hazardous, and then this activity would cease to fall under the category of worst forms as defined by Convention 182.

¹⁰⁶ For instance, operation of power-driven machinery, the presence or use of dangerous chemicals, work at night, or work in isolation.

¹⁰⁷ IPEC (note 100) 47.

The Convention considers work which leaves no physical scars, but is, nonetheless, likely to damage the psychological health of the child or stunt his or her social or intellectual development, as a 'hazardous' form of labour.¹⁰⁸ Examples include work situations in which the child is subject to verbal abuse or strain or pressure to produce something, is exposed to adult behaviour (drinking, smoking, and gambling) or is isolated from peers.¹⁰⁹

Discarding the impractical aim of instantly eradicating such worst forms by legislation, the Convention rather obliges ratifying countries 'to take immediate and effective measures' towards this end.¹¹⁰ To this end, the instrument urges states not only to eliminate the worst forms of child labour, but also to design and implement programmes of action to eliminate it. They are to do so in consultation with relevant government institutions, employers and workers' organisations and are to take into consideration the views of other concerned groups.¹¹¹

The Worst Forms of Child Labour Recommendation No 190 supplements ILO Convention No 182 and further encourages member States to:

'[P]rotect the very young, girls, children in hidden work situations and other especially vulnerable children; include measures for prevention, removal, rehabilitation and social integration; and raise awareness and mobilize society; consider given criteria in determining hazardous work; establish monitoring mechanisms to ensure effective implementation; compile data; provide appropriate penalties and remedies; designate certain activities as criminal offences; consider a wide range of measures aimed at eliminating the worst forms of child labour; and cooperate with international efforts and enhance cooperation and/or assistance among members.'¹¹²

The preamble to this Convention acknowledges that 'child labour, is to a large extent, caused by poverty and that the long-term solution lies in sustained economic growth leading to social progress, in particular, poverty alleviation and universal education'.

Article 8 thus requires member states to:

¹⁰⁸ 'In determining the types of work referred to under Article 3(d) of the Convention, and in identifying where they exist, consideration should be given, inter alia, to: (a) work which exposes children to physical, psychological or sexual abuse'. Article 3 of the Worst Forms of Child Labour Recommendation, 1999 (No. 190).

¹⁰⁹ Ibid.

¹¹⁰ Article 1.

¹¹¹ Noguchi (note 37) 355-356; Raghavan (note 33).

¹¹² Recommendation 190 adopted on 17 June 1999; IPEC (note 100) 45.

‘take appropriate steps to assist one another in giving effect to the provisions of this Convention through enhanced international cooperation and/or assistance including support for social and economic development, poverty eradication programmes and universal education.’

ILO Convention 182 exhorts all members to take effective and time-bound measures to prevent the engagement of children in the worst forms of child labour. States must provide assistance for: the removal of children from such work, their rehabilitation, access to free basic education, and, wherever possible, enrolment into vocational training. The countries must identify and reach out to children at special risk and take account of the special situation of girls.¹¹³

3. Regional Instruments: The African Charter on the Rights and Welfare of the Child (ACRWC)

Shortly after the CRC’s entry into force, the Organisation of African Unity (now the African Union) adopted the ACRWC.¹¹⁴ Scholars contend that the instrument was born out of the feeling by African member-states that the CRC missed important socio-cultural and economic realities of the African experience. The ACRWC thus prides itself on its ‘African’ perspective of human rights, and takes into consideration the virtues of the African cultural heritage, and the values of African civilisation which are expected to inspire and characterise the African concept of the rights and welfare of the child.¹¹⁵

Nevertheless, it was inspired by the trends evident in the UN system. In line with Western thinking, for example the ACRWC defines a child as ‘every human being below the age of 18 years’, although, interestingly, it does not grant the flexibility of the CRC, which allows states to exercise the option of lowering the maximum age of childhood below 18.

¹¹³ Article 7.

¹¹⁴ OAU Doc. CAB/LEG/24.9/49 (1990), entered into force 29 November 1999.

¹¹⁵ Lloyd (2002) 10 *Int J of Children’s Rts* 179 at 180-183.

The Charter guarantees children several participation rights, such as the right to be given an opportunity for their views to be heard either directly or through an impartial representative in all judicial or administrative proceedings affecting them.¹¹⁶ Children also have the right to participate in artistic and cultural life and the administration of justice.¹¹⁷ Disabled children have the right to take part in community life.¹¹⁸

In line with the CRC, the ACWRC provides that ‘every child shall be protected from all forms of economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child’s physical, mental, spiritual, moral or social development’.¹¹⁹ It also provides for protection against sexual exploitation,¹²⁰ and the prevention of the sale, trafficking and abduction of children.¹²¹ The Charter recognises the right of children to play and leisure,¹²² and like the CRC, it provides that, in all matters concerning the welfare of the child, the ‘best interests of the child’ are to be given paramount consideration.¹²³

The Charter, however, takes its cue from its predecessor, the African Charter on Human and People’s Rights (ACHPR),¹²⁴ to impose certain ‘responsibilities’ on children towards their family, society, the state and other legally recognised communities and the international community. Article 31 provides that,

‘[T]he child, subject to his age and ability, and such limitations as may be contained in the present Charter, shall have the duty to work for the cohesion of the family, to respect his parents, superiors and elders at all times and to assist them in case of need; to serve his national community by placing his physical and intellectual abilities at its service; to preserve and strengthen social and national solidarity; to preserve and strengthen African cultural values in his relations with

¹¹⁶ Article 4(2) of the ACRWC; art 12 of the CRC.

¹¹⁷ Articles 12 and 17 respectively of the ACRWC; arts 31(1) and 40 respectively of the CRC.

¹¹⁸ Article 13 of the ACRWC and art 23 of the CRC. The instruments also guarantee the child’s freedoms of expression; association and assembly; of thought, conscience and religion (arts 7, 8 and 9 respectively of the ACRWC; arts 13, 15 and 14 respectively of the CRC) and the child’s right to privacy (art 10 of the ACRWC; art 16 of the CRC) Chirwa (2002) 10 *Int J of Children’s Rts* 157 at (note 68) 162.

¹¹⁹ Article 15(2)(d) also encourages the dissemination of information on the dangers of child labour to all sectors of the community, having regard to the relevant ILO instruments relating to children.

¹²⁰ Article 27.

¹²¹ Article 29.

¹²² Article 12.

¹²³ Article 4(1).

¹²⁴ OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982). Adopted on 27 June 1981 and entered into force on 21 October 1986.

other members of the society, in the spirit of tolerance, dialogue and consultation and to contribute to the moral well-being of society; to preserve and strengthen the independence and the integrity of his country; and to contribute to the best of his abilities at all times and at all levels, to the promotion and achievement of African Unity.’

Activists declare that this provision of duties reinforces a conservative approach to human rights. They say that it represents the most elaborate limitation on children’s rights, particularly those concerned with labour, and they fear that the emphasis on the duty of the individual, rather than that of the state, undermines the force of children’s rights. Activists therefore argue that preservation of African cultural norms may actually encourage child labour.¹²⁵ As such, the Charter’s provision of duties is often viewed as ‘little more than the formulation, entrenchment and legitimation of adult and state rights and privileges against children’.¹²⁶

4. Conclusion: An overall assessment of the international child labour legal regime

All the ILO instruments, the CRC and the ACRWC, clearly share a common concern for children and set down certain rules regulating child work. They agree that the interventions on child labour should have the effect of promoting child development, and they are clearly against any work that hampers a child’s physical, mental, spiritual, moral or social development. In particular, they all emphasise the importance of education.

The study of the child labour regime demonstrates that the predominant approach of the ILO is that of eradication. Indeed the Minimum Age Convention remains the pivotal ILO instrument on child labour. Thus the Worst Forms of Child Labour Convention, which is the latest ILO instrument, does not change the existing obligations for member states. The difference between the two instruments, however, lies in the fact that, while the Minimum Age Convention aims at progressively abolishing child labour, the Worst Forms of Child Labour Convention indicates that

¹²⁵ Evans and Murray (eds) *The African Charter of Human and People’s Rights: The System in Practice, 1986-2000* 229.

¹²⁶ Makau Mutua ‘The African Human Rights System: A Critical Evaluation’, available at http://hdr.undp.org/docs/publications/background_papers/MUTUA.PDF [accessed on 4 March 2004].

such a long-term aim cannot be supported for the ‘worst forms’. Hence, the latter Convention provides for more precise and concrete obligations to implement the prohibition.¹²⁷ Despite such differences between the ILO Conventions, it is clear that the ILO’s current campaign to target ‘intolerable work practices’ still implicitly accepts the existence of ‘tolerable forms of work’.

The drafters of the CRC and ACRWC clearly made some attempt to complement the ILO Conventions. The CRC thus refers to and broadens the ILO concept that the minimum age should be set at levels that will promote the child’s fullest physical and mental development.¹²⁸ The Convention therefore encourages member states to sign and ratify the Minimum Age Convention of 1973. The ACRWC also acknowledges the application of ILO Conventions relating to child labour.¹²⁹

The CRC and the Worst Forms of Child Labour Convention both define a child as a person up to the age of 18.¹³⁰ They differ, however, in that the former gives state members the option to set the age below 18,¹³¹ while the latter does not grant this flexibility. Rather, the Worst Forms of Child Labour Convention requires a complete prohibition of worst forms of child labour for persons under the age of 18.¹³² Children falling below the age of 18, but having reached the general minimum age for work (which is lower than 18), can work as long as the activity does not fall within any of the criteria of the worst forms of child labour.¹³³ The problem underlying both the Minimum Age Convention and the CRC is their drafters’ industrially oriented view of children’s work. Concepts and suppositions were derived mostly from urban and formal sector experience, whereas the vast majority of working children in South Africa are found in rural areas and the informal sector.

¹²⁷ Hanson and Vandaele (note 53) 116.

¹²⁸ Article 32(2).

¹²⁹ Article 15(2).

¹³⁰ Articles 1 and 2 respectively.

¹³¹ Article 1 provides that ‘[f]or the purposes of the present Convention, a child means every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier’.

¹³² Article 3.

¹³³ Noguchi (note 37) 355.

Meanwhile, the CRC and its regional counterpart, the ACRWC, share the same characteristics in recognising childhood not only as a period of protection but also as one of autonomy.¹³⁴ Conceiving the child as an autonomous being is noteworthy, in view of the fact that this is not a feature of African culture.¹³⁵ (The CRC's idea of autonomy, compared with the contrary idea that a child lacks capacity, presents the greatest contradiction in the human rights discourse.) Both treaties set 18 as the upper limit of childhood, although the CRC allows states to set lower ages.

Behind this apparent consensus between the CRC and the ACRWC on the welfare of children lie ideological differences. The Charter's imposition of duties on children is a clear indication that the African conception of childhood differs from that envisioned by the drafters of the CRC. Moreover, while the ACRWC takes its cue from the best interests of the child principle, it is closer to the UN Declaration on the Rights of the Child (1959) in that it provides for a higher standard. Article 4(1) of the ACWRC states that the best interests of the child are 'the' primary consideration while Article 3(1) of CRC provides that the best interests of the child is be given 'a' primary consideration.

The difference between using the definite, as opposed to the indefinite article, may seem trivial, yet it has significant practical ramifications. One may interpret the lower standard in the CRC as a procedural fairness judgment, in that, although judges and others must consider what is in the child's best interests, their decisions need not reflect those interests. Despite being a fundamental principle in the two instruments, the best interests of the child may nonetheless allow for the primacy of whatever cultural norms on upbringing happen to be current.¹³⁶

The biggest shortfall of the whole child labour legal regime is the confusion around the definition of 'child labour'. The ILO Conventions approach this issue in terms of minimum ages and also with regards to children formal employment. The CRC views child labour not according to the activity but according to the effect of the activity on the child concerned. It therefore deems any labour activity as

¹³⁴ Chirwa (note 118) 160.

¹³⁵ Ibid. See further discussion in Chapter VII.

¹³⁶ Lloyd (note 115) 183.

unacceptable, if it is detrimental to the development of the child, regardless of whether it takes place at a work place or the child's home. The ACRWC merely prohibits the economic exploitation of children, and any work which has the same elements as those prohibited under the CRC. Given the multiplicity of approaches to child labour in the international instruments themselves, it is absolutely unclear what work is unacceptable for the child.

Chapter III

EFFECTIVENESS OF THE INTERNATIONAL LAW ON CHILD LABOUR

1. Creation of treaty obligations

International law works on the obvious supposition that legal commitments will determine the state's exercise of power.¹ Lesotho, Zimbabwe and South Africa are party to all instruments regulating the work of children, an indication of their support for the relevant principles and institutional arrangements designed to monitor compliance with those standards. The statistics released by the International Labour Organisation (ILO) and the findings of child labour activists in Southern Africa, however, show that the international regime is not working in the way that it should. In order to identify the reasons why, we need to scrutinise the process of treaty making, the texts of the instruments, the monitoring procedures and the methods for securing state compliance of the three countries.

(a) Drafting and negotiation: participation of African states

The first stage in the creation of any international instrument is the negotiation of a text. In earlier days, this task was carried out by emissaries of one sovereign accredited to the court of another.² Today, multilateral instruments are more commonly negotiated in a single forum, which may be a permanent intergovernmental organisation, such as the United Nations (UN).

Negotiations generally begin with one or more drafts of the text suggested by a country or an international organisation, each clause of which will be amended and modified until agreement can be reached.³ Throughout the process, state representatives

¹ Goodman & Jinks (2003) 14 *Eur J of Int L* 171.

² Sieghart *International Law of Human Rights* 248.

³ *Ibid.*

will take instructions from their governments. At the point of consensus, the text is formally adopted.

The UN Convention on the Rights of the Child (CRC)⁴ was a landmark instrument in the history of human rights, but its gestation period was lengthy: the Convention can be traced to the Geneva Declaration of the Rights of the Child of 1924⁵ and the later UN Declaration of the Rights of the Child of 1959.⁶ The CRC came about as a result of long-term advocacy by voluntary organisations,⁷ and more specifically, in response to Poland's call for an international instrument on children's rights to mark the 1979 International Year of the Child.⁸

Poland had pressed for the 1959 Declaration to be turned into a convention, but with the addition of an implementation mechanism. Initially, this proposal met with little enthusiasm from developing countries, as they felt that it was too much a European affair. Hence only a small group of states participated in the discussions prior to the adoption of the Convention. Four developing countries had representation at all the sessions of the Open-Ended Working Group,⁹ while Algeria, Morocco, Senegal and Egypt participated sporadically. The rest of the African countries (including Lesotho, Zimbabwe and South Africa) never took part at all.¹⁰ Throughout the proceedings, non-governmental organisations representing the interests of children were involved only periodically and their participation was badly coordinated.¹¹

⁴ Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989. Entered into force on 2 September 1990 in accordance with art 49.

⁵ Adopted 26 September 1924, League of Nations O.J. Spec. Supp. 21, at 43 (1924). Although these declarations signalled the international community's intent to improve the living conditions and social recognition of children, they had no legal status.

⁶ Proclaimed by General Assembly resolution 1386 (XIV), 14 U.N. GAOR Supp. (No. 16) at 19, U.N. Doc. A/4354 (1959).

⁷ Such as the Save the Children organisation.

⁸ Freeman *The Moral Status of Children: Essays on the Rights of the Child* 53.

⁹ Brazil, Dominican Republic, India and Central African Empire. Veerman *The Rights of the Child and the Changing Image of Childhood* 182.

¹⁰ 'The African Charter on the Rights and Welfare of the Child' Institute for Human Rights and Development in Africa (IHRDA), available at <http://212.60.76.30/modules/news/index.php?storytopic=16> [accessed on 11 September 2007].

¹¹ Veerman (note 9) 183.

Although the African Charter on the Rights and Welfare of the Child (ACRWC) was modelled on the CRC,¹² it was born out of a feeling by African member-states that the Convention ‘missed important socio-cultural and economic realities of the African experience’.¹³ Some of those were the situation of children living under the then prevailing apartheid regime in South Africa, and customary practices harmful to the life of the girl child, notably female genital mutilation. Other issues not considered by the CRC were the problems of displaced persons arising from internal conflicts, the particularly difficult socio-economic conditions of the continent and the African conception of responsibilities and duties. In addition, it was felt that the CRC had neglected the role of the family in matters regarding the upbringing of the child, adoption and fostering.¹⁴

The ACRWC was drafted and negotiated by representatives of all the members of the Organisation of African Unity (OAU) (today, the African Union (AU)), of which Zimbabwe and Lesotho were members. South Africa was still under the apartheid regime, and hence played no part.

Since its inception in 1919, the International Labour Organization (ILO) has fought against child labour¹⁵ and has adopted 12 relevant Conventions. For drafting and negotiating the conventions, the ILO has a tripartite structure consisting of governments and employers’ and workers’ representatives. Hence every country is represented at the International Labour Conference by four delegates: two government representatives and one each from its employers’ and workers’ organizations.¹⁶ African countries have in most cases ratified ILO Conventions which would have long been in force.¹⁷ This means

¹² OAU Doc. CAB/LEG/24.9/49 (1990). Entered into force on 29 November 1999.

¹³ Lloyd (2002) 10 *Int J of Children’s Rts* 179 at 180; Freeman (note 8) 53.

¹⁴ ‘The African Charter on the Rights and Welfare of the Child’ (note 10).

¹⁵ Parikh ‘International Labour Organization - Child Labour’ Hartford, available at <http://www.hartford-hwp.com/archives/26/007.html> [accessed on April 2005].

¹⁶ ‘Supervision of ILO Conventions’ ILO, available at <http://www.ilo.org/public/english/indigenous/standard/super.htm> [accessed on 10 April 2006].

¹⁷ For instance, Lesotho became party to the ILO Minimum Age Convention of 1973 in 2001, while Zimbabwe and South Africa ratified it in 2001.

that these states have become party to instruments to which they played no part in creating.

Children, as an independent group, have never had formal representation in the drafting of any of the conventions.¹⁸ Moreover, it would also seem that none of the numerous organisations representing the interests of children participate in the negotiations.

(b) Reservations to children's rights treaties

Making reservations to treaties is a common and well accepted practice in international law, and is codified in the Vienna Convention on the Law of Treaties of 1969.¹⁹ This instrument defines a reservation as 'a unilateral statement, made by a state, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that state'.²⁰ Drafters of multilateral treaties, may exclude or allow reservations, or limit their scope in either form or content.

Compared to other multilateral treaties, human rights instruments have a very high rate of reservations.²¹ The international community deems this practice necessary to boost membership, even though it has a tendency to undermine treaty regimes,²² especially when reservations are expressed vaguely.²³

¹⁸ Working children's organisations are representative of only a very small minority of children worldwide and their token participation at an international level is determined by adults

¹⁹ 1155 UNTS 331 8 ILM 679 entered into force on 27 January 1980.

²⁰ Article 2(d). Reservations allow a state to become a member of a treaty in a qualified and contingent manner, exempting parties from certain duties that they are normally expected to comply with. It also encourages ratification because it is possible for a state to avoid assuming obligations in conflict with certain aspects of its domestic law. Reservations therefore attempt to reconcile the interests of individual states with those of the international community.

²¹ The Convention on the Elimination of All Forms of Discrimination against Women has recorded the most reservations to date. The Convention on the Rights of the Child is the most widely ratified human rights treaty but this impressive support is mitigated by reservations or interpretative declarations of 47 state parties. Schabas (1996) 18 *Hum Rts Q* 1.

²² The types of reservations vary with most of them concerning monitoring and/or procedural provisions of a particular treaty. Some reservations relate to substantive norms and these on their own take a variety of forms. Some reservations indicate a non-acceptance of a particular provision while others accept part or

While the CRC provides explicitly for the possibility of reservations,²⁴ the ILO refused to allow them, opting, instead, for flexible state obligations.²⁵ The ACRWC is silent on the question of reservations. As it happens, however, Lesotho, Zimbabwe and South Africa have made no reservations to any of the conventions relevant to child labour including the CRC and the ACRWC. The allowance of reservations nevertheless gives the impression that countries can easily exempt themselves from some of the obligations of children's rights instruments.

(c) Non/low and slow ratification of treaties

For a country to become a party to a treaty, it must demonstrate its willingness to undertake the legal rights and obligations contained in the instrument by signing it. Signature is ordinarily a preparatory step to ratification, which may well be delayed thereby giving states time to seek approval for the treaty at a domestic level.²⁶ Nevertheless signature can create certain obligations prior to ratification, mainly to refrain in good faith from acts that would defeat the object and purpose of the treaty.²⁷

whole of the treaty in so far as it is consistent with the domestic laws of the respective countries. Certain reservations also take the form of interpretative declarations.

²³ Some states have been known to make specific references to the domestic legislation that they intend to protect. This gives great precision to a reservation and helps other state parties to establish their own positions with respect to the reservation in full knowledge of its implications.

²⁴ Article 51 recognises the admissibility of reservations subject to the requirement that they are made at the time of ratification or accession and that they are compatible with the object and purpose of the Convention. The CRC, however, is silent on the legal effects of reservations and also provides no suggestion as to the mechanism for determining whether or not a reservation is valid.

²⁵ Betten *International Labour Law* 22.

²⁶ It must be noted, however, that the signature may constitute an expression of a state's consent to be bound by a treaty is 'the treaty provides that signature shall have that effect; it is otherwise established that the negotiating states were agreed that signature should have that effect; or the intention of the state to give that effect to the signature appears from the full powers of its representative or was expressed during the negotiation. See art 12(1) of the Vienna Law of Treaties of 1969. The relevant human rights treaties under discussion, however, require signature followed by ratification. For instance arts 46 and 47 of the Convention on the Rights of the Child respectively provide that the treaty shall be open for signature and is subject to ratification.

²⁷ Article 18 of the Vienna Law of Treaties of 1969.

Ratification refers to the definitive act of the state to establish its consent to be bound by a treaty which it has already signed.²⁸ Here the state becomes, according to the *pacta sunt servanda* principle, legally bound by the treaty and is obliged to put its provisions into practice by giving effect to its provisions domestically.²⁹

The intended impact of international human rights treaties may, however, be undermined by the non-ratification or the slow or a low rate of ratification. While the CRC went down in history as the fastest and most ratified of all UN human rights treaties, and the ILO Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (the Worst forms of Child Labour Convention) of 1999³⁰ quickly received almost universal ratification, this was not the case with the ACRWC and the ILO Convention concerning the Minimum Age for Admission to Employment (Minimum Age Convention).³¹ Although the CRC took one year to be adopted, the ACRWC took almost ten years.³² After the adoption of the Charter, it took another two years, before any OAU member state ratified or acceded to it.³³ Still, by the year 2000, less than half of the 53 member states of the African Union had ratified the instrument yet all of them had signed it. By June 2005 the number had risen to only 35.³⁴ Currently, 38 countries have ratified the Charter, while 11 states which signed it are yet to ratify it. Four African countries have not even signed.³⁵

²⁸ To ratify a treaty, the state must have first signed the treaty. Although a state may also express its consent to be bound without first having signed the treaty - a process is called accession. Ratification happens when states either exchange or deposit of instruments of ratification with the depository or by notification to the contracting states or to the depository, if so agreed. Article 16 of the Vienna Law of Treaties.

²⁹ Article 26 of the Vienna Law of Treaties.

³⁰ ILO Convention No. 182. Adopted on 17 June 1999 and entered into force on 9 November 2000.

³¹ ILO Convention No. 138. Adopted on 26 June 1973 and entered into force on 19 June 1976.

³² The Children's Charter was adopted on 11 July 1990 by the 26th Ordinary Session of the Assembly Heads of State and Government in Addis Ababa, Ethiopia, but did not receive the requisite 15 state ratifications, as required by Article 47(3) of the Children's Charter. It entered into force on 29 November 1999. Lloyd (note 13) at 180-2.

³³ Ibid.

³⁴ 'Report of the African Committee of Experts on the Rights and Welfare of the Child, Seventh Ordinary Session, Tripoli, Libya (2005)' University of Minnesota Human Rights Library, available at <http://www1.umn.edu/humanrts/africa/rightsofchild-report2005.html> [accessed on 11 April 2006].

³⁵ The countries that have signed the treaty but not ratified it are Central African Republic, Cote d'Ivoire, Congo, Djibouti, Gabon, Guinea-Bissau, Liberia, Somalia, Swaziland, Tunisia and Zambia. The Democratic Republic of Congo, Mauritania, Sao Tome & Principe and Sudan are not party to the Charter. 'Status of Ratification of the African Charter on the Rights and Welfare of the Child', available at

The low and slow uptake of the ACRWC, compared to the CRC, may be attributed to the lack of interest by the majority of members of the then OAU.³⁶ Although the ACRWC is ‘Africa sensitive’, it accords higher standards and more stringent obligations for state parties than its international counterpart.³⁷ Moreover, the regional monitoring body is specific to Africa and tries to operate within the socio-economic conditions of the continent.³⁸ African states may thus be wary of being too closely monitored.³⁹

The ILO Minimum Age Convention has also had a low rate of ratification. It was adopted in 1973, and yet, by 1997, it had been ratified by only 53 states. Although that number has, to date, risen to 143, it is still less than the 173 received by the CRC in its first few years of existence.⁴⁰ While the slow uptake of the Minimum Age Convention probably reflects a lack of international consensus on its underlying principles,⁴¹ the low rate of ratification of human rights instruments is generally evidence of governments’ reluctance to commit to the standards enunciated in the treaties.

Lesotho is a member of various international conventions which relate to the work of children. It ratified the Convention Fixing the Minimum Age for Admission of Children to Industrial Employment of 1919,⁴² the Minimum Wage-Fixing Machinery Convention of 1928,⁴³ the Minimum Age Convention of 1973 and the Worst Forms of Child Labour Convention of 1999.⁴⁴ Lesotho has also signed and ratified the CRC and the ACRWC.

http://www.speakafrika.org/status_ratification_african_charter_rights_and_welfare_child [accessed on 22 July 2008].

³⁶ Formerly Organisation of African Unity (OAU).

³⁷ ‘Report of the African Committee of Experts on the Rights and Welfare of the Child’ (note 23).

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ Larnsky (1997) 136 *Int Lab Rev* 233 at 239.

⁴¹ Ibid.

⁴² C5. Lesotho, however, denounced it in 2001.

⁴³ C26.

⁴⁴ C138 and C182 respectively.

Lesotho has, nonetheless, been slow in ratifying most of the treaties. Prior to its denunciation of the Convention Fixing the Minimum Age for Admission of Children to Industrial Employment by the ILO,⁴⁵ the Committee of Experts had consistently and unsuccessfully implored the country to implement the instrument.⁴⁶ Similarly, the country ratified the Minimum Age Convention in 2001, almost three decades after its adoption, but Parliament has not yet comprehensively updated domestic laws relating to child employment.⁴⁷ Conversely, Lesotho took two years to ratify the Worst Forms of Child Labour Convention of 1999, three years after the adoption of the CRC of 1989 and ten years after the ACRWC came into being.⁴⁸

To date, Zimbabwe has ratified several human rights instruments dealing with a wide range of issues. Ratification, however, has often come many years after signature. With regards to child welfare, it ratified the ILO Minimum Wage-Fixing Machinery Convention (1948) in 1993, the Forced Labour Convention (1930) in 1998, the Minimum Wage Fixing Machinery (Agriculture) Convention (1951) in 1993, the Abolition of Forced Labour Convention (1957) in 1998 and the Minimum Age Convention (1973) in 2000. The Worst Forms of Child Labour Convention (1999) is the only ILO instrument which the country ratified fairly soon after its adoption in 2000. Zimbabwe is also a party to the CRC, which it ratified on 11 September 1990, and the ACRWC, which it ratified on 19 January 1995.⁴⁹

South Africa signed and ratified the CRC in 1996 and the ACRWC in 2000. The country's ratification of ILO Conventions has also been slow. It ratified the 1928 Convention concerning the Creation of Minimum Wage (Fixing Machinery) in 1932⁵⁰ and the 1973 Minimum Age Convention in 2000. However, it ratified the 1999 Worst

⁴⁵ 2001.

⁴⁶ CEACR: Individual Observation concerning Convention No. 5, Minimum Age (Industry) 1919 - Lesotho 1999, available at <http://www.ilo.org/ilolex/english/convdisp2.htm> [accessed on 15 September 2006].

⁴⁷ Such as the Lesotho Labour Code of 1992.

⁴⁸ None of these three latter instruments have been incorporated into domestic law in their totality.

⁴⁹ Tshosa *National Law and International Human Rights Law: Cases of Botswana, Namibia and Zimbabwe* 50-63.

⁵⁰ C26, adopted on 16 June 1928, and entered into force on 14 June 1930. South Africa ratified it on 28 December 1932.

Forms of Child Labour Convention fairly quickly in 2000.⁵¹ South Africa's slow uptake of international human rights treaties may be attributed to the country's shunning of international institutions during its apartheid history.

The three states' non/low and slow ratification of certain human rights treaties (such as the ACRWC) means that for a long period of time they are party to the instruments in name only, but have no legal obligations. This shows a lack of political will in guaranteeing the rights contained in the treaties in question which generally weakens the potency of the instruments.

The application of a treaty may also be undermined by a state's reasons for ratification. Governments generally want to be seen as supporters of human rights. Some ratify conventions with the genuine intention of establishing a universal normative framework and strengthening such a system worldwide.⁵² Other countries simply respond to international pressure.⁵³ India, for example, ratified CEDAW and the CRC in response to increasing international scrutiny of its human rights record, and after Pakistan tabled a resolution to the Commission of Human Rights on the state of human rights in Kashmir.⁵⁴ Iran also acceded to the CRC because it was under pressure at the time due to its deplorable human rights record.⁵⁵

⁵¹ ILOLEX Database of International Labour Standards at the ILO website <http://www.ilo.org/ilolex/english/newratframeE.htm> [accessed on 6 March 2006].

⁵² Thus many countries ratified the Convention on the Elimination of Racial Discrimination to express their opposition to apartheid in South Africa and the rest of the world. Adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965 and entered into force on 4 January 1969, in accordance with Article 19. Similarly, the Japanese Government is renowned for having ratified the CRC because it viewed the Convention as a protector of children in developing countries. Heyns and Viljoen (2001) 23 *Human Rights Q* 482 at 492.

⁵³ Brazil ratified CERD to show some participation in international human rights; the former USSR ratified CERD and CEDAW as part of the international trend to do so, not wanting to lag behind other states; the same applies to the Philippines with respect to CRC. Japan ratified CERD when it was the only liberal democracy left that had not done so. *Ibid.*

⁵⁴ Kashmir is a valley in the north-west region of the Indian subcontinent. It is a source of perpetual conflict between India and Pakistan. India claims the entire region and presently administers almost half the region while Pakistan contests the claim and controls a third of Kashmir. Bose (1999) 41 *Survival* 141 at 153-4.

⁵⁵ *Ibid.*

Treaties are often ratified to facilitate reintegration into the international community after a period of isolation. This action symbolises a break with an authoritarian past or seeks to prevent recurrence of human rights abuses. An example is South Africa at the demise of apartheid in 1994,⁵⁶ and Zimbabwe after its independence in 1980.⁵⁷ States which ratify treaties to mollify other countries, or to be seen in the best possible light, however, may lack the moral motivation and political will to actually implement the provisions.

2. Diluting the force of the legal obligations

(a) Claw-back, derogation and denunciation clauses

The potency of human rights treaties can be considerably diluted by restrictive clauses or an absence of safeguards against wanton suspension of the law. The former are ‘claw-back’ and denunciation clauses, and the latter derogation clauses.

Claw-back clauses serve to limit the application of the provisions granting fundamental freedoms. These clauses are unique to the African Charter on Human and People’s Rights (ACHPR) and the African Charter on the Rights and Welfare of the Child (ACRWC).⁵⁸ The latter qualifies the participation rights of the child by making them subject to restrictions as prescribed by the domestic laws the state parties. For instance, the freedom of expression is subject to ‘such restrictions as prescribed by laws’;⁵⁹ the freedom of association and of assembly has to be exercised ‘in conformity with the law’;⁶⁰ and the right to privacy is subject to the right of parents or legal guardians ‘to exercise reasonable supervision over the conduct of their children’.⁶¹ Rights are therefore qualified, but no reference is made to the circumstances that may

⁵⁶ The country ratified five international treaties shortly after the end of apartheid.

⁵⁷ Heyns and Viljoen (note 52) 492.

⁵⁸ The UN and ILO Conventions do not contain such a clause.

⁵⁹ Article 7.

⁶⁰ Article 8.

⁶¹ Article 10. Chirwa (2002) 10 *Int J of Children’s Rts* 157 at 161.

lead to their qualification.⁶² Claw-back clauses, have the overall effect of whittling down the normative potential of the entire instrument, which includes the protection from child labour, and makes way for undefined governmental or parental restrictions.⁶³

As it happens, Lesotho, Zimbabwe and South Africa do not have claw back clauses in any of their legislation relating to children's rights. Nevertheless, the provisions in the ACRWC present the risk of domestic courts invoking them where legislation is silent (as in Zimbabwe at present) and where the law allows the courts to invoke human rights instruments in their decisions. For instance, in South Africa, the Constitution recognises international law and its application by state organs,⁶⁴ and courts must interpret legislation in a manner consistent with international law.⁶⁵

Denunciation clauses are another feature of human rights treaties. These clauses allow states to release themselves from their obligations at the lapse of a specified period. The ILO Minimum Age Convention, for example, provides that:

‘A Member which has ratified this Convention may denounce it after the expiration of ten years from the date on which the Convention first comes into force, by an act communicated to the Director-General of the International Labour Office for registration. Such denunciation shall not take effect until one year after the date on which it is registered.’⁶⁶

The Worst Forms of Child Labour Convention⁶⁷ and the CRC⁶⁸ contain similar clauses although the latter does not prescribe the minimum time period within which a state must remain bound before denouncing.

The effect of a denunciation on the rights of children is unclear as it is not prescribed in the relevant conventions. Potentially, however, a state may deem itself no

⁶² This severely handicaps the monitoring body, in this case, the ACRWC Committee of Experts, in restraining a government from creating laws contrary to the spirit of the rights granted. Welch Jr. (1992) 14 *Hum Rts Q* 43 at 46.

⁶³ Ankumar *The African Commission on Human and People's Rights* 176.

⁶⁴ Act 108 of 1996.

⁶⁵ Section 233.

⁶⁶ Article 13(1).

⁶⁷ Article 11(1).

⁶⁸ Article 53.

longer bound by international obligations to protect the rights provided including those that relate to the work of children. Too much adverse comment on its degree of compliance, for example, may be an inducement simply to withdraw from the convention in question.⁶⁹ The Zimbabwean president Robert Gabriel Mugabe has in the past been heard to threaten to withdraw its membership from regional and international entities such as the AU and SADC following criticism for the state's abuse of human rights.

Derogation clauses allow states to suspend some rights in narrowly determined situations, particularly those of public emergency. Some international and regional human rights treaties, such as the CRC, ILO Conventions and the ACRWC, do not contain such clauses or provide for a different set of non-derogable rights.

The absence of these clauses, or one listing the rights that cannot be derogated from under any circumstances, makes it unclear which obligations a state will have to continue to observe during an armed conflict, in times of civil strife or any other state of emergency.⁷⁰ Without a derogation clause, states may invoke the international law exception of state of necessity as they please.⁷¹ By doing so they may depart from the rights enunciated in the instruments, without the safeguards routinely built into derogation clauses.⁷²

Although the Southern African region has, until now, enjoyed relative peace, the lack of derogation clauses in the human rights instruments, creates a danger of these states suspending some international obligations, such as the prohibition of child soldiering or the engagement of children in hazardous employment (such as the production of arms), during situations of emergency.

⁶⁹ Murray *The African Commission on Human and People's Rights and International Law* 124.

⁷⁰ Ibid.

⁷¹ This doctrine of state necessity allows a state to interfere with the rights or liberties of individuals where it is in the public interest. This doctrine 'knows no law' and makes a state the sole judge of necessity. It has been recognised by the practice of most great powers. Weidenbaum (1938) 24 *Transactions of the Grotius Society* 105.

⁷² Ibid.

A classic example is Zimbabwe, which is currently teetering on the verge of a civil war and experiencing its worst humanitarian crisis. The state has already begun suspending (unofficially) some of its human rights obligations and has been recruiting and militarily training young men some under the age of 18, under the guise of the National Youth Service Programme,⁷³ to terrorise members of the opposition parties. This is clear evidence of the state's unrestricted derogation from the international principles prohibiting the use of children in conflict.

(b) Contradictions within the text

Any law which imposes duties and bestows rights, must be unambiguous to be effective. The lack of clarity in the definition of 'child' and 'labour' has created much confusion in the children's rights movement. The CRC defines a child as 'every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier'.⁷⁴ The ACRWC, on the other hand, is very clear on its definition of child, which it provides as 'every human being below the age of 18 years'.⁷⁵ The ILO Worst Forms of Child Labour Convention also sets the age limit of the child at 18.⁷⁶ The latter two instruments leave no room for state parties to set the upper limit of childhood to any other age.

The definition of the CRC is problematic in the sense that it suggests that the age of majority and that of adulthood are the same.⁷⁷ Moreover, it does not give guidance for its application particularly in countries with pluralistic legal systems. In the context of this provision, it is not clear if young people under the age of 18, who are not defined as 'minors' according to one (or more) of the domestic legal systems of a country (such as African customary law), are excluded from the application of Convention's provisions.

⁷³ Although the National Youth Service Bill is yet to become law, the state has gone on to implement its provisions some of which clearly violate the constitutional guarantees of personal liberty and the freedom from forced labour and the legislative prohibition against child labour.

⁷⁴ Article 1.

⁷⁵ Article 2.

⁷⁶ Article 2.

⁷⁷ 'For the purposes of the present Convention, a child means every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier.' Article 1 of the CRC.

‘Work’ and ‘labour’ are other ambiguous terms. None of the international instruments clearly define child labour, although they make a hazy distinction between labour and work (the latter being deemed ‘acceptable and beneficial’).⁷⁸ Little guidance is given on what makes some activities ‘work’ and therefore acceptable and other activities ‘labour’ and therefore unacceptable. The CRC makes extensive use of the term ‘exploitation’ yet does not elaborate what it entails.⁷⁹ The ILO describes unacceptable forms of child work as ‘hazardous’,⁸⁰ ‘harmful’,⁸¹ and ‘intolerable’,⁸² without adequately explaining the meaning of these terms. It is also vague as to whom this work must be deemed acceptable and beneficial, and as when acceptable work becomes unacceptable. Hence there is a grey area between work considered harmful and that deemed beneficial to a child’s development.⁸³

These conceptual ambiguities make the international legal obligations on child labour easy to evade and difficult to apply. How do states effectively comply with human rights treaties, train staff, and draft domestic laws when they cannot determine the meaning and limits of international principles?

3. Incorporation of international law into domestic law

(a) Status of international law in domestic law

According to the *pacta sunt servanda* principle, a state is obliged to give effect to international human rights agreements in its municipal law where those agreements

⁷⁸ The CRC does not mention ‘labour’ but ‘work’, which is unacceptable: Article 32(1). The Worst Forms of Child Labour Convention provides for the ‘worst forms’ of child labour but does not deal with acceptable types of ‘work’. Article 7 of the Minimum Age Convention provides for the minimum ages of employment. It does not define the differences between ‘light’ work and other types of work.

⁷⁹ Articles 19, 32, 34, 36 and 39.

⁸⁰ Section II of the Worst Forms of Child Labour Recommendation 190 of 1999.

⁸¹ Article 7 of the Minimum Age Convention and art 3(d) of the Worst Forms of Child Labour Convention.

⁸² ILO Cartagena Indies Declaration on the Elimination of Child Labour, adopted at the First Ibero-American Tripartite Meeting at the Ministerial Level on the Elimination of Child Labour, Cartagena, Colombia on 8-9 May 1997.

⁸³ See Chapter IV for a comprehensive discussion on the definition of child and child labour.

provide that ‘effect’ must be given to their provisions.⁸⁴ A state cannot therefore, invoke the provisions of its internal law as justification for failure to perform.⁸⁵ Compliance with human rights norms can thus be determined by looking at the status of international treaties in domestic law, in other words, their incorporation into municipal law and enforcement by domestic courts.⁸⁶

Some countries follow what is traditionally called a monist approach, whereby treaties automatically become part of national law⁸⁷ simply on ratification or accession.⁸⁸ Other countries follow a dualist approach, whereby international agreements are not self-executing, and thus require an Act of Parliament (or enforcement by administrative bodies) to incorporate them into national law.⁸⁹

From 1948 to 1990, South Africa was at odds with the international community as its apartheid policies conflicted with just about all human rights norms. The hostility of the government to the United Nations and international human rights instruments influenced the mind-set of parliamentarians, the judiciary and legal practitioners.⁹⁰ A traditional approach to sovereignty and absolute respect for domestic jurisdiction guided and shaped legal policy. Some treaties were incorporated into domestic law, in accordance with the common-law dualist approach, and customary international law was

⁸⁴ As the Convention on the Settlement of Investment Disputes Between States and Nationals of other States provides in Article 61: ‘Each Contracting state shall take such legislative or other measures as may be necessary for making the provision of this Convention effective in its territories’ Janis *An Introduction to International Law* 29.

⁸⁵ Article 27. This rule is without prejudice to Article 46 which provides that ‘1. A state may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance. 2. A violation is manifest if it would be objectively evident to any state conducting itself in the matter in accordance with normal practice and in good faith.’

⁸⁶ Legislative enactments constitute the clearest evidence of reception of international law in municipal law as they provide certainty and clarity concerning the extent of the reception of rules of international law in national law. Tshosa (note 49) 22.

⁸⁷ For example, Brazil, Colombia, Egypt, Estonia, Iran, Japan, Mexico, the Philippines, etc. Ibid.

⁸⁸ In Iran, the constitutional superiority of Islamic law overrides the treaties. Ibid.

⁸⁹ Examples of such countries include Zambia, South Africa, Lesotho, Zimbabwe, Australia, Canada, Finland and Jamaica. Ibid.

⁹⁰ Dugard ‘International Law and the South African Constitution’, available at <http://www.ejil.org/journal/Vol8/No1/art4.html> [accessed on 6 March 2006].

treated as part of municipal law unless inconsistent with legislation.⁹¹ Otherwise international law received no constitutional recognition and was in most cases ignored.⁹² ILO Conventions, however, were surprisingly fairly received, with 12 instruments ratified.⁹³ None of them were, however, related to child work.⁹⁴

At the demise of apartheid in 1994, the position changed dramatically. Like its interim predecessor of 1993,⁹⁵ the final Constitution of 1996⁹⁶ provides for the recognition of international law and its application by municipal courts and the executive.⁹⁷ It further provides that ‘customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament’.⁹⁸ Customary international law is also not subject to subordinate legislation, and only a constitutional or legislative provision that is clearly inconsistent with a customary rule can trump it.⁹⁹ Common-law rules and judicial decisions are, however, subordinate to customary international law.¹⁰⁰

As far as the incorporation of treaties is concerned, the country follows a dualist approach. Treaties may be transformed into municipal law, firstly by incorporation of the text in an Act of Parliament; secondly, by being included as a schedule to a statute; and, thirdly, giving the executive power to bring a treaty into effect by way of a proclamation

⁹¹ Ibid.

⁹² While it was applied by the courts in politically neutral matters, such as sovereign immunity and diplomatic privileges, it was generally treated as an alien and hostile legal order. Ibid.

⁹³ Such as the Unemployment Convention 2 of 1919, the Night Work (Women) Convention 4 of 1919, the Equality of Treatment (Accident Compensation) Convention 19 of 1925, the Minimum Wage-Fixing Machinery Convention 26 of 1928, the Marking of Weight (Packages Transported by Vessels) Convention 27 of 1929, the Forced Labour Convention 29 of 1930, the Night Work (Women) Convention (Revised) 41 of 1934, the Workmen’s Compensation (Occupational Diseases) Convention (Revised) 42 of 1934, the Underground Work (Women) Convention 45 of 1935; the Convention concerning Statistics of Wages and Hours of Work 63 of 1938, the Final Articles Revision Convention 80 of 1946 and the Night Work (Women) Convention (Revised) 89 of 1948. Available at the ILO website <http://www.ilo.org/ilolex/english/newratframeE.htm> [accessed on 17 June 2008].

⁹⁴ Dugard (note 90).

⁹⁵ Act 200 of 1993.

⁹⁶ Act 108 of 1996.

⁹⁷ Section 39.

⁹⁸ Section 232.

⁹⁹ As emphasised by section 233 which provides that ‘[w]hen interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law’.

¹⁰⁰ Dugard (note 90).

or notice in the Government Gazette.¹⁰¹ As far as the first two methods are concerned, the Constitution requires approval by resolution of both the National Assembly and the National Council of Provinces, and thereafter, national legislation.¹⁰² Unfortunately the two steps required serve as a bureaucratic bottleneck, as they increase the time period between signing and actual enforcement under municipal law.

The Constitution requires courts to recognise international human rights instruments in their application of the Bill of Rights¹⁰³ and to interpret legislation in a manner consistent with international law.¹⁰⁴ As a result, it has become common practice for the courts to invoke human rights norms, and the decisions of international human rights tribunals.¹⁰⁵ Indeed, all three countries have a rule of interpretation which determines that, where possible, domestic law must be interpreted in conformity with treaty obligations.¹⁰⁶

Although Lesotho is a member of numerous international treaties, its Constitution¹⁰⁷ is conspicuously silent on the status of international law in domestic law. With regard to the enforcement of international law before national courts and other tribunals, the country follows the common-law dualist approach.¹⁰⁸

Moreover, as a member of the Commonwealth, Lesotho follows the Bangalore Principles of 1988, which give guidelines for the application of international treaties.¹⁰⁹ According to these rules, in cases where domestic law is ambiguous or silent, competent

¹⁰¹ Dugard (note 90).

¹⁰² Section 23(2) and (4) of the 1996 Constitution.

¹⁰³ Section 39(1).

¹⁰⁴ Section 233.

¹⁰⁵ The courts have set aside laws and administrative practices that violate human rights. In *S v Makwanyane and Another* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC), the Constitutional Court set aside the death penalty stating that the nature of the punishment violated the rights to dignity and life, and the freedom against inhuman and degrading treatment or punishment. Chapter 2, ss 7-39.

¹⁰⁶ Tshosa (note 49) 22.

¹⁰⁷ Order No. 5 of 1993.

¹⁰⁸ Dugard (note 90).

¹⁰⁹ The Bangalore Principles are a summary of issues discussed at a Judicial Colloquium on 'The Domestic Application of International Human Rights Norms', held in Bangalore, India in February 1988. South Africa, however, became a member of the Commonwealth after these principles came into being while Zimbabwe was expelled from the body.

administrative bodies have to refer to international standards, but, wherever conflict arises, they must give priority to national legislation.¹¹⁰

Zimbabwe also follows the common-law approach.¹¹¹ The status of treaties is regulated by s 17 of the Constitutional Amendment Act of 1987,¹¹² which provides that ‘any international convention, treaty or agreement which (a) has been entered into or executed by or under the authority of the President and (b) imposes fiscal obligations upon Zimbabwe, shall be subject to ratification by the House of Assembly’. This implies that not all treaties that have been executed by the President are subject to parliamentary ratification, but only those which impose financial obligations. Questions remain, however, whether human rights instruments (which do not impose fiscal obligations), require parliamentary approval, and whether ratification by the legislature means an expression to be bound at the international level, implementation at the municipal level.

(b) Children’s rights in the Constitution

The Constitution of Lesotho of 1993 provides for the protection of children and young persons from economic and social exploitation and from employment in work harmful to their morals and health, or dangerous to life.¹¹³ This provision, however, falls under the Principles of State Policy, which are not enforceable in the courts, but are subject to the limits of the economic capacity and development of Lesotho. Hence the principles

¹¹⁰ The Law Reform Commission of Lesotho has created a number of sub-commissions, each responsible for establishing an agenda for legislation to address in one specific area. They will also identify the type of research work still required in order to bring domestic law into line with international standards. ‘ILO Complementary Report on the Implementation of the UN Convention on the Rights of the Child in Lesotho’, available at http://www.crin.org/docs/resources/treaties/crc.26/lesotho_ngo_report.pdf [accessed on 20 October 2006].

¹¹¹ In a rare case of its kind, *Barker McCormac(Pvt) Ltd v The Government of Kenya* 1983 (2) ZLR 72 (S), the Supreme Court of Zimbabwe has to some extent endorsed the principle that international law forms part of the domestic law. It is, however, significant that the judges in the case referred generally to the fact that international law is part of the law in Zimbabwe and did not specifically mention customary international law or use the language to that effect or even any applicable treaty. In *Mharapara v the State* (1986) LRC (Const) 235, Justice Gubbay confirmed the automatic incorporation principle for customary international law. It is important to note that current municipal law in Zimbabwe continues to recognise that the automatic incorporation principle is subject to the will of Parliament. The legislature may exclude by statute direct operation of customary international law in the Zimbabwean domestic law. Tshosa (note 49) 22.

¹¹² Act No. 7.

¹¹³ Section 32.

may do more than guide government agencies and other public authorities in the performance of their functions, ‘with a view to achieving progressively, by legislation or otherwise, the full realisation of these principles’.¹¹⁴

Zimbabwe has incorporated some principles of human rights law into a Constitutional Declaration of Rights.¹¹⁵ This instrument, however, does not provide for children’s rights or child labour.

The South African Constitution is one of the few that contains provisions specifically dealing with the protection of children. Section 28(1)(d) provides for the right of a child to be protected from maltreatment, neglect, abuse or degradation.¹¹⁶ Most importantly, it protects children from exploitative labour practices,¹¹⁷ engaging in work or providing services that are inappropriate for a person of that child’s age, and placing at risk the child’s well-being, education, physical or mental health or spiritual, moral or social development.¹¹⁸ Although this provision incorporates some principles contained in the CRC and the ACRWC, it does not elaborate on what is meant by ‘exploitative’ or ‘inappropriate’ work and the ‘placing at risk the child’s well-being’.

(c) Legislative measures

International and regional human rights instruments may impose on all state members a duty to enact laws that will put into effect the provisions of the treaties. The ILO Conventions,¹¹⁹ the CRC¹²⁰ and the ACRWC¹²¹ all oblige state members to take legislative (and administrative, social and educational) measures to ensure the implementation of the instruments. For instance, the ACRWC explicitly provides that

‘parties shall undertake to the necessary steps, in accordance with their Constitutional processes and with the provisions of the present Charter,

¹¹⁴ Chapter III.

¹¹⁵ Chapter 3, arts 11 -27.

¹¹⁶ Section 28(1)(d).

¹¹⁷ Section 28(1)(e).

¹¹⁸ Section 28(1)(f).

¹¹⁹ For instance, art 7 of the Worst Forms of Child Labour Convention (No. 182).

¹²⁰ Article 3.

¹²¹ Article 1.

to adopt such legislative or other measures as may be necessary to give effect to the provisions of this Charter'.¹²²

Lesotho, Zimbabwe and South Africa have, in various degrees, taken some (although not comprehensive) legislative measures to ensure the implementation of the provisions of children's rights treaties.

The Lesotho Labour Code¹²³ is the only piece of legislation in the country which attempts to directly incorporate international instruments dealing with the child labour (in this case, ILO Conventions).¹²⁴ The Code makes provision for courts to interpret it in accordance with the ILO Conventions and Recommendations ratified by Lesotho and those not yet ratified.¹²⁵ Part IX covers the employment of children (as well as women and young persons).¹²⁶

In 2004, the Law Reform Commission of Lesotho presented the Children's Protection and Welfare Bill, which embodies the principles of the ILO Conventions and provides for the range of rights enshrined in the CRC and the ACRWC.¹²⁷ It also follows in the footsteps of the latter by including certain duties for children, one of them being to 'serve the community by placing physical and intellectual abilities at its service'.¹²⁸ While it goes the extra mile as far as providing protection for child workers, it nevertheless provides inadequate cover for children in informal, domestic and self employment, areas where child exploitation is most rampant.¹²⁹ The Bill, however, has been pending since 2004, and still shows no sign of becoming law.

¹²² Article 1.

¹²³ Order No. 24 of 1992.

¹²⁴ Mr Maema, a representative of Lesotho before the Committee on the Rights of the Child said that the incorporation of international treaties into domestic law was being done in a consistent, though not entirely systematic, manner. ILO Complementary Report on the Implementation of the UN Convention on the Rights of the Child in Lesotho' (note 109).

¹²⁵ Article 4(c).

¹²⁶ The Education Act 10 of 1995 is only complementary to the Code in making the primary education of children compulsory.

¹²⁷ Article 1.

¹²⁸ Section 21(b).

¹²⁹ Section 239 provides '(1) Any person who contravenes the provisions of this Part commits an offence and on conviction is liable to a fine of not less than fifteen thousand or to imprisonment for a term not less than two years or to both. (2) Notwithstanding subsection (1), any person who contravenes the provisions

Zimbabwe has enacted the Labour Relations Act (LRA) of 1985¹³⁰ and the Labour Relations Regulations of 1997,¹³¹ which together lay down the domestic principles governing the employment of ‘children’ and ‘young persons’ in Zimbabwe. The country has also enacted certain complementary pieces of legislation. These include the Education Act of 1996¹³² (which makes primary education compulsory),¹³³ the Children’s Protection and Adoption Act of 1972, as amended by the Children’s Act of 2001¹³⁴ (which restricts the employment of school-going children and young persons and prohibits the engagement of any child or young person in hazardous labour).¹³⁵ The country has also enacted the Manpower Planning and Development Act of 1994,¹³⁶ (which sets the minimum age for apprenticeship).¹³⁷

In South Africa, it is the Basic Conditions of Employment Act 1997 (BCEA) which gives effect to the provisions of ILO Conventions, although the instrument existed before the country became party to the relevant ILO Conventions.¹³⁸ The Children’s Act of 2005¹³⁹ and the Children’s Amendment Act of 2007¹⁴⁰ also seek to give effect to the state’s obligations concerning the well-being of children under international instruments and the Constitution. Section 6(2) of the Children’s Act provides that all proceedings, actions or decisions in matters concerning a child must respect, protect, promote and fulfil the child’s rights as set out in the Bill of Rights. Section 141 of the Children’s Amendment Act prohibits child labour and the exploitation of children.

of ss 233(1), 235 and 237 commits an offence and shall– (a) on first conviction be liable to a fine not less than hundred thousand Maloti (equivalent to R100 000) or to imprisonment for a term not less than five years or both;(b) on second or subsequent conviction to imprisonment for a minimum term of ten years without option of a fine’.

¹³⁰ No. 16 [Cap 28:01] as amended by the Labour Relations Amendment Act (No. 17) of 2002.

¹³¹ SI No. 72 of 1997.

¹³² [Cap. 25:04].

¹³³ Section 5.

¹³⁴ No. 5 [Chapter 5:06].

¹³⁵ Section 10 A inserted by s 10 with effect from 18 January 2002.

¹³⁶ No. 24 [Cap.28:02].

¹³⁷ Section 34(1)(a).

¹³⁸ Section 2(b) of Act 75 of 1997. This Act came into being before the South Africa became party to the Minimum Age Convention and the Worst Forms of Child Labour Convention.

¹³⁹ Act 38 of 2005.

¹⁴⁰ Act 41 of 2007.

The Children's Act uses the 'best interests of the child' principle in the regulation of child labour¹⁴¹ and gives a list of guidelines for the application of the standard.¹⁴² With regard to child labour, the factors to be considered would include the child's age, maturity and stage of development, gender, background and any other relevant characteristics.¹⁴³ The best interests principle in the Act highlights the need to protect the child from any physical or psychological harm that may subject the child to maltreatment, abuse, neglect, exploitation, degradation, exposing the child to violence or other harmful behaviour.¹⁴⁴ It also calls for the recognition of a child's need for development and for engaging in play and other recreational activities appropriate to the child's age.¹⁴⁵

The Child Care Act of 1983 prohibits the employment of a child less than 15 years old¹⁴⁶ while the Sexual Offences Act of 1957 outlaws the engagement of children in prostitution.¹⁴⁷ The Mine Health and Safety Act of 1996 prohibits the employment of children in underground mines.¹⁴⁸ The South African Schools Act of 1996 makes school compulsory for children aged between 7 and 15.¹⁴⁹

Despite these countries' efforts to harmonise international conventions on children's rights with some domestic laws, there nevertheless remain disparities, and

¹⁴¹ Section 9: 'In all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance, must be applied.'

¹⁴² Section 7(1).

¹⁴³ Ibid.

¹⁴⁴ Section 7(1)(1).

¹⁴⁵ Section 6(2)(e).

¹⁴⁶ Section 52A of Act 74 of 1983.

¹⁴⁷ Section 20 of Act 23 of 1957. The problem with the Act is that it allows children to be arrested for prostitution despite being victims of commercial sexual exploitation. The Child Care Act and the Sexual Offences Bill, however, came into being before South Africa became party to the ILO Minimum Age Convention and well before the Convention on the Worst forms of Child Labour came into being. Section 11 of the Sexual Offences Bill of 2003 also contains the same provision.

¹⁴⁸ Act 29 of 1996. The Department of Labour reported to the ILO Committee of Experts that it was in the process of drafting regulations pertaining to the work of children between the ages of 15 and 17 years that would comply with the Convention. In July 2004, the South African Department of Labour (SADOL) passed regulations – Sectoral Determination 10: Children in the Performance of Advertising, Artistic and Cultural Activities. CEACR: Individual Direct Request concerning Worst Forms of Child Labour Convention Submitted: 2006, available at <http://www.ilo.org/ilolex/english/convdisp2.htm> [accessed on 16 September 2006].

¹⁴⁹ Section 3(1) of Act 84 of 1996.

neither Lesotho, Zimbabwe nor South Africa has enforced the CRC and the ACWRC in totality.¹⁵⁰

Lesotho's domestic legislation does not fully reflect the principles and provisions of the CRC, ILO Conventions and the ACRWC. The efforts to amend domestic legislation are yet to be adopted. The Children's Bill of 2004 which incorporated some principles of international law has, to date, not been tabled before Parliament. Customary law also continues to be applied in many situations and sometimes contradicts the principles and provisions of the international instruments.¹⁵¹

Despite Zimbabwe's efforts to deal with child exploitation, the country has not undertaken comprehensive legal reforms with a view to ensuring that national legislation fully conforms to the international human rights treaties. A limited number of rights are provided for in various pieces of legislation, some of which came into being before the CRC was adopted. For instance, education is provided as a right in s 4 of the Education Act of 1987.¹⁵² However, existing laws are poorly enforced because of weak interpretations, a lack of labour inspectors, and a poor understanding among affected workers of basic legal rights.¹⁵³ And Zimbabwe still lacks a legal prohibition on child labour in informal employment.¹⁵⁴

As far as South Africa's compliance with the ILO and CRC is concerned, several pieces of legislation have been enacted in an attempt to bring about some measure of harmonisation between domestic and international law.¹⁵⁵ The national law, however,

¹⁵⁰ 'UN Committee on the Rights of the Child: Concluding Observations: Lesotho' 21 February 2001. CRC/C/15/Add.147, available at: <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3b4c45514> [accessed 17 September 2007].

¹⁵¹ Ibid.

¹⁵² [Cap. 25:04].

¹⁵³ 'Zimbabwe' Bureau of International Labour Affairs US Department of Labour, available at <http://www.dol.gov/ilab/media/reports/iclp/tda2004/zimbabwe.htm> [accessed on 12 March 2005].

¹⁵⁴ 'Committee on the Rights of the Child, Concluding Observations on Zimbabwe', available at <http://www.law.wits.ac.za/humanrts/crc/crc-Zimbabwe96.htm> [accessed on 12 March 2005].

¹⁵⁵ Notably the National Youth Amendment Act (1996); the Legal Aid Amendment Act (1996); the Criminal Procedure Amendment Act (1996); the Film and Publications Act (1996); the National Education Policy Act (1996); the Child Care Amendment Act (1996); the Abolition of Corporal Punishment Act (1997); the Divorce Courts Amendment Act (1997); the Establishment of Family Court Act (1997); the

and, in particular, African customary laws still do not fully reflect the principles and provisions of international law.¹⁵⁶

(d) Coda: Problems created by the plural legal systems

(i) Legal pluralism

In countries with a unitary legal system, the application of international law on child labour would be relatively simple. In Africa, however, it is more complicated. Here the colonial powers introduced European systems of law while allowing the continued observance of indigenous customary laws.¹⁵⁷ Thus inhabitants of former African colonies often find themselves subject to overlapping (and potentially contradictory) obligations, emanating from different systems of law.¹⁵⁸ For purposes of this discussion, these conflicts of law become relevant whenever the cultural norms relating to child rearing methods, gender and the age of majority differ with those of the imported systems of European law.

Maintenance Amendment Act (1997); the Natural Fathers of Children Born out of Wedlock Act (1997); the Criminal Procedure Second Amendment Act (1997), the Children's Act of 2007 and the Children's Amendment Act of 2007. Concluding Observations of the Committee on the Rights of the Child: South Africa, available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CRC.C.15.Add.122.En?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CRC.C.15.Add.122.En?OpenDocument) [accessed on 10 March 2006].

¹⁵⁶ South Africa still has traditional practices and attitudes which limit the full implementation of Article 12 of the CRC, particularly in the provinces and at the local level. Article 12 provides that '(1) States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. (2) For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law'. With the enactment of the Children's Act of 2005 and its subsequent Children's Amendment Act, great strides have been made in harmonising international law with domestic law.

¹⁵⁷ Bekker et al (eds) *Introduction to Legal Pluralism in South Africa* 5 and 18; Bennett (1981) 30 *Int & Comp L Q* 59.

¹⁵⁸ Bekker et al (note 156) 59.

Like other former colonies, Lesotho,¹⁵⁹ Zimbabwe¹⁶⁰ and South Africa¹⁶¹ recognise several different legal systems, which can be broadly classified as Western and African. The former comprises the common law and legislation (through which international law conventions may be incorporated),¹⁶² judicial precedent (in which principles of international law may be invoked) and the common law derived from a Roman-Dutch and English heritage. The latter comprises what is known as ‘official’ customary law, which are customs that have been incorporated into legislation or pronounced upon in judicial decisions, and the so-called ‘living’ customary law, i.e. law which has not yet been included in formal legal sources.¹⁶³ The vast majority of the population in these countries subscribes to African customary law.¹⁶⁴

The three countries under consideration reflect, to varying degrees, the contentious relationship between universal human rights and local cultures. Lesotho has express provision for human rights in its Constitution,¹⁶⁵ and it has enacted legislation which incorporates some ILO principles governing child labour.¹⁶⁶ It has also come up

¹⁵⁹ Since 1884, when Lesotho became a protectorate of Britain, the country has had the same legal structure as that introduced by the colonial administration. In that year, the British administration issued Regulation 12 of Proclamation 2B which provided for the continued operation in Lesotho of the Cape Colonial common law and for the retention of customary law as administered by the chiefs. The current version of this provision is now known as s 2 of the General Law Proclamation.

¹⁶⁰ It began when Queen Victoria issued a Charter expressly recognising African law and customs. The Charter empowered Cecil John Rhodes and his company to occupy and govern the new territory. Rhodes was a British businessman, mining magnate, and politician after whom the colony was named Rhodesia. Northern and Southern Rhodesia eventually became Zambia and Zimbabwe. African laws, however, were subject to any British laws which were in force in the colony and applicable to its inhabitants. Van Niekerk (1990-92) 31-3 *Codicillus* 34 at 41.

¹⁶¹ It is convenient, however, to begin from 1927, when, based on race, Parliament imposed a uniform approach to customary law on what had formerly been four separate territories. The Black Administration Act consolidated all previous legislation governing choice of law and created a separate court system. While the chief’s courts had jurisdiction to apply only customary law, the Act gave the commissioners’ courts and the Native Appeal Court the discretion to apply either common or customary law. All other courts had to apply only common law.

¹⁶² Sections 4 to 24 (Chapter II: Protection of Fundamental Human Rights and Freedoms) of the Constitution of Lesotho; ss 11 to 26 (Chapter 3: The Declaration of Rights) of the Constitution of Zimbabwe and ss 7 to 39 (Chapter 2: Bill of Rights) of the Constitution of South Africa Act 108 of 1996.

¹⁶³ Although there are various other established ethnic groups in these countries, such as the Chinese, Hindu, Muslim and Jewish communities, it is the customary law of the African indigenous societies which is officially recognised. An example of such laws are Lesotho’s Laws of Lerotoli. Bekker (note 156) 11.

¹⁶⁴ Ibhawoh (2000) 22 *Hum Rts Q* 838 at 844.

¹⁶⁵ Chapter II: Protection of Fundamental Human Rights and Freedoms, ss 4 to 24 of the Constitution of Lesotho of 1993.

¹⁶⁶ Part IX of the Lesotho Labour Code.

with a Children's Protection and Welfare Bill¹⁶⁷ which incorporates some principles of the CRC. At the same time, however, the country has a dualist system of laws, and a correspondingly dualist system of courts.¹⁶⁸

Zimbabwe, too, makes constitutional provision for basic human rights¹⁶⁹ and has engaged in piecemeal legislative reform specifying children's rights in labour.¹⁷⁰ Unlike Lesotho, however, it has a unified court system.¹⁷¹ Culture is also evident in a dualist legal system, although art 23(3)(b) of the Constitution exempts African customary law from the prohibition on discrimination: 'in any matter involving Africans or an African and one or more persons who are not Africans where such persons have consented to the application of African customary law in that case'.¹⁷² This provision highlights the tense relationship between human rights (in this instance, the freedom of the girl child from discrimination regarding certain types of labour and access to education)¹⁷³ and customary law.¹⁷⁴ Underlying the Constitutional exemption is the assumption that African norms and values are incompatible with the international norms and values.¹⁷⁵

South Africa has an extensive and fully justifiable Bill of Rights, which makes particular provision for children.¹⁷⁶ Like Lesotho and Zimbabwe, however, the Constitution specifically protects culture, although with the caveat that it may not be exercised in a manner inconsistent with any provision of the Bill of Rights.¹⁷⁷

¹⁶⁷ Bill of 2004.

¹⁶⁸ Hellum (2000) 25 *Law & Social Enquiry* 637.

¹⁶⁹ Chapter 3: Declaration of Human Rights.

¹⁷⁰ For instance the Labour Relations (Employment of Children and Young Persons) Regulations, Statutory Instrument 72 of 1997.

¹⁷¹ In other words, there is no separate set of courts, run by traditional rulers and applying mainly customary law. Hellum (note 167) 637.

¹⁷² Article 23(3)(b).

¹⁷³ Article 23(1)(a).

¹⁷⁴ Sub-article (3)(b). As a result, the Supreme Court in *Magaya v Magaya* [1999] 3 LRC 35 200 found that certain discriminatory customary laws were permissible under the Constitution. The *Magaya* case reflects one way of determining a choice of laws and highlights the problems of maintaining dual legal systems. Bigge and von Briesen (2000) 13 *Harvard Hum Rts J* 289 at 294.

¹⁷⁵ Hellum (note 167) 638.

¹⁷⁶ Section 28.

¹⁷⁷ Sections 30 and 31.

It would seem that drafters of international conventions, especially those on child welfare, did not anticipate global norms encountering these pluralist legal regimes. They seem to have assumed that, once ratified, international law would exist harmoniously with the unitary domestic laws of state members. In states with pluralistic legal systems, it is not only the conflict of international law and African customary law that presents problems to the application of international law, but also the corresponding domestic court structure and choice of law rules.

(ii) Court structure

By introducing a system of legal pluralism, colonial powers acted on the assumption that the European law was for Europeans and customary law for Africans.¹⁷⁸ This simplistic distinction on the ground of race was supported by the court system, which had one hierarchy of courts dealing with African litigation and another with European.

The law and court structure in Lesotho is still based on the 19th century colonial legislation.¹⁷⁹ The High Court has unlimited jurisdiction to hear and determine any proceedings, together with a discretion to apply either of the two systems of law.¹⁸⁰ Magistrates' courts have similar powers. Basotho Courts, however, are authorised to administer only customary law, together with a very limited range of statutory provisions.¹⁸¹

¹⁷⁸ Except in all matters where the state had a direct interest, such as criminal and constitutional law, the received law was applied. The courts in Lesotho, Zimbabwe and South Africa used a flexible approach in deciding when to apply customary law although it was generally reserved for areas involving the family, land tenure and inheritance. If an African litigant was fully assimilated into European society, however, it was open to the court to apply the common law instead. Bennett (note 156) 63.

¹⁷⁹ The law in those times showed only contempt for customary law, and an expectation that the Basotho would abandon their customs and adopt a European way of life. Poulter *Legal Dualism in Lesotho* 18.

¹⁸⁰ Section 2(1) of the High Court Act 5 of 1978.

¹⁸¹ Such as Parts II and III of the Laws of Lerotoli. Matters in connection with civil marriages are excluded from the courts' jurisdiction except where the case concerns the payment of bride price. The laws of Lerotoli are partly codified customary laws and partly regulations made by or at the direction of the colonial government by the Basutoland National Council from 1905 to 1959. The Lerotoli laws continue to be widely followed in the rural areas though most of them have been superseded by modern legislation. Where an action arises, which a magistrate considers would be more conveniently dealt with in Basotho courts, he or she may order a transfer to the latter. Poulter (note 209) at 18.

Since its colonisation, Zimbabwe too has had a dual court system. In 1990, however, the Customary Law and Local Courts Act¹⁸² established a unitary judicial structure consisting of headmen's and chiefs' courts, magistrates' courts, the High Court and the Supreme Court.¹⁸³ Customary law cases may thus be heard at all levels of the judicial system, although they tend to be concentrated in the lower courts.¹⁸⁴ The Constitution of Zimbabwe also recognises the application of customary law in all the courts of the land.¹⁸⁵

Like Lesotho, South Africa supports a dual system of courts.¹⁸⁶ In addition to the magistrates' courts and High Court,¹⁸⁷ courts run by the traditional leaders also operate to cater for the needs of litigants wanting their cases adjudicated according to customary law.¹⁸⁸ The Constitution allows for the application of customary law in all courts of law 'when that law is to applicable, subject to the Constitution and any legislation that specifically deals with customary law'.¹⁸⁹ The traditional courts, however, may apply, in essence, only customary law.¹⁹⁰

¹⁸² Act 2 of 1990 [Cap. 7:05].

¹⁸³ By the Customary Law and Local Courts Act 2 of 1990 [Cap. 7:05]. Prior to 1990 Zimbabwe had a court structure similar to that of Lesotho.

¹⁸⁴ Article 3 of the Customary Law and Local Courts Act. 'Constitution, Government & Legislation', available at the Jurist Legal Intelligence website <http://jurist.law.pitt.edu/world/zimbabwe.htm> [accessed on 16 August 2006].

¹⁸⁵ Section 89 of the Constitution of 1980 which reads:

'Subject to the provision of any law for the time being in force in Zimbabwe relating to the application of African customary law, the law to be administered by the Supreme court or the High Court and by any courts in Zimbabwe subordinate to the High Court, shall be the law in force in the Colony of the Cape of Good Hope on 10 June 1891, as modified by subsequent legislation having in Zimbabwe the force of law.'

¹⁸⁶ Currently the Black Administration Act 38 of 1927. It is due to be superseded by the Traditional Courts Act: See Bill of 9 April 2008 B15/2008

¹⁸⁷ Which include the Constitutional Court, the Supreme Court of Appeal, the High Courts, including any high court of appeal that may be established by an Act of Parliament to hear appeals from High Courts and the magistrates' courts. Section 166(a)-(d).

¹⁸⁸ Black Administration Act 38 of 1927.

¹⁸⁹ In terms of s 211(3) of the Law of Evidence Amendment Act, 'Any court may take judicial notice of...indigenous law in so far as such law can be ascertained readily and with sufficient certainty: Provided that indigenous law shall not be opposed to the principles of public policy or natural justice. Accordingly, all the courts in the country may apply customary law irrespective of the race of the litigants. It must be noted, however, that the courts' power to take judicial notice of customary law is, however, subject to three conditions, two of which were taken from s 11(1) of the Black Administration Act 38 of 1927. The first was a general reservation in favour of public policy and natural justice, the so-called repugnancy clause inherited from the colonial period. Because of the Act's historical use of suppressing customary law this section is, today, generally regarded as inappropriate and outdated. See *Mabuza v Mbatha* 2003 (7) BCLR 743 (C) at paras 30, 32, and *Bhe v Magistrate, Khayelitsha* 2004 (2) SA 544 (C) at 549. The second condition exempted bridewealth from the application of the repugnancy clause. The third proviso, however,

The three countries thus have courts which usually apply the common law and those which are specially designed to deal with disputes in terms of customary law.¹⁹¹ One may assume that a considerable number of South Africans and an even more substantial number of people in Lesotho and Zimbabwe use the customary law courts. Hence, when a matter is brought before such institutions, Western laws are not applied. Not only are the officials of traditional courts not fully aware of human rights standards, but they also lack the training needed to render any determinations involving international law.¹⁹²

In any case, even if such courts could entertain matters involving human rights principles, the customary law applied in such institutions generally rejects the ‘overly individualistic’ character of human rights in favour of community interests.¹⁹³ Consequently, traditional courts are unlikely to apply the principles of inalienable entitlements enshrined in children’s rights.¹⁹⁴ With regard to issues of child labour, African culture considers child work as part of ordinary socialization and human development. By virtue of being African, the arbiters of a customary law court would probably assume that a child has obligations to contribute to the sustenance of the family and the community at large.¹⁹⁵ Drafters of international law (including those of child labour conventions) seem not have anticipated this problem.

was an innovation: the courts could take judicial notice of customary law only if the law could be ‘ascertained readily and with sufficient certainty’. Otherwise customary law must be proved according to the rules specified for custom. For this purpose s 1(2) of the Act allows the parties to lead evidence of the substance of any legal rule in contention. Lehnert (2005) 21 *SALJ* 244; Bennett (note 156) 86-7; South African Law Commission ‘Harmonisation of the Common Law and the Indigenous Law (The application of customary law: Conflict of personal laws)’ (1996) Issue Paper 4, Project 90, 14.

¹⁹⁰ Section 211(3).

¹⁹¹ Lesotho has the Basotho courts, Zimbabwe has headmen and chiefs’ courts, while South Africa is soon to have the Traditional courts: See the Traditional Courts Bill of 9 April 2008 B15/2008 has the Community Courts and Courts for Chiefs and Headmen.

¹⁹² Lehnert (note 188) 244.

¹⁹³ Pollis and Schwab *Human Rights: Cultural and Ideological Perspectives* 13; Bennett *Human Rights and African Customary Law* 2.

¹⁹⁴ Bennett (note 192) 1.

¹⁹⁵ Ncube *Law, Culture, Tradition and Children’s Rights in Eastern and Southern Africa* 203.

(iii) Choice of law rules

In the former colonies, the application of customary law to Africans and common law to Europeans may initially have worked, but when Europeans began to engage in dealings with Africans, and the latter chose to regulate their lives according to the received law, problems of choice of law arose.¹⁹⁶ In the three countries under consideration, such conflicts are solved by choice of law rules devised partly by legislation but mostly by the courts.

The statutory rules in Lesotho and South Africa¹⁹⁷ are very general, leaving most problems to be solved by the courts. Those in Lesotho decide whether common or customary law is applicable by having regard to the parties' mode of life, a somewhat vague criterion that lists factors indicating whether or not a litigant had maintained a traditional or European way of life.¹⁹⁸ Courts therefore consider the place of residence (rural or urban), the possession of ploughing or grazing rights in the countryside; type of employment; ownership of a motor vehicle; the wearing of 'European clothes'; having a bank account and life insurance policies; adherence to the Christian faith; having a common law marriage; the education of children in formal institutions; and having a will in which the bequests do not follow the usual pattern of inheritance under Sesotho law.¹⁹⁹ In present day Africa, however, where people carry on a European mode of life while observing the norms of their culture, such rules are not especially unhelpful.

In Zimbabwe, the legislature has provided more specific choice of law rules. The Customary Law and Local Courts Act provides that customary law may be used in 'any civil cases' if 'the parties have expressly agreed that it should apply; or due to the nature

¹⁹⁶ The applicability of customary law was determined partly by the subject matter of the case and partly by the race of the litigants. Customary law could not be applied, however, if 'repugnant' to European ideas of justice, humanity or morality. The colonial legislators felt that various practices could not be tolerated in terms of the blanket recognition given to customary law. The so-called repugnancy clause was and still is (in some countries) part of the choice of law process. Chanock (1989) 3 *Int J of L & Family* 72; Bennett (note 192) at 59-60; Allott *New Essays in African Law* at 162.

¹⁹⁷ Black Administration Act 38 of 1927 and the Law of Evidence Amendment Act 45 of 1988.

¹⁹⁸ Maqutu and Sanders (1987) 20 *Comp & Int L J of Southern Africa* 377 at 388-389.

¹⁹⁹ There is therefore a slim chance of finding an African adhering solely to the old traditional ways. *Ibid.*

of the case and the surrounding circumstances, it appears that the parties have agreed it should apply; or... it appears just and proper that it should apply'.²⁰⁰

The Constitutions, legislation and case law of Lesotho and Zimbabwe give no indication whether or not general human rights principles supersede customary law,²⁰¹ although the Zimbabwean Constitution exempts the application of African customary law from the prohibition on discrimination.²⁰² In South Africa, however, s 211(3)²⁰³ provides that application of customary law is subject to the Constitution. Even so, the courts are left to work out answers to the many difficult conflicts they encounter, since the Constitution does not clearly regulate in which way and to what extent the Bill of Rights is to be applied to customary law

In this regard, the limitation clause in s 36 of the Constitution is critical in balancing human rights and customary law. It provides that:

'The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including- the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and less restrictive means to achieve the purpose.'²⁰⁴

This provision implies that the violation of a human right by customary law may be justified by other constitutional values.²⁰⁵ If the conditions under s 36 of the Constitution

²⁰⁰ Section 3.

²⁰¹ Bennett *The Application of Customary Law in Southern Africa: The Conflict of Personal Laws* 28.

²⁰² Section 23(3).

²⁰³ This provides that the courts must apply customary law when that law is applicable, subject only to the Constitution and any legislation that specifically deals with customary law. The country's new constitutional dispensation substantially improved the overall status of customary law from that of the apartheid era. It is evident from several clauses in the Constitution (notably s 211(3)) and comments made by the Constitutional Court (in *S v Makwanyane* 1995 (3) SA 391 (CC) at 515-17) that customary law is at last achieving recognition as a foundation of the South African legal system. South African Law Commission (note 220) 21.

²⁰⁴ Hence the subjugation of customary law to the Constitution in terms of s 211(3) primarily means that the crucial question is not whether human rights will have an impact on customary law at all, but rather how customary law will be influenced by the Bill of Rights. Lehnert (note 188) 245.

²⁰⁵ *Bangindawo & Others and Nyanda Regional Authority & Another* 1998 (3) SA 262 (Tk).

are met, a customary rule can be upheld and will consequently be applied unchanged.²⁰⁶ If a violation of a human right has been established, courts have two basic options for dealing with the problem. The most obvious is to strike down the customary law rule, or, according to s 39(2), to ‘develop’ it in line with the Constitution.²⁰⁷

The likelihood of the Bill of Rights overriding customary law depends on the form in which a customary law rule is laid down. That contained in legislation may only be declared invalid,²⁰⁸ since the judiciary may not ‘develop’ the statutory law.²⁰⁹ With regard to non-statutory customary law, contained in academic texts and in precedents, merely striking down a rule is not an option, because a lacuna would result and the courts are not the best agents to fill it.²¹⁰ Alternatively, however, the courts are always free to ‘develop’ customary law to bring it in line with the Bill of Rights.²¹¹

A less direct approach to solving conflicts between human rights and customary law, however, would be for the courts to avoid applying customary law in favour of a rule of common law instead.²¹² Such a solution involves recourse to the choice of law rules. It allows a simple and expedient solution to particular cases because, in certain key areas, common law already gives effect to human rights norms. A prime example is the best interests of the child principle which regulates such matters as custody and guardianship.²¹³

²⁰⁶ Lehnert (note 188) 248-249.

²⁰⁷ Refer to the Bangindawo case (note 230).

²⁰⁸ This can only be done by the Constitutional Court, or by the higher courts if confirmed by the Constitutional Court (s 172).

²⁰⁹ The development of codified customary law can only be undertaken by the legislature. The development of legislation is not regulated by ss 8 and 39.

²¹⁰ *Bhe and Others v The Magistrate, Khayelitsha and Others* 2005 (1) BCLR 1 (CC).

²¹¹ According to s 172(1)(b) of the Constitution, in the course of declaring a law invalid, a court can ‘make any order that is just and equitable’. This can be interpreted as giving courts the power to develop rules of customary law to the extent that a rule of codified customary law has been invalidated which may be necessary to avoid a gap in the law until the matter is regulated by legislation. However, it does not mean that courts are allowed to function as subsidiary lawmakers. It merely allows them temporarily to fill gaps in legislation by developing the law instead of applying the common law. Refer to the *Bhe* case above. Lehnert (note 188) 249.

²¹² Ibid.

²¹³ In *McCall v McCall* 1994 (3) SA 201 (C) the court set out a list of factors that should guide decisions in child custody cases.

Complicating the already problematic application of international law in countries with legal pluralism is a multiplicity of systems of customary law within most African states. With the exception of Lesotho and Swaziland,²¹⁴ no country in Southern Africa has a single unified system of customary law. South Africa has at least eight indigenous groups, with the Zulu, Xhosa, Pedi, Sotho, Tswana, Shangani-Tsonga, Venda and the Swazi being the largest.²¹⁵ Zimbabwe has mainly the Shona (who make up about 82 percent of the population) and the Ndebele (about 14 percent). Minor groups include the Tonga, the Sotho, the Venda, and Hlengwe.²¹⁶ Deciding which of these systems applies to a child may have significant implications for the application of human rights norms. In order to be considered an adult, a Zulu boy does not have to undergo the hazardous circumcision ritual expected of his Xhosa counterpart.

In South Africa, s 1(3) of the Law of Evidence Amendment Act 45 of 1988 lays down choice of law rules for courts presented with conflicts between different systems of customary law.²¹⁷ In essence, this section provides that the courts must apply whatever law was agreed upon by the parties. As the provision does not stipulate an express agreement, courts may impute a tacit or implied agreement which requires reference to the parties' prior conduct, the nature or form of a transaction and the parties' cultural orientation.²¹⁸ In other cases, courts would have to apply the law of the place where the defendant resided, carried on business or was employed,²¹⁹ provided that only one system of law prevailed in that area. If more than one system of customary law applies in the defendant's area, and, if the place of domicile, business or employment is in an urban area and if the defendant's 'tribal' law is one of the systems applicable within the area, the court would be obliged to apply the law of the defendant's tribe.

²¹⁴ Lesotho has one system of customary law as the Basotho are the only African ethnic group in the country.

²¹⁵ CIA World Factbook: South Africa, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/sf.html> [accessed on 20 August 2007].

²¹⁶ CIA World Factbook: Zimbabwe, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/zi.html> [accessed on 20 August 2007].

²¹⁷ Note that the 'indigenous law' mentioned in this section is defined in s 1(4) to mean 'the Black law or customs as applied by the Black tribes in the Republic or in territories which formerly formed part of the Republic'.

²¹⁸ See, for instance, *Mahlaba v Mdladlamba* 1946 NAC (C&O) 51 and *Govuzela v Ngavu* 1949 NAC 156 (S). South African Law Commission (note 220) 85-6.

²¹⁹ See *Govuzela's* case above and *Rubushe v Jiyane* 1952 NAC 69 (S). Ibid.

Zimbabwe's choice of law rules on this subject are similar to those of South Africa in one respect: they emphasise the litigants' actual or presumed intention.²²⁰ However, they differ where no intent can be imputed to the parties. In such instances, the Zimbabwean courts must apply the law 'with which the case and the parties have the closest connection', and, if that law is not ascertainable, the court is directed to whichever law is considered 'just and fair' to apply in the case.²²¹

This simultaneous recognition of African customary law and common law is often criticised. Proponents of customary law describe the Constitutional provisions for fundamental rights as largely Western and a threat to the laws and customs. Human rights activists, on the other hand, regard customary law as a patriarchal system and a severe obstacle to the implementation of human rights.²²²

Whichever side one takes, the fact remains that, where there is a conflict of laws, individuals will endeavour to choose the law which rationalises their decisions or their behaviour. Hence the laws chosen and courts in which they are applied are mostly a matter of expediency, local knowledge and power relations.²²³

4. Treaty monitoring and implementation

The United Nations human rights regime established specialist bodies charged with the oversight of state performance under each specific treaty.²²⁴ Such instruments contain regular reporting obligations for members. These responsibilities are based on an

²²⁰ Section 4 of the Customary Law and Local Courts Act.

²²¹ The notion of close connection is widely used in private international law to determine the 'proper law' applicable to contracts. South African Law Commission (note 220) 87.

²²² Lehnert (note 188) 241; Charlesworth et al (1991) 85 *Am J of Int L* 613-45; Cerna (1994) *Hum Rts Q* 740.

²²³ Meinen-Dick & Pradhan 'Legal Pluralism and Dynamic Property Rights' (2002) 22 *Capri Working Paper* at 6.

²²⁴ For instance, art 23 of the International Convention on Civil and Political Rights establishes the Human Rights Committee. GA res 2200A (XXI) 21 UN GAOR Supp (No 16) at 52 UN Doc A/6316 (1966) UNTS 171 entered into force on 23 March 1976. Article 17 of the Convention on the Elimination of All Forms of Discrimination against Women also establishes a Committee which monitors compliance of states with the Convention. GA res 34/180, 34 UN GAOR Supp No 46 at 193 UN Doc A/34/46, entered into force 3 September 1981.

assumption that the examination of reports by these bodies would lead to a dialogue between each state and the relevant treaty bodies, and thus progressive improvement in compliance.

Not all the international human rights instruments provide machinery for their supervision, interpretation, application or enforcement.²²⁵ The CRC, however, has such a body, and the ILO has elaborate supervisory machinery for the application of its Conventions and Recommendations. Under the ILO Constitution, each of its member-states is bound to report on the measures it has taken to give effect to the provisions of the Conventions.²²⁶

For the most important ILO Conventions, these reports are now required at two yearly intervals, while, for the rest, every four years. The reports are then examined by the ILO Committee of Experts on the application of the Conventions and Recommendations. This body consists of 18 independent persons appointed for three-year terms.²²⁷ It may address direct requests to a state party in confidence, or include observations in its published reports, which it submits to the annual sessions of the International Labour Conference. A specially appointed Tripartite Conference Committee on the Application of Conventions and Recommendations examines the reports in such sessions.²²⁸

The CRC has a Committee²²⁹ which monitors state compliance with the provisions of the instrument. Like other UN Conventions with similar machinery, supervision under the CRC is generally carried out through a procedure under which state

²²⁵ Such as the International Covenant on Economic, Social and Cultural Rights GA res 2200A (XXI) 21 UN GAOR Supp (No 16) at 49 UN Doc A/63/16 (1966) 993 UNTS 3 entered into force on 2 January 1976 and the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others 96 UNTS 271 entered into force on 25 July 1951.

²²⁶ Article 22.

²²⁷ Sieghart (note 2) 438.

²²⁸ Ibid.

²²⁹ Article 43(1) of the CRC provides that '[f]or the purpose of examining the progress made by States Parties in achieving the realization of the obligations undertaken in the present Convention, there shall be established a Committee on the Rights of the Child, which shall carry out the functions hereinafter provided.'

parties are required to render reports describing the measures they have adopted to comply with their obligations on request, or at prescribed intervals, to an international institution specified in the treaty.²³⁰ The institutions then consider the reports and make recommendations.²³¹

The ACRWC entrusts the functions of promotion and protection of its provisions to a Committee of Experts on the Rights and Welfare of the Child.²³² This Committee has more muscle than its CRC counterpart. In addition to having the power to examine state reports, the ACWRC Committee may receive individual and interstate communications²³³ and conduct investigations.²³⁴ The ACRWC also allows any person, group or NGO recognised by the AU, member states or the UN to bring communications before the Committee.²³⁵

Problems, however, exist with the ILO, UN and the African regional systems of monitoring, implementation and enforcement, which consequently affect the application of the relevant treaties.

(a) Backlog in state reporting

The first and most obvious problem is the huge backlog in state reports due under the various treaties. All the Committees set up under the UN regime have merely noted the delays in their annual reports in repeated and ineffectual calls to the General Assembly.²³⁶ For example, in 1993, 59 of the 126 members of the CRC had overdue reports. By 1998, 141 of the 191 state parties were late with their reports.²³⁷ South Africa, Zimbabwe and Lesotho have all been cautioned by both the ILO and the

²³⁰ Article 44.

²³¹ Article 45(d).

²³² Article 32.

²³³ Article 44.

²³⁴ Article 45. The Committee on the Rights of the Child may examine only state reports.

²³⁵ Chirwa (note 61) at 170.

²³⁶ Heyns and Viljoen (note 52) 520.

²³⁷ Ibid.

Committee of the CRC about the tardy submission of reports.²³⁸ Zimbabwe submitted its first CRC report in 1995 (three years after it was due),²³⁹ South Africa submitted in 1999 (two years after it was due) and Lesotho submitted in 1998 (four years after it was due).²⁴⁰ Since then, there have been no reports by these countries to the either the ILO or the CRC.

(b) Delays in processing reports and communications

There are huge delays between the date of submission of a report and its consideration by the relevant monitoring bodies. Due to the increasing number of state members, committees are failing to give adequate attention to reports and individual communications, and the delays are happening at a time when many reports are overdue.²⁴¹ This means that, if all states were to report on time, the delays would become even worse.

The Committee on the Rights of the Child convenes to consider state reports only three times a year for three-week sessions.²⁴² As a result, the Committee has, on different occasions, taken one year to deal with the Zimbabwean²⁴³ and South African²⁴⁴

²³⁸ Ibid.

²³⁹ 'Initial reports of States parties due in 1992: Zimbabwe. 12/10/95.CRC/C/3/Add.35. (State Party Report)' available at <http://www.unhchr.ch/tbs/doc.nsf/385c2add1632f4a8c12565a9004dc311/b82db9a977eea080412562e600392abc?OpenDocument&Highlight=0,Zimbabwe> [accessed 17 September 2007];

²⁴⁰ 'Initial reports of States parties due in 1994: Lesotho. 20/07/98. CRC/C/11/Add.20. (State Party Report)', available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/739266a4d55f1969802566e2003f7b92?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/739266a4d55f1969802566e2003f7b92?Opendocument) [accessed on 17 September 2007].

²⁴¹ The underlying fact is that none of the Committees has received any sustained increase to its regular meeting time. 'Initial reports of States parties due in 1994: Lesotho (note 93), Heyns and Viljoen (note 52) at 521.

²⁴² Normally in January, May and September at the United Nations Office in Geneva. 'Committee on the Rights of the Child – Sessions' Office of the United Nations High Commission for Human Rights, available at <http://www.ohchr.org/english/bodies/crc/sessions.htm> [accessed 17 September 2007]

²⁴³ 'Initial reports of States parties due in 1992: Zimbabwe. (note 92); Committee on the Rights of the Child, Concluding observations on Zimbabwe, CRC-C-15-Add_55 (Twelfth session, 1996).

²⁴⁴ 'Committee on the Rights of the Child: Consideration of Reports submitted by State Parties under Article 44 of the Convention Initial reports of States parties due in 1997: South Africa', available at <http://daccessdds.un.org/doc/UNDOC/GEN/G98/162/94/PDF/G9816294.pdf?OpenElement> [accessed 17 September 2007].

reports of 1996 and 1999, respectively. Although Lesotho submitted its report in 1998, before South Africa, the Committee commented on it only three years later.²⁴⁵

Between 1999 and 2004, the African Committee on the Rights and Welfare of the Child met only four times, during which they discussed procedural and operational issues, rather than state reports. Despite having more powers than those of the CRC Committee, the ACRWC monitoring body is yet to receive reports from any of the members to the Charter.²⁴⁶

(c) Limited political support from states

The will of state parties to improve the human rights system has always been limited. The inclusion of more members seems to be preferred to the integrity of the treaty, a tendency that manifests itself in the lack of reaction by states to questionable reservations, to overdue or inadequate reports or to failure to comply with the provisions of the treaty. Governments, particularly those with limited resources, are more likely to respond routinely (in an offhand way), and they are generally disinclined to encourage rigorous scrutiny of their human rights records.

State parties to multiple conventions, with similar reporting requirements, are struggling with the burden of producing many reports (which consequently reduce the quality and timeliness of submission).²⁴⁷ It must be concluded, therefore, that the implementation mechanisms of the ILO Conventions and the CRC do not establish any particularly effective means of enforcement at the international level. The CRC Committee, like its other UN counterparts, lacks the authority to receive petitions alleging violation of the Conventions, either from state parties themselves or from

²⁴⁵ 'UN Committee on the Rights of the Child: Concluding Observations: Lesotho' (note 149).

²⁴⁶ 'Dates for Submission of Initial Reports of the Implementation of the African Charter on the Rights and Welfare of the Child' African Union, available at <http://www.africa-union.org/child/Due%20date%20of%20Submission%20of%20Reports.pdf> [accessed 17 September 2007].

²⁴⁷ Ibid.

individuals. Neither the ILO nor the CRC Committee has any means of legally enforcing compliance with the standards of the respective instruments.²⁴⁸

While the mandate of the Committee of the ACRWC is defined more precisely than that of the CRC, the Charter's enforcement and monitoring mechanism has three shortcomings.²⁴⁹ The first is in art 44(2), which provides that every communication 'shall be treated in confidence'. It thereby excludes the bracing effect of publicity and its resultant shame, which have a deterrent effect on human rights violations.²⁵⁰ The second problem lies in the ACRWC's failure to mention conditions governing the admissibility of communications, notably, the exhaustion of local remedies.

Lastly, the wisdom of having a separate body to monitor children's rights is questionable. As it is, the African Commission established under the African Charter on Human and Peoples' Rights (ACHPR)²⁵¹ struggles to operate on limited financial resources.²⁵² Considering that the Committee of Experts of the ACRWC will be funded by the same members of the AU, it is bound to face the same problems as the Commission of the ACHPR.²⁵³ There is also a risk of the duplication of duties by the ACHPR's African Commission²⁵⁴ and the ACRWC's Committee Experts.

²⁴⁸ Balton (1990) 12 *Hum. Rts. Q.* 120 at 129.

²⁴⁹ The African Committee is mandated to collect and document information, to commission interdisciplinary assessments of situations on African problems in the children's rights sphere, to organise meetings, to encourage national and local institutions concerned with the rights and welfare of the child, and to give its views and make recommendations to governments where necessary. Most of these powers are not conferred on the UN Committee. Lloyd (note 13) 185-6.

²⁵⁰ Hence, if the confidentiality principle were strictly adhered to, the transparency and efficiency of the Committee would be undermined. Balton (note 247) 171.

²⁵¹ This body was established under art 30 and was officially inaugurated on 2 November 1987 in Addis Ababa, Ethiopia after the OAU 23rd Assembly of Heads of State and Governments had elected its members in July of the same year. The Commission was entrusted to promote and protect rights enunciated by the African Charter. Available at the website of the African Commission on Human and People's Rights <http://www.achpr.org/> [accessed on 13 March 2004].

²⁵² Murray *The African Commission on Human and People's Rights and International Law* 144; Ankumar *The African Commission on Human and People's Rights* 24; Evans & Murray (eds) *The African Charter of Human and People's Rights: The System in Practice, 1986-2000* 248.

²⁵³ Heyns and Viljoen (note 52) at 520.

²⁵⁴ *Ibid.*

The process of treaty making and the ultimate implementation of their provisions inevitably generates various problems which hamper their effective application. The result is far worse in Africa, however, where the principles enunciated under the conventions lack clear meaning, and relevance.

5. Conclusion

A more comprehensive conclusion of this discussion will be provided in Chapter VI, but it is necessary at this stage to make a few preliminary remarks on this appraisal of the effectiveness of the international law on child labour. This chapter brings to the fore pertinent questions about the international regime: What are the implications of the African countries' non/low participation in the drafting and negotiation of children's rights treaties? How do claw back and denunciation clauses, and the lack of derogation clauses affect the potency of children's rights instruments? What does a slow rate of ratification signify about the states' commitment to the rights of their citizens? Does their ratification, in fact, lead to the improved respect for children's rights in the domestic arena of these countries? Can one say that the international regime on child labour is, in fact, capable of achieving its intended objectives?

Although the West has declared human rights universal, their application in African countries remains constrained by considerations that began from the day the instruments were drafted. Like most developing countries, Lesotho, Zimbabwe and South Africa were absent at the drafting and negotiation of all the children's rights treaties. This implies that they became party not only to a pre-determined process, but became bound to instruments whose principles are insensitive to the socio-cultural and economic realities of Africa. As a result, these countries generally lack the moral motivation to implement the enshrined principles in domestic legislation with urgency and enthusiasm.

The international tolerance of reservations, denunciation clauses, qualifications of certain rights tag with a lack of derogation clauses in human rights treaties, clearly

minimises the total depth of obligation. Claw-back clauses and a lack of derogation clauses allow states to circumvent the principles enshrined in the treaties, while denunciation clauses give a sense of the free choice to opt out of treaty obligations.

The ambiguity, particularly of the key terms of 'child' and 'labour', in the text of the treaties means there is no clear cut consensus as to the persons who the law seeks to protect and the precise activities it seeks to abolish. Confusion in the definitions reflects the negotiators' concern with protecting the official positions of their governments with expedient ambiguity, rather than with achieving conceptual clarity, let alone representing beliefs, attitudes and practices of their national constituencies.²⁵⁵ Moreover, ambiguity gives states the freedom to interpret the conventions as they will, and to evade their international obligations as they deem fit.

Disingenuous state reasons for the ratification of human rights treaties create problems, particularly where there already are poor monitoring and enforcement mechanisms. Ratification made by a country simply to communicate to rest of the world a commitment to human rights, or as a symbolic gesture of good will, may in fact deflect internal or external pressure for real change. Countries with poor performance not only get away with human rights violations but may also at times even step up violations in the belief that the nominal gesture of treaty ratification will somehow, shield them from pressure.²⁵⁶ The slow, low or non-ratification of the ACRWC and the ILO Minimum Age of Convention generally reflects the states' lack of commitment or reluctance to be bound by the obligations of the treaty or to guarantee the enshrined rights to their citizens.

It is also apparent that the major engines of compliance in other areas of international law are for the most part absent in the area of human rights. Unlike the international law of money, for example, there are no 'competitive market forces' that press for compliance. The costs of retaliatory non-compliance are low to non-existent,

²⁵⁵ Boyden et al *What Works for Working Children* 65.

²⁵⁶ Neumayer (2005) 49 *J of Conflict Resolution* 925 at 927. Also see Hathaway (2002) 111 *Yale L J* 1935.

because a nation's actions against its own citizens do not directly threaten or harm other states. For the most part, countries take relatively little interest in the extent of human rights violations in other countries. As a result, the three countries under discussion do not feel any pressure to comply with the child labour instruments.²⁵⁷

The monitoring and evaluation mechanisms built into the treaties on child labour have, so far, proven to be incapable of providing an effective method for enforcing the international child labour prohibition and ensuring accountability for the violations that occur.²⁵⁸ Such deficiencies make monitoring bodies redundant and the treaties themselves a dead letter.

Bringing order to and eventually integrating the general law and indigenous law remains a major reform task facing the three countries. Not only are the rules of incorporation of international law restrictive, there is little record of the choice of law rules evolved by the domestic courts, to govern conflicts between various systems of indigenous law, and between customary law and human rights law.²⁵⁹ Unfortunately, it is far from clear when customary law is applicable, as the rules on application are fragmentary, vague and badly drafted. The Constitutions of the three countries still do not contain any answers on how a potential conflict of law on children's issues should be resolved, although the South African Constitution provides that the best interests of the child principle is to guide the court in coming to a decision on matters regarding the welfare of a child.²⁶⁰

The myriad problems in the application of international law inevitably cast doubt on the efficacy of child labour principles in Lesotho, Zimbabwe and South Africa. However, it is the lack of conceptual clarity in the definition of child and labour that

²⁵⁷ Neumayer (note 255) 926.

²⁵⁸ Murison et al *Remaking Law in Africa: Transnationalism, Persons and Rights* 103.

²⁵⁹ Sanders (1985) 1 *Lesotho L J* 47 at 61; Bekker (2003) 26 *Anthropology Southern Africa* 124 at 128; The South African Law Commission summing up the position in South Africa (which is also the case in Zimbabwe and Lesotho). South African Law Commission (note 220) 1.

²⁶⁰ Section 28(2).

presents the greatest danger, as it makes the international law difficult to comprehend and easy to evade particularly for non-Western parties.

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Chapter IV

DEFINING CHILDREN AND LABOUR

1. The definition of a child

By now, it will be apparent that the Achilles heel of international law is lack of clarity in the definition of child labour. It would not be surprising, therefore, if a group of people discussing the phenomenon were each to have different ideas of what the term meant. The various definitions are all products of political settlements, which are themselves the result of social, cultural, political and economic positions taken by states and the other actors that draft the provisions of international law.¹ Such diversity in the understanding of child labour leaves one in quandary as to the precise evil the law seeks to abolish.

A large part of the confusion over the definition of child labour, however, derives from the fact that there is no consensus (and may never be) between various disciplines, cultures and actors over the definition of childhood. It is not clear who the law seeks to protect.² Most people distinguish a child from an adult by referring to physical differences and a power relationship. The distinction, however, is not so simple. It is complicated by a diversity of possible relationships within each cultural group.³ Defining a child thus involves answering a number of questions. At what age does childhood begin: at conception, birth, or infancy? What are its characteristics? Is its end marked by physical signs, individual accomplishments, rites of passage or the attainment of an arbitrarily fixed age?⁴

¹ Cullen *Role of International Law in the Elimination of Child Labour* 22; Breen (2003) 25 *Hum Rts Q* 453.

² Boyden et al *What Works for Working Children* 27.

³ In African cultures, for instance, the duration of child dependence and subordination is not fixed. The age roles for all individuals also vary. Fletcher and Hussey *Childhood in Question: Children, Parents and the State* 32.

⁴ The concept of child has sometimes been used to give information about certain relationships. For instance, regardless of how old we become we will always be our parents' children. Those who are born last will always be the 'baby' of the family, regardless of age, accomplishments or physical attributes. Gabarino *Children and Families in the Social Environment* 99.

Societies have always had a 'concept' of childhood, but various 'conceptions' of this phenomenon vary in three basic ways, namely, the boundaries, dimensions and divisions. The boundary of childhood is the point at which it is considered to begin and end. A society nearly always has a formal division of roles and responsibilities that amount to the setting of a boundary between childhood and adulthood. Examples are rites of passage or initiation ceremonies which celebrate the end of childhood.⁵ This thesis is concerned with the point at which childhood ends and adulthood commences.

The second way which conceptions of childhood may differ is in their dimensions. There are various vantage points from which to detect differences between children and adults. These include the moral or juridical angle from which persons may be deemed incapable, by virtue of age, of being held accountable for their actions; the physical viewpoint from which persons, by virtue of their immaturity, are seen as lacking in adult reason or knowledge; and a political angle from which young humans are thought unable to contribute towards and participate in the running of society.

Other dimensions in the childhood discourse also exist. Some societies deem childhood to end at puberty, when humans are able to procreate, or at a time when individuals are capable of independently sustaining themselves. A person who is, therefore, juridically a child, will not necessarily be so from the point of view of reproductive capacity or self sufficiency. Hence, the various dimensions of childhood need not converge in defining one consistent and agreed upon period of human life.⁶

The third respect in which conceptions of childhood can differ is their divisions. The early life of a human being may be subdivided into a number of different periods and the category of childhood can bear different relations to these. Most cultures recognise a very early period of infancy, characterised as one of extreme vulnerability and dependence upon adult care. A great deal of significance is often attached to weaning, because this tends to occur during the next pregnancy of the mother, and thus marks a

⁵ Archard *Children's Rights and Childhood* 32-3.

⁶ Ibid.

point at which the young infant is about to be replaced as the object of close maternal attention. The acquisition of speech may also be another key point of transition.⁷

The fact that there are terms such as ‘infancy’ and ‘adolescence’ bears on the conceptions of childhood as follows:

‘Childhood may be understood in two separate ways. The broad understanding of childhood is that it is a comprehensive term for the stage extending from birth to adulthood. Infancy, adolescence and similar terms that may be available, constitute subdivisions of that period. The narrow appreciation of the term views childhood as the stage after infancy, but before adolescence. The ‘child’ is therefore sandwiched between infancy and adolescence which is at the threshold of adulthood.’⁸

Determining childhood is thus no ‘child’s play’. Beyond our knowledge that children differ from adults, scholars recognise that the extent to which and how they differ, vary with time and place. Because of the difficulty in coming up with a standard definition of childhood, and the subsequent complexity of defining child labour, further research and analysis of this concept is essential.

(a) Historical debate

Since the 18th century, childhood has been a subject of intense interest to Western scholars.⁹ Today, the West¹⁰ views children as innocent and vulnerable beings, dependent on adult care and guidance but free of adult responsibilities.¹¹ Historians have argued with almost monotonous regularity that this conception of childhood was not always the case. Some, most notably Phillip Ariès, assert that prior to the 18th century no concept of childhood existed in Western Europe at all. Ariès launched the historical scholarship on childhood and family life in the Western world,¹² and almost single-handedly created an awareness of the changing conceptions of childhood across the

⁷ Ibid.

⁸ Ibid.

⁹ Pollock *Forgotten Children: Parent – Child Relations from 1500 to 1900* 1.

¹⁰ Which for purposes of this thesis can be broadly conceived to stand for a fairly uniform set of cultural and legal assumptions.

¹¹ Boyden et al (note 2) 27.

¹² He did so in his book entitled *L’enfant et la Vie Familiale sous l’Ancien Règime*, published in English in 1962 as *Centuries of Childhood*. Pollock (note 9) 1.

centuries.¹³ According to him, childhood, as it is known today, was an 18th century invention.¹⁴

Ariès insisted that medieval society in the Western world was ignorant of childhood.¹⁵ It saw no transition period between infancy and adulthood, and had no general idea of the need for education, nor concern with the physical, moral and sexual problems of childhood.¹⁶ Instead, society considered children as ‘little adults’, and thus dressed and treated them as such.¹⁷

To Ariès, childhood was a social construction that gradually developed between 1500 and 1800. He painted an unhappy picture saying, that unlike the modern idea of childhood, in the medieval ages it was typified by a lack of sentiment.¹⁸ He drew this conclusion from the casual way in which parents treated the death of their children,¹⁹ attributing this to the high rate of infant mortality.²⁰ Society believed that, through direct contact with the adult world, a child should learn an occupation. Ariès therefore averred that, partly because of the apprenticeship system, children passed immediately from

¹³ Another historian, Lloyd De Mause, painted a very negative image of childhood and family life in the past, going so far as to say that ‘[t]he history of childhood is a nightmare from which we have only recently begun to awaken. The further back in history one goes, the lower the level of child care, and the more likely children are to be killed, abandoned, beaten, terrorized, and sexually abused’. Thomas ‘To What Extent Were There Important Changes in the Way That Children Were Brought up in This Period?’, available at <http://www.elizabethi.org/essays/childhood.htm> [accessed on 15 October 2005].

¹⁴ Ncube (ed) *Law, Culture, Tradition and Children's Rights in Eastern and Southern Africa* 11.

¹⁵ Even though his sources were taken mainly from French culture. ‘Changing Conceptions of Childhood’, available at

http://www.polity.co.uk/content/BPL_Images/Content_store/Sample_chapter/074561731X%5Cheywood.pdf [accessed on 14 October 2005]; Pollock (note 9) 2.

¹⁶ ‘Changing Conceptions of Childhood’ (note 15).

¹⁷ Cognitively, children were expected to acquire the same vocabulary as their parents. Roberts et al ‘History of Childhood’, available at <http://encyclopedias.families.com/history-of-childhood-422-430-ec> [accessed on 15 October 2005]

¹⁸ A French cleric Pierre de Bérulle, agreed with Ariès, describing childhood as ‘the most vile and abject state of human nature, after that of death’. ‘Changing Conceptions of Childhood’ (note 15).

¹⁹ Archard (note 5) 20.

²⁰ ‘Ariès is not the only historian who subscribes to the “indifference and neglect” theory, nor is he the only one to explain it in terms of the socio-political and medical context of that era. Others have claimed that, as a result of the high rate of infant mortality, parents were emotionally indifferent to their children. Tucker’s investigation of 14th-century children’s burials supports this idea. Noting that medievals did not bother to record the dead child's sex, he concludes that the whole issue of their death was unimportant to them. Another explanation for the relative disregard of children is frequent childbearing, which ‘put less value on the product’. Aloni ‘Medieval Children’ at <http://www.360degrees.org/timeline/essays/aloni.html> [accessed on 15 October 2005].

infancy to adulthood. Once children had reached the training stage, parents sent their children away to serve as apprentices so that they could start to help the head of the household in his trade.²¹

Ariès' assumptions were based on medieval writings on age and development, particularly those which talked about the 'ages of man', and he attempted to show which things were appropriate at different phases of life: the depictions of children and childhood in medieval art; ideas of how children should dress; the history of games and pastimes; and the way moralists and others wrote about the idea of childhood innocence.²² He contended that it was only in the 16th century that adults began to notice children as a source of amusement and relaxation. By the 17th century, people, particularly moralists, began to realise the difference between adults and children. Society began to see children as innocent, weak beings requiring special treatment before they could join the world of adults.²³ By the 18th century, attentive child rearing was promoted to preserve the child's innocence, and the child took a central place in the family.²⁴

While some agree with Ariès,²⁵ others viewed his theory as either unrepresentative or unreliable. Those against his hypothesis argued that he took evidence out of context, confused prescription with practice, and used atypical examples. Ariès was criticised for denying the immutability of the special needs of children, especially small ones for food, clothing, shelter, affection and conversation. Scholars disparaged his

²¹ The general feeling was, and for a long time remained, that one had several children in order to keep just a few. Parents could not allow themselves to become too attached to something that was regarded as a probable loss. There were in fact three stages of childhood in the middle ages: *enfances*, *puerita*, and adolescence. *Enfances* begins when the child is born and lasts until seven. After infancy comes *puerita*, the period of training and education (seven to fourteen). After *puerita* comes the stage of adolescence, in which 'a person is big enough to beget children'. Aloni (note 17).

²² Clarke 'Histories of Childhood', available at http://www.blackwellpublishing.com/content/BPL_Images/Content_store/Sample_chapter/0631233962/wyse%2002Chap01.pdf [accessed on 15 October, 2005].

²³ 'Changing Conceptions of Childhood' (note 15).

²⁴ Boyden et al (note 2) 27.

²⁵ For example, John Demos in his book *Family Life in a Plymouth Colony*. He agreed with Ariès that there was no concept of childhood in medieval times and even believed that there was no such awareness in the 17th century, when Ariès claimed it emerged, since children then were still clad in the same fashion as adults. Pollock (note 9) 3.

‘undue’ emphasis on the writings of moralists and educationalists and his failure to consider economic and political factors.²⁶

Other historians simply dismissed Ariès’ theory altogether, the most vocal being Linda Pollock, who questioned his methodologies and conclusions.²⁷ She strongly denied that between 1500 and 1900, there had any major changes in the way parents viewed or brought up their children. Instead, she said there was never a social discontinuity marking the invention of childhood, and that adults have always been aware that children are different and have needs unlike their own.²⁸ She said the changes lay in the way adults perceived the requirements of children. Pollock concluded that ‘the concept of childhood existed in the 16th century but had simply changed and become more complex over time’.²⁹

(b) Modern conception

What then, is the contemporary conception of childhood? It derives from 17th and 18th century authors, notably John Locke and Jean-Jacques Rousseau. Locke, the 17th century philosopher, perceived children as ‘ignorant persons requiring literacy, education, reason, self control and shame before they could be transformed into a civilised adult’.³⁰ He viewed children as ‘travellers newly arrived in a strange country of which they know nothing’.³¹ Locke said childhood was mainly something that had to be overcome, which offered opportunities, for a step-by-step conversion into maturity. He saw the child’s mind as an empty slate upon which parents and instructors could write their lessons.³² Locke advocated the gradual hardening of children by subjecting them to cold baths,

²⁶ Hendrick (1992) 15 *Refresh* 1.

²⁷ Pollock (note 9) 3.

²⁸ Abernethie (1998) 6 *Int J of Children’s Rts* 81 at 85.

²⁹ *Ibid.*

³⁰ He believed that children could not participate as full citizens as they did not have the requisite rationality to exercise their natural freedom and rights. Lugtig (1996) 41 *Mcgill L J* 893.

³¹ Locke quoted in Archard (note 5) 3.

³² He was however against corporal punishment. ‘Childhood’ in *The Reader’s Companion to American History*, available at http://college.hmco.com/history/readerscomp/rcah/html/ah_016200_childhood.htm, [accessed on 16 October 2005].

giving them leaky shoes, feeding them little meat and allowing them only adequate sleep.³³

The 18th century French philosopher, Rousseau, proclaimed the necessity of the concept of childhood, but advocated a very different conception. To him, it was as a period of extreme weakness and vulnerability.³⁴ He believed in the ‘spontaneity, purity, strength and joy of childhood’, and saw these as capacities to be celebrated.³⁵ ‘A child is like a living plant that, with a minimum of care, would grow and blossom into an exciting beautiful flower.’³⁶ Rousseau saw children as ‘moral innocent[s] close to nature’ and criticised those ‘seeking the man in the child’ without thinking of what he is before being a man.³⁷

Rousseau took a step further than other reformers by regarding children as individuals in their own right, who deserved the freedom to express themselves. As far as he was concerned, strict supervision and structure were unnecessary for the successful development of a child.³⁸ Instead, he demanded that education recognise its identity and peculiar nature. This entailed seeing children as children, not as adults, and as having certain qualities by virtue of being young.³⁹ Rousseau’s romantic perception of the child was a major factor in paving the way for modern ideas of child development.⁴⁰

In the early 18th century, society generally expected children to be useful from an early age, mostly in the context of the household, where, as unpaid members of a domestic workforce, they helped with daily labour and outdoor chores. By the late 18th century onwards, in the course of other long-term economic, political, and social transformations, society came to accept an ideal of prolonged and sheltered childhood.

³³ Abernethie (note 28) 87.

³⁴ ‘Child Psychology’ University of Kansas, available at http://www.kuce.org/isc/previews/psyc/psyc333_lesson.html [accessed on 16 October 2005].

³⁵ Abernethie (note 28) 87.

³⁶ ‘Child Psychology’ (note 34).

³⁷ Ibid.

³⁸ Curator ‘Centuries of Childhood’ Kent University Museum, available at <http://dept.kent.edu/museum/exhibit/kids/kids.html> [accessed on 16 October 2005].

³⁹ Archard (note 5) 30.

⁴⁰ Abernethie (note 28) 87-8.

Changes in the nature and organisation of work concentrated more people into towns and produced a growing separation between paid and unpaid labour, and intensified social differentiation, whether by class, employment and social group, or by gender and age.⁴¹

During the industrial revolution, as we have seen, poor children were extensively used in textile mills. By the end of the 19th century, however, an employer's changing requirements for profitable output reduced the usefulness of child labour in large scale production. In addition, state intervention placed more restraints on the employment of children and made education compulsory. At the same time, rising wages meant that the domestic economy had less need for children's earnings.⁴²

Children changed from being 'economically useful' to being 'non-productive'. Society no longer saw them as future caretakers, but as vulnerable beings requiring special care and protection. Parents therefore placed greater importance on education as security for the child's value in the labour market. They began to save money by taking out life insurance and by setting up trusts and endowments to protect this 'newly constructed unproductive being'.⁴³

The public also began to place greater value on human life and health, which aroused state concern with the conditions of childhood. The urge to 'civilise the little heathens of poor neighbourhoods', the serious belief in the national and individual benefits of schooling, and the vision of childhood as a period of carefree dependence (or at least of education rather than employment),⁴⁴ fuelled the enactment of legislation making school attendance compulsory. Hence, society deemed childhood a stage before and below adulthood, demanding its own distinct world.⁴⁵

⁴¹ Ibid.

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Fletcher and Hussey (note 3) 17.

⁴⁵ Other cultures possess the concept of childhood and so recognise a difference between children and adults. But they see children as differing from adults in a far less dramatic and obvious fashion than is implied by the modern conception. Archard (note 5) 39; Jans (2000) 11 *Childhood* 27 at 32.

Today, the significance of childhood is even more pronounced, and its duration longer than in past times. All Western cultures perceive childhood as a period of: extended economic dependence, protected innocence and weakness, and rapid learning which is achieved through universal schooling. During this period, the child is largely separated from economic and community life.⁴⁶ The term ‘child’ is based on the notion that young persons are vulnerable both in the physical and mental senses, and hence ‘suffer’ from immaturity, weak intellect and the incapacity to make decisions that are in their interests.⁴⁷ The West thus depicts children as helpless (or potential victims), dependent on adult protection.

This modern Western notion of childhood is historically and anthropologically unusual not only for the radical division it draws between childhood and adulthood, but also for valuing children’s helplessness rather than usefulness. It extends their dependency to an advanced age by deliberately delaying instruction in certain life skills, notably, the making a living or the raising a family. Such a view of childhood leaves children free of responsibility.⁴⁸ In line with this conception, children from industrialised societies now spend their time in school, but still must have time for leisure and play. Although economically dependent, children are also considered capable of handling certain aspects of social and political autonomy, fostered by education systems that stress individual rights and responsibilities.

The modern conception of childhood has two key features. First is a rigid hierarchy, which separates children from adults by special dress, games, language and behaviour. Second is the idea of childhood innocence, whereby a childhood must be both happy and separated from the corrupt world. This is expressed in the child-centred

⁴⁶ Archard (note 5) 39.

⁴⁷ Boyden et al (note 2) 27; Archard (note 5) 37.

⁴⁸ Myers ‘Appreciating Diverse Approaches To Child Labour’, presentation during the symposium ‘Child Labour & the Globalizing Economy: Lessons from Asia/Pacific Countries’, 7 – 9 February 2001, found at the Child Labour website, available at <http://www.childlabor.org/symposium/myers.htm> [accessed on 5 October 2006].

family which is determined materially, if in no other way, to make these the ‘best years of life’.⁴⁹

As a result of this paternalistic conception, adults monopolise the determination of what is in the best interests of the child under the supposition that childhood, by its definition, makes children ill-suited to take rational, reasonable and wise decisions.⁵⁰ It is from the Western conception of childhood that the view arises that children are to be protected against exhausting, unhealthy labour and that they have a right to care, education and, more generally, their own social environment. These prescriptions have been codified into international standards and domestic legislation.⁵¹

(c) African conception

While Western societies mark the end of childhood at a certain age, in Africa the movement of individuals through childhood is not marked by arbitrary fixed ages and but by rites of passage that lack chronological specificity.⁵² Thus the African conception of childhood depends, to a very large extent, upon the social, economic and cultural dynamics of a given society. In pre-colonial Africa, ‘[childhood was] marked by factors that had more to do with the biology or physical development, ability, the purpose for which a definition of childhood or adulthood [was] sought and status, rather than with the number of years a person has lived’.⁵³

African societies deemed childhood as a period of ‘training’, as evidenced by the persistent demands of adults on children to perform arduous tasks to ‘toughen them’, in

⁴⁹ Fyfe *Child Labour* 13.

⁵⁰ Ncube (note 14) 17.

⁵¹ For instance, arts 19, 24, 28, 31, 32 and 36 of the CRC; s 28(e) and (f) of the Constitution of South Africa; s 43 of the South African Basic Conditions of Employment Act 75 of 1997.

⁵² Women and Law in Southern Africa ‘Towards a Cultural Understanding of the Interplay between Children’s Rights and Women’s Rights: An Eastern and Southern African Perspective’ Working Paper No. 11, February 1995, at 7.

⁵³ Age was treated as an approximate benchmark, not an exact record. Ncube (note 14) 100. The arbitrary fixing of the age of majority by a legal fiction is thus problematic in African countries where the conception of childhood differs radically from the Western notion embodied in international human rights instruments. Women and Law in Southern Africa (note 52) 7.

preparation for their entry into the harsh world of adulthood.⁵⁴ It was also perceived in terms of intergenerational obligations of support and reciprocity.⁵⁵ A child in this sense was always a child, in relation to his or her parents, who expected, and were traditionally entitled, to all forms of support in times of need. For instance, a Shona child always had the duty to look after its parents if they were incapable of taking care of themselves.⁵⁶

African childhood was also a period of internalised and rigorously enforced obedience to authority. The Shona maintained strict discipline, and disobedience attracted corporal punishment.⁵⁷ This notion implied that the family not only managed the training and socialisation of children into adulthood but that it also had the right to determine the tasks, traditions and customs which had to be complied with before 'childhood' in its narrower sense ended.

As in most societies, however, the African concept of 'child' is both biologically and socially constructed, depending largely on the purpose for which a definition of childhood is sought.⁵⁸ In the biological sense, a child is any person who is born to another. 'I am my father and mother's child...regardless of my age and station in life. To my father and mother I am always their child and in some respects forever subject to their authority or advice or guidance for so long as they are alive.'⁵⁹ In a social sense, a woman may remain a child all of her life. For instance, according to Sesotho culture, she may not be an autonomous individual without reference to her father, husband or other male extended family members.⁶⁰

Some African societies tie the concept of child to the physical ability to carry out specific tasks. These decisions are influenced by any of several factors, which may

⁵⁴ Bhaca girls, for example, from an early age took an active part in the housework of the kraal and learned the essential feminine techniques of grinding, cooking and field-work. Young boys learned how to handle livestock, treat their diseases and assist them when giving birth. Alston (ed) *The Best Interests of the Child* 90; Hammond-Tooke (note 63) 77.

⁵⁵ Ncube (note 14) 12.

⁵⁶ Holleman *Shona Customary Law with Reference to Kinship, Marriage, the Family and the Estate* 62.

⁵⁷ Ibid.

⁵⁸ Ncube (note 14) 100.

⁵⁹ Ibid.

⁶⁰ Ibid.

include economic status, level of education or location (rural or urban). Persons from families of meagre means and low educational status are deemed by their societies to reach adulthood earlier than those of economically affluent and educated ones.⁶¹

African societies mark the end of childhood and the beginning of adulthood by an ongoing process of maturity. Some societies view puberty as the point marking the transition to social adulthood, when new economic responsibilities are acquired and entrance into the institution of marriage takes place.⁶² Others use initiation. A Xhosa male child, for example, does not become an adult until he has gone through all the circumcision rituals, during which he has to spend several days in the bush fending for himself through hunting and gathering.⁶³ Any man who has not gone through this process will be derogatorily referred to as a 'child' and regarded for all intents and purposes as such.⁶⁴ Even after this, however, full adulthood is not attained until he has married and established a family.⁶⁵ Childhood is therefore a period of bachelorhood or spinsterhood.⁶⁶

(d) Legal conception

Historically, Western laws set an age limit at which a person stopped being a child. The upper limit of childhood varied with context, but it has been progressively extended.⁶⁷

⁶¹ Ncube (note 14) 207.

⁶² Ibid.

⁶³ Hammond-Tooke *Bhaca Society* 77.

⁶⁴ Ibid.

⁶⁵ Macmillan & Copher (2005) 67 *J of Marriage & Fam* 858 at 868-75.

⁶⁶ In the same way that societies may consider a person over the age of 18 as a child, either socially or biologically, they may also deem a person below that age as an adult. Examples of such are a 'child chief', a 'child parent' or a 'child spouse'. They fall in the category of parent or adult by virtue of having the same name of an ancestral spirit, by procreation or by marital status.⁶⁶ In all these instances, the society may accord the child the status of an adult in the position so appointed or attained. Women and Law in Southern Africa (note 52) 7. See Chapter V for a comprehensive discussion of African childhood from the pre-colonial era to the present.

⁶⁷ In the course of the 19th century, for example, British legislation gradually raised the minimum age of employment in various sectors from about 4 to 13 years old. Criminal responsibility for a child as young as seven years old was the same as that of an adult, although penalties for those below the age of 16 were different. For legal rights to inherit, and capacity to take legal action or vote, infancy ceased at 21. The Poor Law of 1834 deemed those over the age of 15 to be adults. The 1876 Elementary Education Act defined children as those falling within the age bracket of five to 14 years of age. Different Acts set different upper limits for childhood. The sex of the child also made a difference. Girls were held to be in

Today it is clear that the international legal conception of child is heavily influenced by Western thinking. As a result of a supposed mental immaturity, children are denied legal capacity, and are placed under parental responsibility so that they may not execute juristic acts, administer their own affairs or enter into contracts without assistance.⁶⁸

ILO Conventions and the United Nations Convention on the Rights of the Child (CRC) define a child as ‘every human being below the age of 18 years’. The CRC, however, goes on to provide that a child is a person under the age of 18 ‘unless under the law applicable to the child, majority is attained earlier’.⁶⁹ The African Charter on the Rights and Welfare of the Child (ACRWC), on the other hand, simply states that a child is ‘every human being below the age of 18 years’.⁷⁰ The ILO Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (Worst Forms of Child Labour Convention) also defines a child as one who is below the age of 18. The Charter and the ILO Convention therefore leave no allowance for variation.

Under the CRC, a state may fix its own markers of adult status. Moreover, states with systems of legal pluralism will most likely have different age limits of childhood within their jurisdictions depending on personal laws applicable. Even in states with a single legal system, however, different legal instruments may define ‘child’ in different ways. Hence there may be laws where a person ceases to be a child for some purposes while remaining one for others. For example, the right to vote and the right to marry without parental consent may be acquired at different times.

For example, in Lesotho, the Labour Code⁷¹ and the Deserted Wives and Children Proclamation⁷² define a child as a person below the age of 15. The Legal Capacity of

need of protection longer. According to the Prevention of Cruelty Act of 1889, for example, a child was a boy under the age of 14 and a girl who was below 16. The age of consent, which affected girls only, was raised from 12 to 13 in 1875, then to 16 in 1885. Fletcher and Hussey (note 3) 28.

⁶⁸ Ibid.

⁶⁹ Article 1 of the CRC.

⁷⁰ Article 2.

⁷¹ Section 3.

⁷² Section 2 of Order 60 of 1959.

Married Persons Act of 2006 defines a child as a person under the age of 18.⁷³ Under customary law, men attain majority when they marry.⁷⁴ Before 2006, women were perpetual minors. With the promulgation of the Legal Capacity of Married Persons Act, however, all women, whether married under common or customary law, are no longer deemed minors.⁷⁵ For purposes of labour, the customary-law definition of a child is tied to the ability to carry out the task at hand.⁷⁶

In Zimbabwe, s 2 of the Children's Protection and Adoption Act of 1972⁷⁷ defines a 'child' as a person under the age of 16 years and includes an infant. It distinguishes a child from a young person, who is above the age of 16 but below 18. Meanwhile, s 28(3) of the South African Constitution of 1996 defines a child as a person below the age of 18.

The definition of child contained in the CRC suggests that the ages of majority and adulthood are the same, although these concepts differ.⁷⁸ Majority is reached at the numerical age at which one acquires the full legal rights and powers of an adult, such as the right to vote and the power to enter into binding contracts without parental assistance. Some domestic legal systems 'institutionalize childhood by setting an age of majority at which persons become legal subjects responsible for their own affairs and able to exercise citizenship rights'.⁷⁹ In other systems the maximum age of childhood differs from the age of majority.⁸⁰

⁷³ Article 2 of Act 9 of 2006.

⁷⁴ In *Mohapi v Maqelepo* 1976 LLR P131 at 134 para 27 the court laid down the principle that a man remains a minor until he marries. The case indicated that when a man marries earlier than 21 years, he achieves majority status.

⁷⁵ Article 3(1).

⁷⁶ Ncube (note 14) 207.

⁷⁷ As amended by Act 5 of 2001.

⁷⁸ 'For the purposes of the present Convention, a child means every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier.' Article 1 of the CRC.

⁷⁹ 'Childhood', available at <http://encyclopedias.families.com/childhood-243-247-iemf> [accessed on 16 October 2005].

⁸⁰ The ages of majority, however, vary from country to country although most have set it at 18. In Japan the age of majority is 20 and, in the United States, the age varies from state to state, although the general age is 18. In Canada the age of majority varies from province to province. Available at <https://secure.tdcnadatrust.com/apply/aom2.html> [accessed on 3 October 2006].

Not all countries view the age of majority as marking the end of childhood. Lesotho has set this age at 21,⁸¹ while the Labour Code⁸² and the Deserted Wives and Children Proclamation⁸³ define a child as a person below the age of 15. The Legal Capacity of Married Persons Act defines a child as a person under the age of 18.⁸⁴ In Zimbabwe the law also does not consider the age of majority to be the same as the upper age limit for childhood. The Children's Protection and Adoption Act defines a 'child' as a person under the age of 16 years and a young person as one who is above the age of 16 but below 18.⁸⁵ The Legal Age of Majority Act of 1982, however, sets the age of majority at 18.⁸⁶ Before 2005, the age of majority in South Africa was 21.⁸⁷ However, the Children's Act of 2005⁸⁸ harmonised the age of majority and the upper limit of childhood at 18.⁸⁹

The arbitrary setting of the upper age limit for childhood at 18 by the ACRWC⁹⁰ and the Worst Forms of Child Labour Convention,⁹¹ is problematic when applied to African cultures (and some of the rest of the non-Western world) where the determinants of adulthood are both biologically and socially constructed.⁹²

2. Child labour

Having identified the various conceptions of child and childhood, and acknowledged that any such conception is both problematic and variable, we now turn to the definition of

⁸¹ Age of Majority Ordinance 62 of 1829.

⁸² Section 3.

⁸³ Section 2 of Order 60 of 1959.

⁸⁴ Article 2 of Act 9 of 2006.

⁸⁵ Section 2.

⁸⁶ Section 3 of Act 15 [Cap 8:07].

⁸⁷ In terms of s 2 of the repealed Age of Majority Act 57 of 1972.

⁸⁸ No 38.

⁸⁹ Article 17. The problem with using the age of majority as the upper limit for childhood is that in some cases, a minor may reach majority through an emancipation procedure whereby a minor is granted full adult status. Some states will allow children who are at least 16 years old to apply for emancipation if it can be proven that the child has a job that pays sufficient remuneration and if the child is able to get accommodation. The numerical age no longer becomes the determining aspect of childhood.

⁹⁰ Article 2.

⁹¹ Article 2.

⁹² Refer to the 'African conception' of child above.

child labour. Generally, people associate ‘labour’ with physical work, production, employment, or toil of a particularly hard or tiring kind. They often see it as an activity that is carried out for some form of reward, return or remuneration.⁹³ Thus industrial societies tend to identify labour with the process of earning a living.⁹⁴ With that understanding in mind, could child labour be simply defined as tiring and remunerated work done by any young person? The question that arises is: What determines the lawfulness of some forms of child work and the wrongfulness of others?

(a) Commonly accepted assumptions

Western law operates on a series of key assumptions about child labour. Most of these regard it as a negative phenomenon, a social evil, something from which a child ought to be shielded.⁹⁵ The general reasoning behind this assumption is that childhood is exclusively a time for school, leisure and play, and not a time for burdening a child with responsibilities other than those of education.

Another assumption is that all work under a certain age is bad for children, because they are not sufficiently physically and psychologically developed. Some sections of Western society are more particular in assuming employment is wrong. They believe that wage labour is characterised by the marginal quality of the tasks, which are unproductive, ill-paid, and can be done without any formal skills whatsoever.⁹⁶ Employment thus ‘exposes children to exploitation, as they are in no position to negotiate their salaries or to demand proper working conditions’.⁹⁷

Western societies also assume that children who work are generally unable to attend school, and that work itself gives them no opportunity to acquire the skills that may in future help in retaining a job in the formal sector.⁹⁸ (This idea originated from the

⁹³ Abernethie (note 28) at 91.

⁹⁴ Ibid.

⁹⁵ Ibid.

⁹⁶ Rodgers & Standing (eds) *Child Work, Poverty and Underdevelopment* 164-5.

⁹⁷ Ibid.

⁹⁸ Pierik & Houwerzijl (2006) 20 *Ethics & Int Affairs* 193-6.

era of the industrial revolution when children worked all day with little remuneration if any.) Another assumption is that work by children for unrelated adults is likely to be harmful because children will not be protected by the natural affection linking kinfolk.⁹⁹

(b) Definitional problems

One of the initial problems associated with the regulation of child labour is the difficulty of defining the scope of behaviour that requires regulation. Two distinct discourses in the historical literature use the term child labour in very different ways. One body of work defines a child as anyone under a certain age, and it applies ‘child labour’ to *any* work done by such people. The other deems child labour on family establishments as a contribution by children of whatever age to that economy, and, as such, perfectly acceptable.¹⁰⁰

Today, international organizations, non-governmental organizations, trade unions and other interest groups use various definitions of ‘child labour’. The following are the most common:

1. work that deprives children of their childhood, their potential and their dignity, and thus is harmful to physical and mental development;¹⁰¹
2. work that harms or exploits children in some way;¹⁰²
3. work that is detrimental to the growth and development of the child;¹⁰³
4. any work that interferes with a child’s physical development, opportunities for a minimum of education or the need for recreation;¹⁰⁴

⁹⁹ Rodgers & Standing (note 96) 164-5.

¹⁰⁰ Cunningham (2000) LIII 3 *Economic History Rev* 409 at 410.

¹⁰¹ By depriving them of the opportunity to attend school; by obliging them to leave school prematurely; or by requiring them to attempt to combine school attendance with excessively long and heavy work. Adapted from Inter-Parliamentary Union/ International Labour Office 2002.

¹⁰² Elfrank-Dana, quoted by Dudzinski ‘Experience Child Slavery’ IHS Child Slave Labour News, available at http://ihscslnews.org/view_article.php?id=58 [accessed on 19 September 2006].

¹⁰³ Caesar-Leo (1999) 8 *Child Abuse Rev* 75.

5. fulltime work with no time for rest, leisure and play; and
6. too much work at too young an age.

The ILO Conventions approach child labour in terms of minimum ages of employment, while the CRC views it, not according to the activity but according to the effect of the activity on the child concerned. It deems any labour unacceptable, if it is detrimental to the development of the child, regardless of whether it takes place in a work place or at home.¹⁰⁵ The ACRWC merely prohibits the economic exploitation of a child and any work which has the same elements as those prohibited under the CRC.¹⁰⁶

When we move to domestic law, we see that the Lesotho Labour Code does not define child labour, but prohibits the employment of children in commercial and industrial undertakings, except if they are private and employ only members of the child's family.¹⁰⁷ The Code excludes from its application work within family settings and self-employment.¹⁰⁸ With regards to child labour, the Children's Protection and Welfare Bill provides for the 'right to be protected from exploitative labour'.¹⁰⁹ It also lays down the elements of exploitative labour, which include the deprivation or hindrance of a child's access to health, education or development. Unfortunately, these provisions have yet to become law.

¹⁰⁴ Homer Folks, the Chairman of the United States National Labour Committee. Ibid.

¹⁰⁵ Article 32 of the CRC provides that 'States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development'.

¹⁰⁶ Article 15.

¹⁰⁷ Article 124(1).

¹⁰⁸ Although they may be harmful to the child. The Lesotho Government has never supplied a list of categories of work excluded from its application of the Convention. It has also not given reasons why children working in family undertakings have been excluded from the scope of the law, or provided information on consultations held on this matter with the employers' and workers' organisations concerned. Ncube (note 14) 208; CEACR: Individual Observation concerning Convention No. 138, Minimum Age, 1973 Lesotho 2005, available at <http://www.ilo.org/ilolex/english/convdisp2.htm> [accessed on 16 October 2006].

¹⁰⁹ Section 14.

In South Africa, Chapter 6 of the Basic Conditions of Employment Act (BCEA)¹¹⁰ regulates the employment of children. It provides that ‘no person may employ a child in employment that is inappropriate for a person of that age’.¹¹¹ The major limitation of this Act, however, is that it does not apply to the work of children falling outside formal employment. The Act, thus, does not comply with the Minimum Age Convention, the Convention on the Worst Forms of Child Labour, the CRC or the ACRWC.

This sample of definitions does not describe a single phenomenon. To the contrary, the definitions imply quite dissimilar notions about what is problematic about child labour, and, in consequence, course, they lead to divergent policies for addressing the issue. The key phrases that seem to recur are: ‘too much work’, ‘too young an age’, ‘hazardous to morality and health’, ‘harmful to development’, ‘exploitation’ and ‘interference with education’. These concepts themselves, however, are subject to different interpretations.

Child labour has therefore been defined by juxtaposing it with child work, by using age boundaries, by the nature of the work, by its impact on the health, development and morals of the child, by the hours spent, by the effect on education, and by the economic benefits accruing to the child or third persons. A closer scrutiny of these ways of defining child labour is therefore necessary.

(i) Labour/work dichotomy

The view that not all work is unacceptable has received universal agreement. Human rights bodies have traditionally found child labour harmful and ‘child work’ acceptable.¹¹²

¹¹⁰ Act 75 of 1997.

¹¹¹ Section 43(2).

¹¹² ‘The distinction between work and labour is to be found in a critical overview of the climate in which these processes operate and the quality of the relationships in operation.’ Mishra & Mishra *Tiny Hands in Unorganised Sector: Towards Elimination of Child Labour* 15.

Some people view work as an enjoyable and wholesome activity, a crucial ingredient of social relations, self discovery, self expression and self realization. They see labour as a production process designed to meet the profit motivated needs of the employer, and not the physiological and psychological needs of the employee. According to this distinction, child work does not detract from other essential activities of children, such as leisure, play and education. Child labour, however, impairs the health and development of children and particularly interferes with their schooling.¹¹³ In practice, child labour is not light work after school or legitimate apprenticeship opportunities. Hence, when children help out in a family business or perform domestic work, people do not call the activity 'labour'.

The United Nations Children's Emergency Fund (UNICEF) makes a distinction between 'dangerous and exploitative work' and 'beneficial work'.¹¹⁴ Dangerous and exploitative work is that which is carried out full-time and at too early an age. The working day is too long; it is carried out in inadequate conditions; it is not sufficiently paid; it involves excessive responsibility and it undermines the child's dignity and self-esteem. Such is child labour.¹¹⁵ Beneficial work, on the other hand, is that which promotes or stimulates a child's physical, cognitive and social development without interfering with scholastic or recreational activity, or rest.¹¹⁶

According to the ILO, child work refers to adult-guided activities that focus on the child's growth and enculturation into the family and society. Child work is therefore developmental in nature.¹¹⁷ The dichotomy between child work and child labour is, however, problematic in that many people use the terms interchangeably. Both are born

¹¹³ Bourdillon (ed) *Earning a Life: Working Children in Zimbabwe* 8.

¹¹⁴ UNICEF is an organ of the United Nations mandated by the United Nations General Assembly to advocate the protection of children's rights, to help meet their basic needs and to expand their opportunities to reach their full potential. UNICEF is guided by the CRC and strives to establish children's rights as enduring ethical principles and international standards of behaviour towards children.

¹¹⁵ Ochaita et al (2000) 8 *Int J of Children's Rts* 15 at 19; 'Child Protection from Violence, Exploitation and Abuse', available at the UNICEF website http://www.unicef.org/protection/index_childlabour.html [accessed on 18 June 2008].

¹¹⁶ Ochaita (note 114) 19.

¹¹⁷ National Research Council of the National Academies *Monitoring International Labour Standards: Techniques and Sources of Information* 169.

of the ubiquitous human need to survive. They are interactions requiring physical and mental effort, and they are means of acquiring resources.¹¹⁸ Much of the ambiguity centres on these common features.

The definition of work most often used in surveys and censuses is largely based on participation in the wage labour force, while most children's work occurs outside this sector. The ILO's estimate of the number of labouring children is in most cases based on wage labour statistics supplied by member countries. The criterion most frequently used to define unpaid activities as 'work' is whether or not the activity contributes to production. Measuring children's productive output, however, has proved to be difficult, since, in many cases, their contribution is indirect. For example, are boys who spend their days playing in the fields and scaring away birds working? Neither they, nor their parents may perceive the activity as work, yet it may have a positive effect on farm productivity.¹¹⁹ Definitions of work, particularly children's work, are highly variable and may differ according to cultural and economic circumstances.

An emphasis on the distinction between work and labour may be useful if one is looking for a way to ban some forms of child labour and accept others.¹²⁰ In reality, many children's activities are a combination of work and labour, in varying degrees of each, depending upon the quality of relationships involved. For instance, a girl doing domestic chores in her own home or in a foster arrangement may fall into any either the work or labour categories, depending on her relationship with the guardians she is living with. One thus cannot determine the point at which acceptable work shifts to child labour. It must also be noted that the criteria used to determine child work and child labour change across time, place and culture and vary according to different conceptions of childhood.¹²¹

¹¹⁸ Mishra & Mishra (note 112) 15.

¹¹⁹ For example, are boys who spend their day playing in the fields and scaring away birds working? They many not perceive their activity as work, nor may their parents, yet it may have a positive effect on productivity. Rodgers and Standing (note 96) 91.

¹²⁰ Andvig (1998) 2 *Forum for Development Studies* 327 at 328.

¹²¹ Abernethie (note 28) 91-8.

The work-labour distinction also implies that all profit motivated activity is harmful and all gratuitous activity benign. It does not consider children in family situations as exploited. This understanding of labour implies that it is paid employment, whereas a great deal of children's work is not remunerated and is not productive.¹²²

Another problem with the distinction between labour and work is its focus on abstract definitions, which distracts from the activities of children in practice and from the situations in which these activities are performed. Once something is classified as child labour, it is identified as bad, and therefore to be abolished. It evokes an emotional reaction rather than a careful consideration of the actual situation of the child.¹²³

Unless children are looked at within a proper context, however, there are bound to be misunderstandings in defining child labour.¹²⁴ Recent studies on child development suggest that children's ability to work, and to benefit or suffer from it, varies significantly from child to child. The new research also shows that child work has many effects, some good and some bad, not all of which can be separated from each other.¹²⁵ Even so, evidence about the impact of child work is fragmentary. There are few studies using case controls to show the long-term impact of early work or its relative severity. The studies that do exist rarely examine the psychological costs or benefits of work, and much of what is written focuses on the potential hazards rather than the actual harm that occurs.¹²⁶

In general, the Western attempt to neatly separate child work from child labour is the basis of stereotyping and prejudice. If we find the criteria for deciding in advance whether a particular activity is to be classified as work or labour, we are considering whether the activity should be permitted or not, before examining the advantages and disadvantages for the children concerned.¹²⁷

¹²² Ibid.

¹²³ Bourdillon (note 113) 9.

¹²⁴ Ibid.

¹²⁵ Bachman (2000) 53 *J of Int Affairs* 545 at 554.

¹²⁶ Ibid.

¹²⁷ Bourdillon (note 113) 10.

(ii) Light work, hazardous/worst forms

The ILO has allowed a large degree of national discretion in defining the categories of light and hazardous work.¹²⁸ The Minimum Age Convention provides that national laws or regulations may permit the employment or work of persons between 13 to 15 years of age on light work, which is ‘not likely to be harmful to their health and development; and such as not to prejudice their attendance at school, their participation in vocational orientation or training programmes approved by the competent authority or their capacity to benefit from the instruction received’.¹²⁹ This competent authority must determine what light work is, and prescribe the number of hours and conditions in which such work may be undertaken.

In determining whether work is likely to be harmful, the ILO takes into consideration, among other factors, the duration of work, the conditions under which the work is done and the effects on school attendance. The ILO, however, does not provide any operational guidance for assessing these factors and determining whether any given form of work would qualify as light work.

When we turn to domestic law, we find that the Lesotho Labour Code permits the employment of children between the ages of 13 and 15 for light work in technical schools and similar institutions, provided that the work has been approved by the Department of Education.¹³⁰ No known ‘competent authority’ or any law has specified the activities and conditions of light work.

The much awaited Children’s Protection and Welfare Bill of 2004 defines light work as that which is not likely to be harmful to the health or development of the child and does not affect the child’s attendance at school or the capacity of the child to benefit from school.¹³¹ It prohibits the engagement of a child in night work and in industrial

¹²⁸ Ibid.

¹²⁹ Article 7(1).

¹³⁰ Section 124(2).

¹³¹ Section 236(2).

undertakings,¹³² and sets the minimum age for admission of a child to employment at 15 years.¹³³ The minimum age for light work is 13.¹³⁴

In Zimbabwe, the Labour Relations Regulations provide that a child who is over the age of 12 may perform light work where it is an integral part of a course of education or training, for which the school or training institute is primarily responsible, and does not prejudice such child's education, health, safety, social or mental development.¹³⁵ The regulations, however, do not provide any guidance on the types of light work or activities permitted and the conditions in which such work may be undertaken.¹³⁶ Interestingly, South African laws are silent on the employment of children between the ages of 13 and 15 in light work.

The Minimum Age Convention¹³⁷ and the Worst forms of Child Labour Convention¹³⁸ both prohibit the employment of persons below the age of 18 in any work that is hazardous or likely to be harmful to the child. Hazardous work includes work which is by its very nature, or the circumstance in which it is carried out, likely to jeopardise the health, safety or morals of young persons.¹³⁹ The Worst Forms of Child Labour Convention allows countries to authorize employment deemed hazardous or likely to be harmful for persons from the age of 16, on condition that the health, safety and morals of the children concerned are fully protected, and that the children have received adequate specific instruction or vocational training in the relevant branch of activity.¹⁴⁰

Section 125(1) of the Lesotho Labour Code, provides that

¹³² Night work should start at 6 pm and end at 6 am. Section 234.

¹³³ Section 235.

¹³⁴ Section 236(1).

¹³⁵ Regulation 3(1).

¹³⁶ Article 7(3) provides that a competent authority must determine the light work which may be permitted and prescribe the number of hours during which, and the conditions in which, it may be undertaken.

¹³⁷ Article 3.

¹³⁸ Article 3.

¹³⁹ Article 3 of the ILO Recommendation Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour 190 of 1999.

¹⁴⁰ Article 4 of R 190.

‘a child or young person shall not be employed on any work which is injurious to his/her health or morals, dangerous or otherwise unsuitable, or on any work which the Minister, by notification in the Gazette, or the Labour Commissioner, acting in accordance with any directions of the Minister, has declared, by notice in writing, to be a kind which is injurious to the health or morals of a child’.

The Code conforms to international law by restricting the employment of persons under the age of 16 in mines and quarries,¹⁴¹ but, nonetheless, fails to specify the types of work or employment likely to jeopardize the health, safety and morals of children.¹⁴²

The Lesotho Children’s Protection and Welfare Bill defines ‘hazardous employment’ as work which poses a danger to the health, development, safety or morals of a person.¹⁴³ The Bill lists the types of work that are hazardous, and includes: mining and quarrying, the carrying of heavy loads, manufacturing industries,¹⁴⁴ work in places such as bars, hotels and places of entertainment,¹⁴⁵ herding animals at cattle posts, commercial sex work, tobacco production and trafficking.¹⁴⁶

In Zimbabwe, the amended Labour Relations Act 17 of 2002 outlaws the employment of any person under the age of 18 in work potentially hazardous to health, safety and morals.¹⁴⁷ The Children’s Protection and Adoption Act also prohibits the engagement of any child or young person to engage in hazardous labour.¹⁴⁸ These provisions, nevertheless, do not specify the types of work classified as hazardous.¹⁴⁹

¹⁴¹ Section 127. Persons between the ages of 16 and 18 may work in such establishments under an apprenticeship provision.

¹⁴² Although ss 12 and 13 of the Labour Code provides for a system of inspection ensured primarily by labour officers (inspectors), a large number of children, some of them under the minimum age of employment, are working in potentially dangerous conditions with no supervision. ‘UN Committee on the Rights of the Child: Concluding Observations: Lesotho’ 21 February 2001. CRC/C/15/Add.147, available at: <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3b4c45514> [accessed 17 September 2007].

¹⁴³ Section 237(2).

¹⁴⁴ Where chemicals are produced or used and machines are used.

¹⁴⁵ Where a person may be exposed to immoral behaviour.

¹⁴⁶ Section 237(3).

¹⁴⁷ Section 11(4).

¹⁴⁸ Section 10A(4).

¹⁴⁹ Article 3(1).

In South Africa, as far as the prohibition and identification of hazardous work is concerned, the Mine Health and Safety Act of 1996 outlaws the employment of children under the age of 18 underground in mines.¹⁵⁰ The Child Care Act of 1983 punishes the involvement or participation in the commercial sexual exploitation of a child.¹⁵¹ The Sexual Offences Act of 1957¹⁵² prohibits and provides penalties for anyone who makes a child engage in prostitution.¹⁵³ All these pieces of legislation, however, lack an explicit definition of hazardous employment.

The Children's Amendment Act of 2007¹⁵⁴ makes provision for the worst forms of child labour. It outlaws, *inter alia*, the employment of children under the age of 15 years, the use, procurement, offering or employment of a child for purposes of commercial sexual exploitation or illicit activities, including drug production and trafficking.¹⁵⁵ It forbids: forced child labour, whether for reward or not; encouraging, inducing, forcing, or allowing a child to perform labour that 'by its nature or the circumstances is likely to harm the health, safety or morals of a child'; or placing at risk the child's well-being, education, physical or mental health, or spiritual, moral or social development.¹⁵⁶

¹⁵⁰ Section 85 of Act 29 of 1996. The Department of Labour reported to the ILO Committee of Experts that it was in the process of drafting regulations pertaining to the work of children between the ages of 15 and 17 years which will comply with the Convention. In July 2004, the South African Department of Labour (SADOL) passed regulations – Sectoral Determination 10: Children in the Performance of Advertising, Artistic and Cultural Activities. CEACR: Individual Direct Request concerning Worst Forms of Child Labour Convention Submitted: 2006, available at <http://www.ilo.org/ilolex/english/convdisp2.htm> [accessed on 16 September 2006].

¹⁵¹ Section 50A(1) of Act 74 of 1983.

¹⁵² Section 22 of Act 23 of 1957. Section 11 of the Sexual Offences Bill of 2003 also contains the same provision.

¹⁵³ Section 20. The problem with the Act is that it allows children to be arrested for prostitution despite being victims of commercial sexual exploitation. The Child Care Act and the Sexual Offences Bill, however, came into being before South Africa became party to the ILO Minimum Age Convention and well before the Convention on the Worst Forms of Child Labour came into being.

¹⁵⁴ Act 41 of 2007. It amends the Children's Act of 2005.

¹⁵⁵ Section 141.

¹⁵⁶ Subsection 2. 'Subsection (1) para (a) does not prevent the performance of labour by a child, whether for reward or not –(a) subject to the Basic Conditions of Employment Act, 1997 (Act No. 75 of 1997), in an advertisement, in sport or in an artistic or cultural event, provided that such engagement does not place the child's well-being, education, physical or mental health or spiritual, moral or social development at risk; or (b) in work which is carried out within the framework of a programme registered in terms of the Non Profit Organisations Act No. 71 of 1997 and that is designed to promote personal development and vocational training.'

The Act also obliges the relevant Minister to take all reasonable steps to assist in ensuring the enforcement of the prohibition on the worst forms of child labour, which includes the confiscation (in terms of the Prevention of Organised Crime Act of 1998) of assets acquired through the use of such child labour.¹⁵⁷

The type of work which falls under the rubric of light and hazardous is left to individual countries to determine. The comparison between light and hazardous work therefore remains unhelpful as it fails to provide any effective method of distinguishing between child labour and child work.¹⁵⁸

(iii) Exploitation

Although international law does not in general provide a clear definition of child labour, various international instruments use ‘exploitation’ as the central notion. For example, the International Convention on Economic, Social and Cultural Rights (ICESCR),¹⁵⁹ provides that children and young persons should be protected from economic and social exploitation. Different definitions of exploitation are used, and they range from the ‘worst forms of child labour’, bonded labour, work at too young an age, and working for too many hours in hazardous conditions.¹⁶⁰ Some writers have even viewed exploitation as the mere existence or utilization of child work.¹⁶¹

Legal literature considers exploitation to be something that distinguishes acceptable and unacceptable child work, but it goes no further in explaining the concept. When confronted with the question of how to define economic exploitation, the UN Committee on the Rights of the Child requested the ILO Office to provide such a definition.¹⁶² The response did not give much guidance. Exploitation was defined as ‘work which is carried out in conditions of employment inferior to those established by

¹⁵⁷ Section 141(3) of Act 121 of 1998.

¹⁵⁸ McKechnie & Hobbs (1999) 8 *Child Abuse Rev* 87 at 88.

¹⁵⁹ Article 10 (3). Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966. Entered into force 3 January 1976, in accordance with article 27.

¹⁶⁰ Hanson & Vandaele (2003) 11 *Int J of Children’s Rts* 73 at 118.

¹⁶¹ *Ibid.*

¹⁶² At the Committee’s fourth session in October 1993. Hanson and Vandaele (note 160) 108.

international labour standards (minimum age for admission to employment, forced labour, protection against employment injury, protection of wages etc.)'.¹⁶³ A member of the Committee defined exploitation as 'those practices where human dignity of the child or the harmonious development of the child's personality is not respected'.¹⁶⁴ But how are notions such as growth and development to be considered? Can one allege that working under a certain age per se constitutes exploitation?

Today, some quarters of the international community associate exploitation with wage labour and the involvement of third parties outside the family.¹⁶⁵ Others perceive work to be exploitative only when, regardless of the consequences for the individual child, it threatens what society views as normal socialisation.¹⁶⁶ The underlying assumption is that, even under conditions of extreme indigence, work within families is acceptable. Some societies believe that children working side by side with their parents are unlikely to be exploited, as the parents' main concern is their children's training and socialisation. The general belief is that parents naturally protect their children from excessive drudgery and allow sufficient scope for education and leisure. The same societies perceive the unremunerated daily tasks performed by children to help their parents as an expression of essential obligations that ensure normal socialisation.¹⁶⁷

Indeed socialisation is the process through which children learn the culture, norms and values of their particular society, thereby learning to become the desired type of adult. Seen in this light, work is a positive facet in a child's development, acceptable as a time of learning.¹⁶⁸ It is sometimes forgotten, however, that not all work is beneficial to a child and not all socialisation is positive. A child may be socialised into accepting inequitable or exploitative relationships as the norm or simply as the way things are.

¹⁶³ Ibid.

¹⁶⁴ Maria Santos Pais, quoted in Hanson and Vandaele (note 160) 118.

¹⁶⁵ But to say that exploitation occurs mainly in waged situations denies the prevalence of slavery and bonded labour, of prostitution, of domestic, unpaid exploitation and forms of social exploitation. Waged labour exploitation may seem more prevalent, but it is also the most easily recorded and can therefore be made more visible.

¹⁶⁶ Nieuwenhuys (1995) 3 *Int J of Children's Rts* 213 at 214.

¹⁶⁷ Ibid.

¹⁶⁸ Abernethie (note 28) 96; Fyfe (note 49) 4.

The underlying assumption of drawing a line between work that is part of children's normal upbringing and exploitative child labour thus seems to be a moral one. It is essentially based on the normative evaluation of the nature of the relationship between children and adults, and it bears no relation to the modalities of work in the adult world.¹⁶⁹ The most remarkable aspect of this divide is that, in the adult world, the notion of exploitation is essentially an economic one, linked to such quantifiable variables as the cost of labour and the rate of profit. When it comes to children, however, exploitation appears to be associated with the moral notions that regulate upbringing.¹⁷⁰

In an attempt to achieve a clearer definition of exploitation, UNICEF proposed the following formulation in its 1986 Executive Board Paper:

'A child is exploited by: starting fulltime work at too early an age; working too long; excessive physical activity, experiencing social and psychological strains; work and life on the streets; inadequate remuneration; too much responsibility too early; work that does not facilitate their psychological and social development; and work that inhibits their self esteem.'¹⁷¹

This framework accommodates the traditional view that the term 'exploitation' has something to do with a third party employer who extracts a profit. It goes further, however, to embrace a 'social exploitation' dimension by acknowledging work in the informal sector (where the family can be the exploiter), as well as the human rights dimension by recognising children's subordinate position in society.¹⁷²

(iv) Age, education and school attendance

Another criterion used for determining child labour is the age of the child.¹⁷³ The whole concept of establishing minimum age reflects the concern that children of too young an age should be especially protected. Prior to the 1860s, the Western world did not

¹⁶⁹ Nieuwenhuys (note 166) 215.

¹⁷⁰ Ibid.

¹⁷¹ Fyfe (note 49) 18 -19; Abernethie (note 28) 100.

¹⁷² Ibid.

¹⁷³ 'Child Labour in Africa: Targeting the Intolerable', available at the ILO website <http://www.ilo.org/public/english/comp/child/conf/africa/targeting.pdf> [accessed on 11 October 2006].

consider age as an important measurement for the acceptability of child work, and, at that time, the employment of nine-year-olds (and below) was legal and common place.¹⁷⁴ Rather than establishing age limits, however, 19th century child labour legislation reduced the hours of work and provided some education for child labourers.¹⁷⁵

With changes in the conception of childhood, the early 20th century saw the ILO setting age limits for the employment children in various sectors of the economy. The age limits in the Convention concerning Minimum Age for Admission to Employment (Minimum Age Convention) of 1973 still form the basis for international and national legislation. The Convention compels countries to fix a minimum age for employment that must not be less than the age for completing compulsory schooling.¹⁷⁶ The instrument sets the minimum age of employment at 15.¹⁷⁷ Domestic limitations on age vary according to the nature of the work, and the so-called ‘development of the child’ and educational obligations.¹⁷⁸

Fixing the minimum age based on the completion of compulsory schooling, however, has its problems, as the following reveals. In at least 25 countries there is no specified age for compulsory education.¹⁷⁹ An analysis of state parties’ reports to the Committee on the Rights of the Child shows that there are a number of countries where

¹⁷⁴ Zelizer *Pricing the Priceless Child. The Changing Social Value of Children* 75.

¹⁷⁵ An example was the Health and Morals of Apprentices Act of 1802 in Great Britain, which outlawed night work and attempted to limit the working day in cotton mills. A subsequent Act of 1819 forbade the employment of children under the age of 9 in cotton mills. Fyfe (note 49) 30; Zelizer (note 174) 75.

¹⁷⁶ It should not be less than 15 years (art 2 para 3). Developing countries may set the minimum age at 14 (art 2 para 4).

¹⁷⁷ Article 2(3). Since the British Factory Acts of the 19th century, compulsory education has proved to be one of the most effective means of combating child labour. International law reflects an acknowledgment of that fact. The age of admission to employment is thus inextricably linked to the age limit for compulsory education. The logic is that if compulsory schooling ends at the same time as the minimum age for employment, it removes the risk of children engaging in employment before they are legally entitled to work and rules out an enforced period of idleness. ILO: Minimum age, General Survey of the reports relating to Convention No. 138 and Recommendation No. 146 concerning minimum age, Report of the Committee of Experts on the Application of the Conventions and Recommendations, Report III (Part 4(B)), ILC, 67th Session, Geneva, 1981, paragraph 140.

¹⁷⁸ The Conventions however provide flexibility for countries to establish a younger minimum age of 12 or 13 for children to partake in ‘light work’ (art 7). Hanson and Vandaele (note 160) 101.

¹⁷⁹ This figure is very likely to be even higher given the number of countries which completely fail to report whether education is or is not compulsory, or report unclear information (an additional 36 countries). Melchiorre *At What Age... Are School-Children Employed, Married and Taken to Court?* 3.

education is not compulsory at all. Other countries, which have enshrined the obligation in their Constitution or other legal instruments, do not provide for an age range between enrolment and completion of school. In limited cases, there are exceptions or exemptions from the obligation of compulsory education.¹⁸⁰ Moreover, in these same countries, children are legally obliged to go to school until they are 14 or 15 years old, but a different law allows them to work from an earlier age.¹⁸¹

While the minimum age for employment in Lesotho conforms to the Minimum Age Convention,¹⁸² education is not compulsory in the country, despite a Constitutional provision which states that ‘Lesotho shall endeavour to make education available to all and shall adopt policies aimed at securing that primary education is compulsory and available to all’.¹⁸³ The Education Act also requires parents to ensure that their school-going children receive full-time education suitable to their ages,¹⁸⁴ but it neither specifies the age for the commencement or completion of such education nor defines the ‘school-going age’.

As for Zimbabwe, the Labour Relations Act (LRA) sets the minimum age for admission to employment at 15 years, but it does not link this age to that for the completion of compulsory schooling.¹⁸⁵ The Education Act makes primary education compulsory for every child of school-going age,¹⁸⁶ but does not provide the age for the completion of compulsory schooling.¹⁸⁷ Partly due to the lack of legislation linking the

¹⁸⁰ In such cases compulsory education is equated with public/State schooling, whereas in other countries it is clearly a far broader concept embodying all educational establishments regulated by public authorities, including those which are privately administered, or even ‘home schooling’.

¹⁸¹ Melchiorre (note 182) 4.

¹⁸² Article 124 of the Labour Code provides that the minimum age of employment is 15.

¹⁸³ Section 28(b).

¹⁸⁴ Section 3(2) of Act 10 of 1995. Many children, particularly herd-boys, those living in poverty and in remote rural communities, nevertheless, continue to have no access to education.

¹⁸⁵ Section 11(1)(a).

¹⁸⁶ Section 5 of [Cap. 25:04] of 1996.

¹⁸⁷ The ILO Committee of Experts recently emphasised the necessity of linking the age of admission to employment to the age limit for compulsory education. The Committee said that ‘if the two ages do not coincide, various problems may arise. If compulsory schooling comes to an end before the young persons are legally entitled to work, there may be a period of enforced idleness. Alternatively, if young persons are legally entitled to work before the end of completion of compulsory schooling, children from poor families might be tempted to drop out of education and work in order to earn money’. Report of the Committee of Experts on the Application of Conventions and Recommendations (note 177).

age of admission in employment to the age limit for compulsory education, 826 412 children aged between 5 and 14 are engaged in ‘work’.¹⁸⁸ In 2000, The ILO Committee of Legal Experts thus requested Zimbabwe to adopt legislation fixing the age of completion of compulsory schooling at 14.¹⁸⁹

The LRA permits the employment of apprentices from the age of 13 to 14, without the consent of a guardian, in work that is an integral part of the school curriculum, a course of training or technical or vocational education.¹⁹⁰ This is contrary to the Minimum Age Convention which sets the minimum age for such work at 14. The Manpower Planning and Development Act of 1994,¹⁹¹ however, sets the minimum age for apprenticeship at 16 years.¹⁹² In practice, a person may not be admitted for any professional training without having at least completed and received results for his or her ordinary level school certificate (which is at the age of 16).¹⁹³

The Children’s Protection and Adoption Act of 1972¹⁹⁴ also restricts the employment of school-going children and young persons.¹⁹⁵ This Act prohibits any parent or guardian from knowingly causing or permitting children or young persons of school-going age to be absent from school in order to engage in employment for gain or reward.¹⁹⁶ No other person is allowed to employ for gain or reward children or young persons of school-going age at a time when they are reasonably expected to be in school.¹⁹⁷

¹⁸⁸ Ibid.

¹⁸⁹ Ibid.

¹⁹⁰ Section 11(1)(a) and (2)(b) and (3).

¹⁹¹ No. 24 [Cap.28:02].

¹⁹² Section 34(1)(a).

¹⁹³ The ILO Committee of Experts noted that in practice, apprentices needed to have reached the age of 16 for the Apprenticeship Board to clear them for the purposes of employment. According to the Government, in practice it is not possible for a young person under 16 years to be employed as an apprentice, because normally the age of completion of ordinary level studies is 16 or 17. CEACR: Individual Direct Request concerning Minimum Age Convention, 1973 (No. 138) Zimbabwe (ratification: 2000) Submitted: 2006.

¹⁹⁴ As amended by Act No. 5 of 2001 [Chapter 5:06]. The Act is intended, in pertinent part, ‘to make provision for the protection, welfare and supervision of neglected and abused children and juveniles’.

¹⁹⁵ Section 10A inserted by s 10 of Act 5 of 2001 with effect from 18 January 2002.

¹⁹⁶ Section 10A(1)(a).

¹⁹⁷ Section 10A(1)(b).

In South Africa, the Basic Conditions of Employment Act (BCEA) provides that ‘no person may employ children who are under 15 years of age, or who are under the minimum school-leaving age in terms of any law, if they are 15 or older’.¹⁹⁸ The Act adds that ‘no person may employ a child in employment that is inappropriate for a person of that age’.¹⁹⁹ The major limitation of this piece of legislation, however, is that its application does not extend to the work of children falling outside formal employment.

The South African Schools Act of 1996 complements the BCEA by making school compulsory for children aged between 7 and 15.²⁰⁰ The Child Care Act of 1983 also prohibits the employment of a child less than 15 years old and excludes self-employment from its application.²⁰¹ Like the BCEA, however, the South African Schools Act and the Child Care Act were promulgated before the country ratified the relevant ILO Conventions on child labour.

The BCEA allows the Minister of Labour to set additional prohibitions or conditions on the employment of children who are above the age 15 and no longer subject to compulsory schooling.²⁰² The Act echoes the provisions of the Constitution by making it an offence to employ a child in work that ‘is inappropriate for a person of that age²⁰³ and which places at risk the child’s well-being, education, physical or mental health or spiritual, moral or social development’.²⁰⁴ It does not, however, elaborate on the types of work which may be detrimental to a child’s well-being.

Despite the legal provisions for compulsory education between the ages of 7 and 15 years, primary education is still not free. An inequality in access to education has thus remained in some areas, particularly among children of colour, and girls and children

¹⁹⁸ Section 43(1)(a) and (b).

¹⁹⁹ Section 43(2).

²⁰⁰ Section 3(1) of Act 84 of 1996.

²⁰¹ Section 52A of Act 74 of 1983.

²⁰² Section 44(1) and (2).

²⁰³ Paragraph (a).

²⁰⁴ Subsection (2).

from economically disadvantaged families. Many still do not attend school, and they are most likely to engage in child labour instead.²⁰⁵

In conclusion, there are several problems with defining child labour according to minimum age limitations. First there is no biological reason for setting age limitations for certain types of work. Secondly, relevant conventions setting minimum ages for employment only deal with child labour in relation to the labour market. This means that all other informal forms of labour which may otherwise be harmful, such as work within a family enterprise or domestic work, fall outside the definition of child labour and are therefore not regulated.²⁰⁶

Determining child labour is also problematic in developing countries which may lack the institutional wherewithal to register the birth of every child. Age is thus difficult to prove. In any event, some child development experts believe that age is not always the best way to decide whether individual children are ready for work, or whether any particular kind of work is appropriate for a specific child.²⁰⁷ Several factors should be considered such as the health and nutrition of the child and its living environment.

Moreover, campaigners against child labour have often pointed out the negative correlation between child work and formal education. The understanding of child labour as a practice harmful to a child's intellectual development is a well-established belief that has its origins in the mid-19th century. It is believed that labour is energy-consuming and tiring, thus leaving children with neither time nor energy to attend school.

However, one has to be careful not to make an automatic assumption that work by children impairs education and intellectual development. Although full time work (whether hazardous or not) is clearly incompatible with school attendance and

²⁰⁵ Concluding Observations of the Committee on the Rights of the Child: South Africa available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CRC.C.15.Add.122.En?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CRC.C.15.Add.122.En?OpenDocument) [accessed on 10 March 2006].

²⁰⁶ Grimsrud (ed) *The Next Steps: Experiences and Analysis of How to Eradicate Child Labour* 9.

²⁰⁷ Bachman 'The political economy of child labour and its impacts on international business', available at [http://www.nabe.com/publib/be/000330.pdf#search=%22us%20Dept.%20of%20Labour%20\(1998\)%20definition%20of%20child%20labour%22](http://www.nabe.com/publib/be/000330.pdf#search=%22us%20Dept.%20of%20Labour%20(1998)%20definition%20of%20child%20labour%22) [accessed on 19 September 2006].

performance, part-time child labour does not necessarily interfere with education when it occurs during the school holidays, or last for only a few hours a week during the school year.²⁰⁸

Defining child labour as work that keeps children from school, creates a risk of over estimating the harm, and neglecting the poor quality education in many schools in developing countries.²⁰⁹ What is more, the definition overlooks the fact that school can sometimes be a cause of child labour for children of poverty stricken families. They are left with no option but to earn money to help pay for school costs.²¹⁰

A final but important question with a definition based on education is, 'what is education'? More than one form exists. There is first the formal education which involves going to school and equipping the child with the necessary skills for formal employment; secondly there is traditional education which includes engagement in customary livelihoods at home, in fields and forests or on the sea with parents and communities.²¹¹ The basic skills transmitted in both types of education allow children to grow up and survive in often harsh environments and prepare them for adulthood. The current definitions relating to education do not take into account the existence of these different forms of education. They assume that what a child gets from a school is the only conceivable 'education'. A traditional society, however, considers child work as an important component of education especially in the household based production system and various apprenticeship arrangements.²¹²

²⁰⁸ Anker (2000) 139 *Int Lab Rev* 257 at 261.

²⁰⁹ Heady 'What is the effect of child labour on learning achievement? Evidence from Ghana', available at <http://unicef-irc.org/publications/pdf/iwp79.pdf#search=%22What%20is%20the%20effect%20of%20child%20labour%20on%20learning%20achievement%3F%20evidence%20from%20Ghana%22> [accessed on 21 September 2006].

²¹⁰ Anker (note 208) 261.

²¹¹ Larsen 'Indigenous and Tribal Children: Assessing child labour and education challenges', Child Labour and Education Working Paper, International Programme on the elimination of Child Labour (IPEC) website at http://www.ilo.org/public/english/standards/ipecc/publ/download/edu_indigenous_2003_en.pdf [accessed on 21 September 2006].

²¹² Rodgers and Standing (note 96) 33.

(v) Health

Activists often define child labour by reference to the effects work may have on a child's health, on the assumption that labour is harmful to the health and life expectancy of children. Historians acknowledged that during the industrial revolution in Europe, working children suffered permanent damage to their health as a direct consequence of their early experiences, when they worked long hours without rest and were exposed to dangerous substances and machinery.²¹³

Today there are many reports of children being exposed to work which results in poisoning, serious skin and other infections, chronic lung disease, cancers, burns, amputations, skeletal deformities, and impairments to hearing, vision and immune function.²¹⁴ Child prostitutes risk pregnancy and sexually transmitted diseases, including HIV infection. Those in domestic service are often victims of physical, psychological, and sexual abuse. Children in combat risk disease, disability and violent death, and former child combatants suffer from aggression, alienation and an inability to interact socially.²¹⁵

Definitions of child labour centred on the 'likely' impact of work on the 'health, development and morals of the child' are, however, based on speculative thinking. Such definitions confuse hazards or risks with actual outcomes, and, as a result, most information about child labour tends to cite its risks not its effects. Whereas children have a right to be protected from potentially hazardous situations, it must be borne in mind that the presence of risk does not tell us much about the actual outcome of the work for children. In other words, exposure to a hazard does not necessarily have damaging consequences; much depends on the social and normative context of the work, the nature and severity of a hazard, and how children respond.²¹⁶

²¹³ Refer to Chapter II.

²¹⁴ Scanlon et al 'Child labour' *BMJ Journals*, available at <http://bmj.bmjournals.com/cgi/reprint/325/7361/401> [accessed on 20 September 2006].

²¹⁵ Ibid.

²¹⁶ Boyden et al (note 2) 79.

Evidence on the health effects of child labour is not easily obtained, given the complexity of the relationships involved. This is demonstrated by the fact that simple mathematical descriptions of the correlation between child labour and child health do not support fears, possibly well founded, that work is damaging to child health. There is a lack of a consistent correlation between the percentage of children reporting health problems and the type of activity in which they are engaged. In some countries, children working most intensively are most likely to report health problems, while in other countries this may actually be the healthiest group of children. In some cases, children combining work and school are most likely to suffer illness, but there are other instances where children attending school (and not working) are the least healthy.²¹⁷

The apparent inconsistency between beliefs that work is damaging to health and the lack of clear evidence might be attributable to a number of factors, some extraneous, such as income or region.²¹⁸ A relationship between work and health might also be obscured by measurement problems, since the measures of health and of work are usually crude.²¹⁹

A further complicating factor is that the relationship between child labour and health is likely to be dynamic. Current health reflects past, rather than present, activity. The child seriously injured in an accident last year may have poor health, not caused by the current work activity. On the other hand, the child working with asbestos today can expect to experience poor health as an adult. A simple correlation of work activity and contemporaneous health cannot pick up such dynamics.²²⁰

²¹⁷ O'Donnell et al 'Child labour and health: Evidence and research issues', available at http://www.ucw-project.org/pdf/publications/childlabour_health.pdf#search=%22health%20and%20child%20labour%22 [accessed on 20 September 2006].

²¹⁸ Ibid.

²¹⁹ And might be incapable of reflecting a relationship between the intensity of child work and more objective and detailed indicators of health. Ibid.

²²⁰ Any negative impact of child labour on health may also be obscured by the selection of the healthiest youngsters as subjects of research. In this case, simple comparison between the health of working and non-working children cannot reveal the impact which work has on the health of the former.

Most information on the likely hazards of work defined as child labour has been gathered by sector, industry or occupation. Research by the ILO, for instance, separates effects by industrial sector.²²¹ This kind of approach helps with the identification of broad health and developmental risks specific to each industry. For instance, mining is usually rated as physically dangerous, while children in domestic service are thought to be exposed to risks of a social nature, such as emotional and sexual abuse.

Approaching the assessment of hazards by sector or industry gives the impression that particular industries present particular health hazards. At first glance, this may appear justifiable. In practice, however, the extent to which hazards are occupation specific might be exaggerated. Due to a general lack of solid analysis, much of what we know about specific occupations and industries largely reflects the professional or ideological inclinations of Western researchers.²²² It is imperative to consider whose judgment of risk prevails, what indicators of risk are being used, how these are identified and by whom. Rarely are the opinions of the protagonists— in this case working children— taken into account, although their perspective of risk is often very different.

Another problem with defining hazards by sector and industry is that some children working in industries considered hazardous may in fact be doing quite safe jobs. In the same vein, children working in so-called safe industries may actually be engaged in dangerous work. What is more, the tendency to list all hazards associated with a particular industry overlooks the question of their relative severity of impact; whereas some hazards are really quite minor, others are life threatening. Conversely, some of the most serious hazards are not occupationally specific, but are prevalent across all economic sectors.²²³

Finally, there are situations in which some work may make a positive contribution to the health and physical capacity of children. For instance, in situations of extreme poverty, the mobilisation of all household labour available, including that of children may

²²¹ Boyden et al (note 2) 84-6.

²²² Ibid.

²²³ Ibid.

be necessary, if basic consumption needs are to be met. It is also conceivable that such work is beneficial to the health and physical development of children, if it is not too strenuous and develops physical fitness and strengthens resistance to disease. With this in mind, it would thus be totally erroneous to define child labour as work that is always (or likely to be) hazardous to health.

(vi) Rest, leisure and play

A child who is deprived of time for rest, leisure and play has also been deemed to be engaged in labour. With the promulgation of the CRC, these activities have been recognised as rights, but they are difficult to interpret in most social conditions.

The concept of leisure resulted in a clear distinction between work and time off from work. For some people, however, particularly those from developed societies, the work-play distinction is misleading. Leisure is not 'time', but a state of being in which the individual has the resources, the opportunity and the capacity to do those things that contribute most to self-actualization and to the recognition of responsibilities and relationships to others.²²⁴ Many people find leisure in work itself or in functional, goal-directed activities that were often looked upon in early history as work.²²⁵

The concepts of rest and play are also subject to various interpretations. For some, they may mean a total absence of work and engaging in amusing activities. What others may consider as rest or play, however, may be work for another. What an adult may consider as rest may not be the case from the point of view of a child. For example, an adult may consider the time an older child spends looking after a baby sibling as a time of play, whereas the child may find it stressful, as it carries heavy responsibilities.

²²⁴ Sapora 'Modern Concepts of Leisure' found at the Northern Illinois University Periodicals Online, available at <http://www.lib.niu.edu/ip0/1975/ip750524.html> [accessed on 21 September 2006].

²²⁵ The Aristotelian concept of leisure as a 'condition or state of mind', or 'state of being' free from the necessity of labour, more than ever forms the basis for our concepts of leisure today. The Aristotelian concept of leisure does not exclude labour, but it does exclude the 'obligation' or the 'necessity' to perform labour as a primary condition of life. Ibid.

There are also grey areas between play, leisure and rest, on one hand, and work, on the other. An example is where children spend their day playing games while herding cattle or chasing the birds from the fields. Are such children working, or they are actually playing?

One way of protecting rest and leisure time is to prescribe working hours. Lesotho and Zimbabwe have adopted this approach. The Lesotho Labour Code categorically states that: ‘No person under the age of 16 years shall be required or permitted to work for more than four consecutive hours without a break of at least one hour, or for more than eight hours in any one day.’²²⁶ Working children under the age of 16 must return to their homes each night.²²⁷ The Code imposes criminal sanctions on parents or guardians and employers who permit the employment of children contrary to the provisions of the Code.²²⁸

The Labour Relations Regulations of Zimbabwe also go beyond the provisions of the ILO Conventions by setting the maximum time of employment for any child at six hours a day.²²⁹ The Regulations provide that children may only work continuously for a maximum period of three hours, after which they must take a break of at least 15 minutes.²³⁰ Children are also entitled to at least one and half days off work each week, of which a minimum of 24 hours must be continuous.²³¹ The labour of the masses of children in informal (such as those in the streets) and domestic employment remains unregulated in Zimbabwe. South African laws are silent on the maximum hours of employment for children.

²²⁶ Section 125(4).

²²⁷ Except domestic workers: Article 125(5).

²²⁸ Article 129 and 127(1).

²²⁹ Regulation 4(1)(a).

²³⁰ Regulation 4(1)(b).

²³¹ Regulation 4(3).

3. Conclusion

Defining child labour ‘is no child’s play’. The legal perception of childhood and the definition of child have been informed by Western theories of child development. What has been overlooked, however, is the existence of the different conceptions of childhood in different parts of the world and in different cultures and normative systems. While all cultures seem to appreciate that children differ from adults, it is nevertheless difficult to reconcile these differences and to determine the limits they set for childhood.

The way we think and feel about the concept of child and the conceptions of childhood depend on our experiences with individual children, our understanding of cultural wisdom about what is best for children and our own personal experience as a child. What we know and care about children is revealed in the actions we take to ensure their well-being.²³²

As for the definition of child labour, there is clearly no common theme that unites the concept, even in Western states. By being used to signify so many different things, the term has become severely devalued and problematic. Moreover, the concept of child labour is now so thoroughly confused with the broader notion of child work that it is no longer used in precise definition.²³³ It is not unusual for three or four participants in a discussion about child labour to use the same term, each person having in mind a different phenomenon. (In the technical literature a single publication often will use ‘child labour’ in more than one sense.) Nevertheless, the term ‘child labour’ is so ubiquitous and habitual that it probably cannot be abolished or circumvented.²³⁴

A natural drift toward some common understanding of child labour is slowed by the fact that the variety of definitions of the phenomenon has by now been thoroughly institutionalized. Organizations base their ‘child labour’ activities upon whatever

²³² Myers (note 48).

²³³ Boyden et al (note 2) 19.

²³⁴ The distinctions properly separating ‘labour’ from ‘work’ in English do not readily translate into other languages, leading to considerable confusion. Ibid.

particular interpretation they give the term, and changing the definitions would imply the need to change policies and programmes as well, a reform not easily or quickly accomplished.²³⁵

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²³⁵ Myers (note 48).

Chapter V

CHILD DEVELOPMENT IN SOUTHERN AFRICA FROM PRE-COLONIAL TIMES TO THE PRESENT

1. Pre-colonial period

The examination of the concept of childhood in European societies revealed that the way in which children were perceived at any given time determined the kind of work they were likely to do.¹ The thesis will now turn to the social order of the indigenous societies of Southern Africa with a view to examining the development of child rearing methods over time, and how these have affected social expectations of children. For the purposes of exploring this topic we can identify three historical eras of major importance: the pre-colonial, colonial and post-colonial.

(a) The Bantu-speaking peoples

In pre-colonial times, three distinct ethnic groups occupied Southern Africa: hunter-gatherers (the San); the pastoralists (the Khoe Khoes); and those who practised both hunting and agriculture (the Bantu-speaking peoples). The former two groups are today numerically insignificant, hence the Bantu-speaking people will form the particular subject matter of this thesis.

Historians and archaeologists claim that the Bantu-speaking peoples originated from West Africa, near present-day Cameroon, around 4 000 years ago, and spread to the eastern and Southern parts of Africa in one of the largest mass movements in history.² Anthropologists classified this group more in terms of related languages and similar social characteristics rather than as an ethnic entity. Colonial scholars identified: the

¹ Refer to Chapter VI.

² The history of the Bantu, available at http://library.thinkquest.org/16645/the_people/ethnic_bantu.shtml [accessed on 6 March 2007].

Nguni,³ the Shangaan-Tsonga,⁴ the Sotho,⁵ the Tswana,⁶ the Venda⁷ and the Shona.⁸ These groups were further divided into sub-groups; for instance, the Nguni included: the Swazi,⁹ the Zulus,¹⁰ the Ndebele,¹¹ the Bhaca¹² and the Xhosa.¹³ Despite some dissimilarities between the basic groups, they nevertheless had a great degree of linguistic and cultural similarity.¹⁴

³ The term 'Nguni' is used today as a matter of convenience to embrace the many hundreds of tribes inhabiting the Eastern Cape, Natal and northern provinces of South Africa, and the state of Swaziland. It also includes offshoots in other parts of Southern Africa, for instance, the Ndebele of Matabeleland in Zimbabwe, Zambia and Angola (these are the Northern Ndebele). Duggan-Cronin *The Bantu Tribes of South Africa* 9.

⁴ The Shangaan (Vatsonga or Vitsonga) are a group of people found mainly in Southern parts of Mozambique, the Limpopo and Mpumalanga provinces in South Africa and south-eastern Zimbabwe. Niehaus (2002) 101 *African Affairs* 557-83.

⁵ The Basotho (Sotho-speaking people) have lived in Southern Africa since around the 15th century. The Basotho nation (modern Lesotho) emerged from the genius diplomacy of Moshoeshe I who gathered together disparate clans of Sotho origin that had dispersed across central Southern Africa in the early 19th century. Many Basotho people today live in South Africa as a result of their ancestors moving there to work as migrant labourers, particularly in the gold mines. 'Sesotho', available at <http://www.experiencefestival.com/sesotho> [accessed on 6 March 2007].

⁶ The Tswana are an ethnic group who migrated from East Africa to Southern Africa during the 14th century. Today there are 59 different groups in South Africa who use the overall name of Tswana. About 75 percent of Tswana people live in South Africa while only 25 percent live in Botswana. They are closely related to the Sotho (of Lesotho and South Africa). 'The Tswana', available at the Encounter South Africa website <http://www.encounter.co.za/article/94.html> [accessed on 12 March 2007].

⁷ As with most of the other peoples of South Africa, the Venda (VhaVenda) came from the Great Lakes of Central Africa. They first settled down in the Soutpansberg Mountains. Here they built their first capital, D'zata, the ruins of which can still be seen today. The Venda are generally regarded as one of the last Bantu-speaking groups to have entered the area south of the Limpopo River. 'Venda', available at http://www.krugerpark.co.za/africa_venda.html [accessed on 22 June 2007].

⁸ The Shona are a group which settled in Zimbabwe and formed a kingdom at what is today known as the Great Zimbabwe located in the south-eastern part of Zimbabwe. Today their population is around 9 million. They speak a range of related dialects whose standardised form is also known as Shona.

⁹ The Swazi broke away from the mainstream of Nguni migrants and settled in the region of the Pongolo River, absorbing the Nguni and Sotho clans in the area. By 1750 they had settled in the Hluti region in the south of the Kingdom. 'Swaziland: Historical Background' Government of Swaziland, available at <http://www.gov.sz/home.asp?pid=2366> [accessed on 30 May 2007].

¹⁰ The Zulu live mainly in KwaZulu-Natal Province, South Africa. They are renowned for being a mighty warrior nation established in the late 18th century.

¹¹ The Ndebele are a branch of the Zulus who split from King Shaka in the early 1820s. They then moved northwards in 1834 into the northern provinces of South Africa and present-day Zimbabwe. In the latter country, they battled with the Shona, eventually carving out a home now called Matabeleland that encompasses the west and south-west regions of the country. In the course of the migration, large numbers of conquered local clans and individuals were absorbed into the Ndebele nation.

¹² The Bhaca of East Griqualand occupy a portion of one of the former Transkeian territories. They immigrated into the Cape and owe their genesis to the Tshakan wars of the early 19th century. Hammond-Tooke *Bhaca Society: A People of the Transkeian Uplands South Africa* xv.

¹³ The Xhosa people settled south-eastern South Africa in the last two centuries. Duggan-Cronin (note 3) at 9.

¹⁴ Schapera (ed) *The Bantu-Speaking Tribes of South Africa* 67-8.

Like other people worldwide, a key structure in Bantu culture was the family. This group determined behaviour patterns for each individual towards other members, and moulded feelings, thoughts and conduct accordingly. From untold generations of predecessors, each individual inherited this framework, which proved itself in later times to be capable of growth and variation, sometimes giving birth to new developments and other times undergoing disintegration and decay.¹⁵

(i) Family structure

To understand any aspect of the social life of an African people (whether it be economic, political or religious), it is essential to have a thorough knowledge of their systems of household and kinship.¹⁶ The basic social and economic unit of society was the household, consisting of several clustered houses in which resided a senior male, his wife (or wives) and unmarried children. In polygamous arrangements, each wife was entitled to her own house, in which she lived and raised her children.¹⁷ A typical household usually included the married sons and their families (wives and children), and any other relatives or unrelated dependants who were attached to the head.¹⁸ The head of the household controlled its collective resources, which included the land, livestock, agricultural products and labour.

It is clear from what constituted a household that African societies attached great importance to a larger kin group. Kinship relations were (and remain so today) essentially the same in all the indigenous cultures of the three states under study.¹⁹ The ties of kinship traced through blood or established by marriage had moral, religious and often legal content. Family members were linked in strong reciprocal aid relationships, which entailed complex rights and responsibilities.

¹⁵ Ibid.

¹⁶ Radcliffe-Brown and Forde (eds) *African Systems of Kinship and Marriage* 1.

¹⁷ Grier *Invisible Hands, Child Labour and the State in Colonial Zimbabwe* 37.

¹⁸ Several homesteads may be scattered over an area of the countryside, constituting a village under the leadership of a hereditary chief or headman. Ibid.

¹⁹ Hammond-Tooke *The Bantu Speaking Peoples of Southern Africa* 177.

A newly married couple normally took up residence among the relatives of the husband. The father and his kin controlled over the children. Discipline, authority, economic duties and legal affiliations therefore played a great part in determining the behaviour of children towards their father and his kin, while affection and love were characteristic of the relations of the children with their mother and her kin. The father was undoubtedly the head of his family and had complete authority over his children, as long as they remained in his household (and even afterwards). The mother, too, commanded the obedience and respect of her children, to whose welfare she was totally devoted.²⁰

A strict hierarchy based on seniority prevailed among the children themselves, and served as a fundamental principle for structuring everyday behaviour. Hence an elder sibling always took precedence over the younger. Sisterhood and brotherhood, however, most often overruled age differences, and there was a prescribed type of behaviour for a brother towards his sister and vice versa.²¹

The same principles of kinship and seniority existed outside the circle of the nuclear family: the father formed a close knit group with his brothers and so did the mother with her sisters. These siblings were everywhere grouped under a vernacular kinship term and were distinguished as 'great' or 'little' according to their position in the sibling age hierarchy.²² To them, as a group, the same general deference and obedience were due as to the biological father and mother, mitigated somewhat for the younger ones and modified naturally by the experiences of life according to temperament and general closeness of contact.²³

²⁰ Schapera (note 14) at 71-3.

²¹ Ibid.

²² For instance the younger sister of the mother would be referred to as 'little mother', while the elder brother of the father would be referred to as 'big father'.

²³ The father's sister (who in Western terms would be called the 'aunt') was treated like the 'female father' although she was referred to by a vernacular term different to that of the father. She was deemed to know the peculiar ways and traditions of the paternal home of her brother far better than his wife. The 'female father' was thus often called in on special occasions (such as on payment of lobolo for her brother's daughters) to ensure that the family traditions and customs were maintained. A maternal uncle similarly had a part to play in the lives of his sister's children. He was the 'male mother' and usually shared the gentle protective attitude of his sister to her offspring. The formalized relationship between women and

Grandparents also played a vital role in the family structure. Patrilineal principles gave the father's relatives the greater responsibility in the upbringing and control of children, and hence tended to make the paternal grandparents stricter and more critical of the behaviour of their grandchildren, than the maternal ones.²⁴

It is apparent that in African societies, a large body of kin were drawn into contact with each other. The child knew where to seek assistance or hospitality and where it could be called upon to render assistance in case of need. The kin group was the natural category of people one turned to for economic assistance and friendly counsel in times of sadness or happiness. From birth, one was in contact with these people in an intricate web of give-and-take relationships.

(ii) The economy

Before the arrival of the Europeans, the Bantu-speaking peoples lived mostly upon the natural resources of their environment. Although economic activities in the region varied from area to area, depending on the climate, topography, soil types and the availability of ground water, they were predominantly agriculture and pastoralism.²⁵ Land was a valuable resource.²⁶ Indeed, it was the foundation of the whole social system, and a supply of adequate arable and grazing land for each household was essential. The economic unit was the household (which might have included even remote kin and strangers).²⁷ Since production was for subsistence and not for exchange, the family was

their brother's children and men and their sister's children was most pronounced among the Tonga, Venda and the Shona. In these systems of kinship a child also considered the offspring of its parent's siblings as its own 'brothers and sisters' instead of 'cousins'. A child was thus expected to behave towards its cousins on the same general principles that he/she had learnt to practise towards his/her own siblings in the nuclear family, subject to the principle of seniority. Ibid.

²⁴ Ibid.

²⁵ Areas such as the eastern parts of Southern Africa were well watered, allowing for the cultivation of crops. Its inhabitants also had the advantage of fertile soils. Progressing to the west, with the exception of the Southernmost parts of South Africa, rain became less, making the societies living there pastoralists and hunters rather than cultivators. Bennett *Customary Law in South Africa* 371.

²⁶ Bennett (note 25) at 371. Horbat-Houghton *Some Economic Problems of the Bantu in South Africa* 3.

²⁷ Hammond-Tooke *The Bantu* (note 19) at 136.

cooperative not competitive. All members of the household worked together to supply the common need.²⁸

Cultivation produced the bulk of the diet (although it did not have the same social value as herding).²⁹ The fields were, in most cases, situated within walking distance of the homesteads making it easy for the people to work on them on an almost daily basis.³⁰ The peoples' interest, however, was in livestock, particularly in cattle. Animal husbandry was highly developed among the Tswana and Nguni, whereas among the Shona, Venda, Shangaan and Tonga, disease from tsetse fly and rinderpest, warfare and unfavourable rainfall patterns greatly reduced the size of herds.³¹

Livestock were a movable reservoir of food, (although in practice, they were rarely killed except for major social and religious rites). They were a form of currency with which to pay fines, bride price (lobolo) and gifts. Containers were made from cattle horns, and cow dung was used for fuel as well as cement for plastering walls and floors. Cattle were also beasts of burden and they played an essential part in religious rites and festivals.³² Due to their many uses, cattle got the constant care and attention of every male, almost from the time a boy was old enough to walk.

People also kept goats and sheep, which provided meat and milk.³³ The hides from the livestock were processed for clothing, shields, bags, and other useful objects.³⁴ Fowls were a source of meat and eggs.

²⁸ Hobart-Houghton *Some Economic Problems of the Bantu in South Africa* at 4.

²⁹ Sorghum was the principal crop of sub-Saharan Africa followed by millet, beans and melons along with other grains and vegetables.

³⁰ The Tswana however were frequently a good distance away due to the concentration of people in large village settlements and hence has special homesteads they lived in during the agricultural season. Schapera (note 14) at 134.

³¹ Marwick *The Swazi: An Ethnographic Account of the Natives of the Swaziland Protectorate* 158.

³² The Swazi, for instance, had a cattle culture that attached enormous importance to their herds, which had a ritual value and in connection with which were numerous taboos, particularly those which had to be observed by women. *Ibid.*

³³ These animals were more readily slaughtered than cattle.

³⁴ Schapera (note 14) at 132.

These societies supplemented the meat from domesticated animals with that of wild game, which was in great abundance in Southern Africa. They hunted fairly sporadically as occasion and opportunity permitted, particularly during the months when other types of food were out of season.³⁵ Local rulers organised the hunting of large game, which was normally a cooperative event, while individuals hunted small game throughout the year. Women constantly gathered edible tubers, leaves and berries, particularly during droughts or between the sowing and harvesting periods.³⁶

Trading was on a small scale as people produced similar types of commodities, and placed little value on material possessions. Needs were simple, and few goods were of economic importance.³⁷ Any unevenness in production between groups stimulated trade rather than specialisation. In one year, a group might experience a low output of grain but have plenty of livestock, and would then use the available resource to barter for grain even though the second party to the transaction was also a pastoralist and farmer.³⁸ A further stimulus to exchange was the rewards of status and prestige that could accrue to wealthy individuals who invested surpluses in gaining wives, and forging alliances.³⁹

On the whole, the traditional African economy was redistributive, and largely limited to the bounds of a politically defined chiefdom. Any surplus produced was normally that of food.⁴⁰ There were no great differences in technology nor was knowledge of techniques unevenly distributed.⁴¹ In general, economic activities were geared to meet the needs of local subsistence.

³⁵ The skins and fur of the animals killed also provided material for clothing and certain forms of decoration; their horns are made into receptacles and musical instruments of various kinds. Their teeth and claws were used as ornaments and their fat mixed with medicines for many forms of 'magic'. Schapera (note 14) at 141.

³⁶ Bennett (note 25) at 372.

³⁷ There was nevertheless a well-established traffic in copper and iron goods although the region had very few regular traders and market places or trade routes. Bennett (note 25) at 373. Hammond-Tooke *The Bantu* (note 19) at 136.

³⁸ Hammond-Tooke *The Bantu* (note 19) at 136-7.

³⁹ *Ibid.*

⁴⁰ The subsistence activities of the individual tribesman were carried out within limitations which derived from the natural environment and from regulations imposed by men in authority. He could use only the resources available in the tribal area and his access to them was controlled chiefly by regulation. *Ibid.*

⁴¹ *Ibid.*

(iii) Division of labour

The patrilineal system worked well with settled agriculture, in which access to land was closely related to social identity, and ambitious men tried to build around themselves a large family of dependent agricultural labourers. It was, and continues in some instances, to be the goal of men to gather around them a growing lineage of descendents and dependants who acted as a corporate body for economic purposes and also as a united body in times of crisis or tension.⁴²

All able bodied members of the homestead were responsible for food production. In pre-colonial times, the family division of labour was undoubtedly less conflict ridden than it is today. Members accepted their roles without question, since society saw responsibilities as natural, supported by various myths of origin.⁴³

Family members performed most tasks collectively: for instance, simple chores such as fetching water or herding cattle were done as a group. Whenever it could not cope with the work, the family could rely on its members or neighbours to help particularly when weeding and harvesting were involved.⁴⁴ Today, work parties are still a common practice in rural areas.

In many forms of production, labour was divided along gender lines, and despite occasional variations, the allotment of duties was fundamentally the same in all families.⁴⁵ Women tended to do tasks that were compatible with child-care, were not potentially dangerous, did not require distant travel. Whichever gender used a product was, in most cases, the one that produced it. Anthropologists found correlations between female subsistence contributions and fixity of residence, occupational specialization, agricultural intensification and the processing of animal products. They noted, however,

⁴² Bourdillon *Earning a life: Working Children in Zimbabwe* 28.

⁴³ In most African societies, the division of labour along gender lines promoted a reciprocal effort. If men were farmers, women were food processors and traders. Where women and men were engaged in the same productive activity, such as farming and weaving, they produced different items. Sudarkasa (1986) 12 *Feminist Studies* 100.

⁴⁴ Bourdillon (note 42) 28.

⁴⁵ Strobel (1982) 8 *Signs: Journal of Women in Culture & Society* 109 at 110; Kielland & Tovo *Children at Work: Child Labour Practices in Africa* 6.

that in tribes where cattle and the plough were used, female participation in agriculture decreased.⁴⁶

Men were responsible for clearing the fields,⁴⁷ protecting the home, hunting and taking care of livestock, which they herded, milked and slaughtered. Women and older girls tilled the soil, planted, weeded, harvested and threshed, although men occasionally helped.⁴⁸ Females also cooked, fetched water and firewood, ground the grain, made clothes, cleaned the household and gathered wild fruit and vegetables. They were thus mainly responsible for the home, food-crop production and the care of children.⁴⁹

(b) The child

(i) Activities

The family was centred on the reproduction of children more than any other function, and no marriage was complete until a woman had borne her husband at least one child. Men were allowed to marry multiple wives to guard against childlessness.⁵⁰ Large numbers of offspring were highly valued, and family planning was antithetical to the common notion that children were a gift from God.⁵¹

Children not only provided emotional satisfaction but were also, from an early age, an economic asset. Most writers on Africa have stressed that children represented lineage continuity, and served to maintain the link between the ancestors and the living.⁵² They would eventually take charge of remembering the dead through maintenance of family shrines.

⁴⁶ Bourdillon (note 42) 28 and 36.

⁴⁷ Except for the Shangaan-Tonga where this was women's work. Ibid .

⁴⁸ For instance among the Shona, women particularly spent a greater part of their time in the fields. From early September they began to cultivate the land in preparation for the planting which occurred between late October and mid November and continued working on the land until July when the last of the harvest was gathered. Ibid.

⁴⁹ Schapera (note 14) at 149-50.

⁵⁰ Kayongo-Male & Onyango *The Sociology of the African Family* 6.

⁵¹ Traditional abstinence was intended to ensure the health of children, not to reduce their numbers. Ibid.

⁵² Rwezaura (1989) 12 *Int J of L, Polity & the Family* 253 at 256.

Socialisation, affection and religious upbringing were traditionally matters for the entire family. Children belonged to the parents as well as the kin group, and it was quite common for a child be sent to live with relatives for a period of years, without parents worrying about its welfare. The 'lending' of children was also common, usually to show kinship solidarity, and giving children up to their relatives often meant that parents were willing to share their precious gift.⁵³

Although African society viewed children as a sign of God's blessing, they had practical value in terms of their potential labour contributions.⁵⁴ From the time a child was born, to the time it was weaned (usually between one and three years old), it led a warm, secure and pampered existence. At this stage the family's attention to the infant's needs and well-being were more important than any attempts to train or discipline it.⁵⁵

From an early age, an African baby was drawn into the life of the community. At first, it went everywhere with its mother, but soon it was given partly to the care of a child nurse, typically an older sister, cousin or other girl in the household. These young carers, who ranged from the age of 5 to 10 years old, often congregated with their young charges, and the baby was thus introduced into a playgroup of contemporaries.⁵⁶ Sometimes the baby was left in the care of its grandmother. All the women in the household took an interest in the child. During this period, through its contact with the individual members of its household, the child learned to recognise the basic principles of kinship relations.⁵⁷

Weaning marked the end of infantile dependency, at which point the child began to get the rudiments of education in household duties, and in acquiring its mother tongue.⁵⁸ Although it still lived a relatively carefree and irresponsible life, the young child nevertheless became increasingly useful in chasing chickens and running errands.

⁵³ Kayongo-Male & Onyango (note 50) at 7.

⁵⁴ Evans (1994) 15 *Coordinators' Notebook* 1 at 7; Kayongo-Male & Onyango (note 50) 7.

⁵⁵ Mönnig *The Pedi* 107; Hunter *Reaction to Conquest: Effects of Contact with Europeans on the Pondo of South Africa* 24.

⁵⁶ Hammond-Tooke *Bhaca Society* (note 12) 77.

⁵⁷ Holleman *Shona Customary Law* 60.

⁵⁸ Mönnig (note 55) 107.

Society believed that, from a young age, children required the necessary knowledge to do the work expected of an adult, mainly through increasing participation in the work of the household.⁵⁹ Before they reached the age of 7 years, there was little differentiation in the duties given to children. Both sexes were given the job of caring for younger siblings while the mother worked in the fields or around the house. Thereafter, the types of tasks were gender based.⁶⁰

A child's circle of acquaintances increased as it ventured farther from the safety of the homestead in the exploration of its environment. Its peer group, watched over by older children, laid down the rules for acceptable behaviour.⁶¹

Young boys gained their first experience of herding with the less valuable stock, such as the calves, goats and sheep.⁶² The older boys of 10 years and above herded and milked the cattle, learned to handle weapons, helped to build the cattle kraals and did other work of a similar nature. While in their late teens, the older boys organised the herding as they deemed fit, which often meant that the juniors looked after the animals while the seniors engaged in competitive games or in catching rodents and birds. Adults usually maintained a non-interventionist approach with this system, unless animals damaged crops or property.⁶³

Boys who had reached puberty also began military training and took part in raids on neighbouring communities.⁶⁴ At initiation ceremonies, marking the transition from childhood to manhood, elders emphatically reminded the initiates that cattle-herding and warfare were the two dominant spheres of masculine activity.⁶⁵ Boys (particularly

⁵⁹ Bass *Child Labour* 15-30. Evans (note 54) 7-8.

⁶⁰ Swazi children were occasionally sent to deliver messages or ordered to fetch and carry. Marwick (note 31) at 149.

⁶¹ Hammond-Tooke *The Bantu* (note 19) at 219-20.

⁶² Krige *The Social Systems of the Zulus* 76.

⁶³ While this type of boys' sub-culture was found in all the Bantu tribes, it nevertheless was especially apparent among the Pedi and Xhosa tribes. Hammond-Tooke *The Bantu* (note 19) at 219-20.

⁶⁴ This was more so in the Nguni societies particularly among the Zulus and Swazi. Grier (note 17) at 34; Krige *The Social Systems of the Zulus* (note) 106-7; Kuper *An African Aristocracy: Rank Among the Swazi* 117.

⁶⁵ Schapera (note 14) at 151.

among the Shona), were also part of hunting and trading expeditions and helped to mine gold in pits and alluvial rivers.⁶⁶

The life of the girls did not change drastically in the years between weaning and puberty. Unlike the boys, girls remained for the most part tied to the household in the role of assistant housewife. In the early years, her main occupation was usually that of nursemaid. With time, she gradually learned all the other skills she needed to run her own home.⁶⁷

At first, her responsibilities were small and given according to her physical abilities. She was taught techniques which matched her strength, and she gradually learned skills such as balancing a calabash of water or a bundle of firewood, stamping or grinding corn, cooking, smearing and cleaning the huts and hoeing.⁶⁸ In summer she was involved in the preparation of land for planting. Once the first rains fell, she took part in the sowing of crops, and throughout the year was involved in horticulture. Shona girls also assisted adults in brewing beer and making baskets and cloth.⁶⁹ They started by imitating these activities in their play and were gradually drawn into actual domestic work under the supervision of their mothers, aunts and older sisters.⁷⁰ Long before reaching puberty, a girl was able to run a household. At initiation ceremonies girls were exhorted to do agriculture and housework.⁷¹

Despite the fact that the period of childhood was often marked by delinquent behaviour (particularly among the boys), which the adults occasionally found unacceptable, it was nevertheless a time during which valuable lessons for the future were learned. The boys developed an intimate and accurate knowledge of the veldt and its wildlife while the girls developed early maternal instincts.⁷²

⁶⁶ Grier (note 17) at 34.

⁶⁷ Schapera (note 14) at 151; Grier (note 17) at 34.

⁶⁸ Hammond-Tooke *The Bantu* (note 19) 222.

⁶⁹ Rwezaura (note 52) 255-6; Grier (note 17) at 34.

⁷⁰ Schapera (note 14) at 150-1.

⁷¹ *Ibid.*

⁷² Hammond-Tooke *The Bantu* (note 19) at 220-2.

Children of the Bantu-speaking societies, like others in today's developing world, were never autonomous in a social or political sense. They were always economically and socially accountable to the wider kin-group, although they had important productive responsibilities.⁷³ The Tonga children found in Mola, Zimbabwe, for example, participated from the age of 10 in the household's agricultural enterprise as farmers, livestock owners and cash earners. They also owned and controlled arable land and livestock. Boys were expected to build their own houses while girls ran the household in the absence of senior women.⁷⁴ In industrialised communities, such capacities and responsibilities would probably be acquired much later in the adult years.

From the recorded observations of the life and customs of the various Bantu-speaking peoples, it is clear that children were not merely little helpers, who were set tasks to keep them occupied and out of the way of adults. In the pre-colonial times, children, along with women, were the backbone of the labour-force.⁷⁵ So vital were they to the labour intensive economies of the region that men struggled with one another for control over them, and went so far as to recruit additional children from outside the kin group through pawning, captivity and purchase.⁷⁶ Before the advent of colonial rule, increasing the number of children within the homestead, and controlling their labour power in productive activities, was part of the core dynamic around which Shona and Ndebele societies of Zimbabwe were organised.⁷⁷

(ii) Socialisation

It is clear that African societies deemed work an inherent part of a child's socialisation process.⁷⁸ Accordingly, children were taught to accept, value and reproduce the behaviour and sentiments of the society into which they were born. The specific aims

⁷³ Reynolds *Dance Civet Cat: Child Labour in the Zambezi Valley* xxvii.

⁷⁴ *Ibid.*

⁷⁵ Strobel (note 45) 11.

⁷⁶ Grier (note 17) 34.

⁷⁷ *Ibid.*

⁷⁸ Socialisation is the process through which children learn the culture, norms and values of their particular society, and learn to become the type of adult desired by and acceptable to society. In this light, work is a positive facet in a child's development, acceptable to the conception of childhood as a time of learning. Abernethie (1998) 6 *Int. J. of Children's Rts.* 81 at 87; Fyfe *Child Labour* 4.

and methods of the process, however, varied depending on the nature and needs of that society. Since traditional societies of the region were homogeneous, conservative and technologically unprogressive, child rearing and socialisation took very different forms from those found in the West.

Unlike the Western system of education, that of pre-colonial Africa was conservative and conformist, aimed at accepting the traditional way of life. The aims and the methods of education showed fundamental differences. Western socialisation was (and still is) characterised by an extended period spent in vocational training and the development of skills in formal educational institutions. By contrast, children in Southern Africa acquired technical training by imitation of a limited range of skills practised by adults.⁷⁹ Where it existed, the short period of formal education (such as in initiation schools), was concerned with training in social behaviour.⁸⁰

The socialisation process was simplified by the fact that status was ascribed rather than achieved. Individuals could be labelled at birth in terms of the status and roles they were likely to fulfil by virtue of their gender, position in the family and parent's rank. The socialisation to which the individual was subsequently exposed was goal oriented in terms of these predicted roles.⁸¹ Besides being trained in production techniques, an African child was also taught good manners, and encouraged to develop a character and good personality.⁸² Children were thus socialised and brought up to respect parents and others in positions of authority, to be courteous and generous to strangers, to display moderation and control over their instincts and emotions, and, more generally, to be hard-working, trustworthy, sincere and kind to others.⁸³

The most striking characteristic of this process of socialisation in the African family was the large number of agents involved, as opposed to Western family systems,

⁷⁹ A traditional society considers child work as an important component of education especially in the household based production system and various apprenticeship arrangements. Rodgers & Standing (eds) *Child Work, Poverty and Underdevelopment* 33.

⁸⁰ Hammond-Tooke *The Bantu* (note 19) 211.

⁸¹ Ibid.

⁸² Rwezaura (note 52) 256.

⁸³ Ibid.

where only the parents dealt with the socialisation of their own children. Traditionally (and still today in rural areas), a child was socialised by the whole community, in the sense that it could be taught, corrected or disciplined by anyone older or of the same age.⁸⁴ In Western society, home, school, church and peer groups may all have very different ideas of what constitutes suitable behaviour, but, in the pre-colonial societies considered here, all the institutions and individuals concerned with socialisation worked together within a homogeneous framework to produce the ideal community member.⁸⁵

Children were not handed over to the specially trained few. And the immediate family was not the only model for behaviour; rather it was the whole community. Both groups were interested in children's progress and were expected to teach them, praise or punish their efforts. Presented with a single set of beliefs, values and behaviour patterns, the acceptance of which ensured the advantages of recognition and status in the adult world, there were few problems of choice or rebellion. The individual generally conformed without question.⁸⁶

2. Colonial occupation

(a) Arrival of missionaries and colonists

Prior to the 19th century, the first European to be seen in most parts of the continent was the missionary, who had come to 'spread the word', the trader or an explorer, with no object in view except discovery and adventure. While the effect of these visitors on local societies was certainly noticeable, it was not far-reaching, as they initially had no desire to stay permanently or to possess land.⁸⁷

⁸⁴ Kayongo-Male and Onyango (note 50) 19-20.

⁸⁵ Kielland & Tovo (note 45) 4-7.

⁸⁶ Hammond-Tooke *The Bantu* (note 19) 212.

⁸⁷ Marquard & Standing *The Southern Bantu* 71-2.

During the 19th century, however, missionary societies began to play a more visible role in the ‘civilisation’ of the Southern African region.⁸⁸ They opened up vast tracts of new country, explored and ‘discovered’ the cultures of Bantu-speaking peoples. The Xhosa and the Tswana were the first groups among whom the missionaries settled.⁸⁹ Other missionaries ventured further north, and, before the turn of the century, work among the Ndebele and Shona in Zimbabwe had begun.⁹⁰

Although the Christian missionaries found the old generation of Africans very difficult to evangelise, a sizeable community of converts began to grow, mainly as a result of the introduction of Western education and, to a lesser extent, the translation of the scriptures and related literature into the vernacular languages.⁹¹ Ironically, changes brought by missionaries at a practical and economic level did more to further their spiritual cause than any amount of moralistic sermonising from the pulpit. Thus local acceptance of early missionaries in Southern Africa was based more on their introduction of material and technological innovations than upon their Christian teachings.⁹²

The political settlement of the region in 1652, began with the arrival of the Dutch commander, Jan van Riebeeck, and his 90 men at the Cape of Good Hope. They had been instructed by the Dutch East India Company to build a fort and develop a vegetable

⁸⁸ In 1560 the first missionary to Southern Africa landed at Sofala in Mozambique. In 1737, two hundred years later the next missionary arrived at the Cape of Good Hope to establish a mission station on behalf of the Moravian Mission Society. Ibid.

⁸⁹ In 1821, Robert Moffat founded the London Missionary Society (LMS) among the Tswana after several intermittent attempts by other missionaries. The LMS, the Methodists (Wesleyans) and the Glasgow Missionary Society (Presbyterian) started work among the Xhosa around the same time. By the end of the 1820s, the Moravians and the Berlin Missionary Society (Lutheran) and the Methodists missionaries had set up stations among the other Nguni peoples in what later became Ciskei and Transkei. Around the 1840s, Paris Evangelical Missionary Society (Reformed) and the American Board of Commissioners for Foreign Missions respectively, established churches among the South Sotho in what is now Lesotho, and among certain Zulu. Marquard and Standing (note 87) 71-2; Hammond-Tooke *The Bantu* (note 19) 415-6.

⁹⁰ The London Missionary Society opened the first station at Inyati among the Northern Ndebele. They opened a second one at Hope Fountain. Among the Shona the first missionaries to arrive and set up camp were the Jesuits who had accompanied the Pioneer column, which was the spearhead of white settlers who were being supported by the British South African Company.

⁹¹ Zvobgo *A History of Christian Missions in Zimbabwe 1890-1939* 149; Marquard and Standing (note 87) 166.

⁹² Zvobgo (note 91) 149.

garden for the benefit of the scurvy-ridden crews of passing ships on the Eastern trade route.⁹³

The British were the next wave of Europeans to settle in Southern Africa. In 1795, following the Napoleonic wars, the Dutch agreed to British occupation of the Cape as a guarantee against French colonisation.⁹⁴

In the early years, settler numbers increased slowly. In 1820, however, encouraged by grants of land, 5 000 British settlers descended *en masse* on the Cape. The British government's decision to emancipate the slaves led to the Dutch leaving the Cape in protest.⁹⁵ One branch settled in what is today known as Kwa-Zulu Natal where they overthrew the Zulu. In 1943 the British annexed this area which became the Crown colony of Natal.⁹⁶

Between 1867 and 1868, the Dutch trekkers, attacked and overran almost all the territory occupied by the Sotho. King, Moshoeshoe I appealed to the British for protection and in March 1868, what was left of Sotho territory country became a British protectorate. Under the terms of the agreement ending the war the present day boundaries of the country of Lesotho were established.⁹⁷ Another group of Dutch trekkers proceeded north, crossed the Vaal River and established a number of smaller republics in what became known as Transvaal.⁹⁸

⁹³ Fenwick & Rosenhain *South Africa from Settlement to Self Determination* 21.

⁹⁴ The British returned the colony to the Dutch in 1803 after the Treaty of Amiens but remained there until the territory permanently ceded to the British in 1814. *Ibid.*

⁹⁵ Iliffe (1999) 52 *Economic History Rev* 87 at 88.

⁹⁶ The two groups were both pastoralists practising agriculture on a lesser scale were soon engaged in warfare over land. The Xhosa found themselves up against the gun and the result was the breaking up their territory some of which was permanently filled by European settlers. Marquard and Standing (note 87) 71-72. See also Schapera (note 14) 333; Fenwick & Rosenhain (note 93) 21.

⁹⁷ The Sotho were forced to cede to the Afrikaans-speaking peoples vast amounts of good farming land situated in what is now the Orange Free State. The latter, meanwhile, persevered with their search for land and freedom, ultimately establishing themselves in various Republics, for instance, the Transvaal or South African Republic and the Orange Free State.

⁹⁸ Here they encountered the Ndebele who they pushed further north into what is today Zimbabwe. What was the territory of Transvaal now forms the provinces of Gauteng, Limpopo and Mpumalanga and part of the North West Province.

Meanwhile mining and industrial activity and British colonial ambitions demanded more land. Hence Cecil John Rhodes, Prime Minister of the Cape, obtained from the Ndebele King, Lobengula, a concession for his British South African Company to mine gold in the territory north of the Limpopo River (which today is Zimbabwe). Soon thereafter, a strong expedition entered the area and occupied the land of the Shona-speaking peoples. Because most Europeans intended to mine, not to farm, there was not much demand for land (although large areas were bought by companies and speculators). Conflict with the Ndebele nevertheless broke out resulting in a war in which the latter were defeated.⁹⁹

By the beginning of the 19th century, all of Southern Africa south of the Zambezi River had fallen under European rule.¹⁰⁰ The colonial powers established a powerful state apparatus which prevailed over various indigenous political systems and social groups within their jurisdictions.¹⁰¹

(b) Colonial impact

The spread of Western economic, social and political patterns affected the indigenous peoples of Africa in many ways. Among the most readily observable was the differentiation of the people into new social classes, which were economic, religious or political.¹⁰²

(i) Economic changes

The economy was among the first aspects of indigenous culture to be affected by contact with Europeans. The economies of African societies, which, for many generations, had been autonomous and oriented to meet subsistence needs, became part of the wider political and economic order of the colonial state. Through a range of administrative and legal techniques, such as land grabbing, obligatory sale of livestock, forced labour,

⁹⁹ Marquard and Standing (note 87) 185.

¹⁰⁰ The British took over most of Southern Africa, although Germany and Portugal occupied Namibia and Mozambique, respectively. Kuper (1964) 2 *J of Modern African Studies* 149 at 151.

¹⁰¹ Alston (ed) *The Best Interests of the Child: Reconciling Culture and Human Rights* 92.

¹⁰² Missiological Institute *Migrant Labour and Church Involvement* 15.

enforced cultivation of cash crops and compulsory education, the colonial state created a need for European money.¹⁰³

The settlers introduced new needs which the traditional methods of production and exchange could not meet. African peoples found it impossible to resist the competing claims of an exchange system and the cash economy. For instance, the Shona potter was no longer needed where the trader had tin-ware for sale. The traditional system for storing food could not compete with the new practice of sale to the Europeans for cash or vouchers (which represented the right to purchase goods).¹⁰⁴

When the colonial administration demanded tax payments in monetary form, it further disrupted the old system of production. In both Zimbabwe and South Africa, hut, land and marketing taxes were imposed. The growth of commercial farming drastically altered land rights, which had generally been vested in the family or community and were therefore collective in nature. The growing market for agricultural products and the expansion of white farmlands led to problems of land shortage.¹⁰⁵

The indigenous agricultural and pastoral economy, which had been directed mainly towards self-subsistence, was subordinated to the demands of the international cash economy, based on mining and manufacture.¹⁰⁶ The need for earning tax money, the unavailability of arable land and the reluctance to sell cattle drove many men out to work for wages in mines or industries or on farms away from the tribal home.¹⁰⁷

(ii) The labour migration

By the 20th century, migrant labour became the only viable way for growing numbers of people to pay tax and satisfy new consumer needs. The change to migrant labour can be divided into three phases. In the first phase, the economy of white settlers was almost

¹⁰³ Alston (note 101) 92.

¹⁰⁴ Grier (note 17) 1.

¹⁰⁵ Ibid.

¹⁰⁶ Alston (note 101) 92.

¹⁰⁷ Ibid.

wholly based upon farming.¹⁰⁸ In the vicinity of the ports, farming was moderately intensive, but, in the interior, it was cattle and sheep ranching, which had much in common with the traditional economy. A need for labour on these farms arose, and Africans, having been stripped of most of their land, thus moved to the farms to provide it in return for a place to stay. Thus began a labour tenancy system.¹⁰⁹

The second phase came with the opening of the mining industries in South Africa and later Zimbabwe. Although large-scale mining became a major industry, it did not replace farming, but, instead, stimulated and transformed it to make farming it more market-oriented to feed the large populations in the mining areas.¹¹⁰ Diamond and gold mining was labour-intensive, and within a few years of mineral discoveries, Kimberly and the Witwatersrand had attracted the largest concentrations of people in Southern Africa. Africans provided unskilled labour, while immigrants from Europe and America supplied the skilled workers.¹¹¹

Africans initially went to work on the mines their own volition. Soon a labour shortage loomed, however, causing private employers and the colonial administration to look further afield for potential workers. Various individuals began recruiting labour and offering gifts to chiefs to enlist their support. The mining companies then took a hand and introduced forced labour.¹¹²

From the 1860s to the First World War, farming and mining were the main generators of income and employers of labour.¹¹³ By the 1920s, however, the

¹⁰⁸ Trapido (1978) 5 *J of Southern African Studies* 26-30.

¹⁰⁹ Crush (1985) 11 *J of Southern African Studies* 235-57; Lucas (1987) 77 *American Economic Rev* 313 at 320.

¹¹⁰ Also see Stent (1948) 18 *Africa: J of the Int African Institute* 161-163.

¹¹¹ Berg (1965) 13 *Economic Development and Cultural Change* 394 at 395; Fenwick & Rosenhain (note 93) 33-4.

¹¹² A newspaper editorial of March 1873, on the subject of local labour, among other things urged missionaries to: '[s]ingle out all the unemployed young men they know of, at their various stations, and talk over the matter with them individually...The missionary's work is not done when the work of the pulpit and the duties of religious instruction are over. He must follow these up, by seeing how the young men growing up under his care, set themselves to the first duty of practical Christianity - which is to earn an honest livelihood'. Marquard and Standing (note 87) 71-2.

¹¹³ Hammond-Tooke *The Bantu* (note 19) 397-8.

manufacturing industry had developed to such an extent that it began to rival them as the third basic sector of the economy. In this third phase, manufacturing grew in absolute and relative importance to become the biggest generator of income and provider of wage employment for people of all races. Lesotho and Zimbabwe became useful supply pools of labour, not only for the mines, but also for agriculture and the manufacturing industry, all of which were located in the growing urban areas.¹¹⁴

Employment accelerated the economic incorporation of the African peoples into the modern cash economy. It offered those who were successful in making the transition a standard of living much better than the majority could have obtained in their traditional economies.¹¹⁵ Households soon became dependent upon the market for their recurrent needs.

(iii) Fragmentation of the family

The transition from a subsistence to a modern industrial economy inevitably led to a different way of life, with novel forms of work and play, new perspectives, changing values and goals and fresh forms of interpersonal relations. Western civilisation is always associated with modernisation and the resulting social, psychological and economic changes. The transition was from a relatively timeless, static world to the rapidly changing unstable environment of the town or city.¹¹⁶

Migrant labour caused the most obvious and far-reaching disruption to the African social unit.¹¹⁷ Men were often withdrawn from their rural homes for various

¹¹⁴ In 1973, 79 percent of black workers in South African mines were from the surrounding states. Most of them settled permanently in the country. Between 1936 and 1956, as many as 140 000 adult males from Lesotho migrated to South Africa. Some parts of Africa, especially those neighbouring mining towns and large commercial farming regions lost many economically active males who were drawn into wage employment. As early as 1943, almost half of the young Tswana men (from Botswana) between the ages of 15 and 44 years were employed away from their homes, and 28 percent of all adult Tswana males were absent working in South Africa. Cobbe (1982) 16 *International Migration Rev* 837 at 839.

¹¹⁵ Ibid.

¹¹⁶ Solien de Gonzalez (1961) 63 *American Anthropologist* 1264-80.

¹¹⁷ Provisions for the contractual binding of labourers to employers had already been in force in the Cape since the early years of the 19th but these were largely directed at the Khoi Khoi whose numbers in the region were sufficient numbers to satisfy the needs of the colonial labour market. Marquard and Standing (note 87) 71-2.

lengths of time, and prolonged absences meant changes in the organisation of the family work. As for the men, migration to the towns introduced a new life and an environment wholly different from anything they had previously experienced. They were forced to work under the discipline imposed by the use of power-driven, precision machinery and the dictates of the clock.¹¹⁸

There were several categories of migratory wage labour, whose effects on family organisation varied according to the period of absence: seasonal, temporary or non-seasonal, recurrent and permanent. Seasonal migrants were those who travelled from their traditional place of residence once a year, either as complete or partial families or as single adult individuals, to areas in which great numbers of workers were needed temporarily. With the introduction of commercial farming, local peoples engaged in occupations such as planting and harvesting or processing raw food items on the white-owned farms. This type of migration had little effect on the organisation of the family except that the source of income was now outside the family structure and production was for the world market.¹¹⁹

The temporary or non-seasonal migration category occurred in all parts of Africa. Migrants rarely travelled in family groups: in most cases only young unmarried adults moved.¹²⁰ People migrated mainly to earn enough to pay off the land and hut taxes required by the colonial administration. Young people might wish to see something of the world outside their community, learn about Western ways, earn a certain amount of cash with which to purchase goods (especially those valued by their own cultures) or to gain prestige among their fellows.

This type of migration created an additional source of wealth and brought back new wants to the village. Africans therefore constantly needed money in increasing amounts to satisfy their demands. This new economic system undermined the traditional

¹¹⁸ There he also learned the elements of modern hygiene and first aid. He interacted with fellow Africans from different societies speaking different languages. *Ibid.*

¹¹⁹ Solien de Gonzalez (note 116) 1265.

¹²⁰ Schapera (note 14) 367; Solien de Gonzalez (note 116) 1266.

means for gaining prestige (for instance hunting prowess or having a large herd of cattle). Young men returning home with cash gained status out of proportion to their age or experience within their own culture, thus interfering with the traditional authority structure, which had previously placed responsibility in the hands of the senior men. This type of migratory pattern diminished the available supply of labour for maintaining the traditional way of life, and placed a heavier burden on the older men, women and, in most cases, younger children.¹²¹

Recurrent migration was merely an intensification of temporary or non-seasonal migration. Men made irregular journeys of varying lengths of time to obtain wage labour throughout their productive years. As most migrants were married, wives and children were left behind in the villages. The men returned at frequent intervals throughout the year or were absent for several years before returning home. The regularity of their return hinged upon several factors including the distance they had to travel to obtain work, the amount of job security offered and the amount of economic returns. This type of migration restructured the family unit, that traditionally had depended on a male head controlling the family economy. Similarly, it changed the traditional divisions of labour: those remaining in the village took on more work and new roles. Male heads nevertheless were able to exercise their authority during the short period that they returned home.¹²²

The category of permanent removal was when people moved from their home areas to other locations, which offered more opportunities for employment and in which they settled more or less permanently. Sometimes such workers went alone (mostly young unmarried men) or were accompanied by their wives and children.¹²³ In the latter instances, the nuclear family operated without the traditional support of the extended family. Marriages, child rearing and socialisation, which were the primary concerns of a

¹²¹ This often resulted in the resale of items formerly bought by the money from this migratory labour. Schapera (note 14) 367.

¹²² The period of absence increased with time until some men never returned to their homes. Those who would have wanted to return home regularly were not granted an opportunity of bringing their wives to the place of work or given time off to do so. Solien de Gonzalez (note 116) 1269.

¹²³ While some got jobs in industry, some were drawn onto the streets of urban areas, where they engaged in illicit activities. Ibid.

larger kin group, were increasingly arranged by the couples themselves. In such cases, families lacked the traditional sanctions, and the kinsmen of each spouse were less effective in helping maintain the stability of marital unions.¹²⁴

In many instances, married men went alone and started 'new families' in the towns, due to the increasingly long periods they had to live there. Some never returned because going back was taking a step backward in their lives. In the reserves, the number of female headed households with dependent children therefore increased.

The pull to the urban centres, though regulated by colonial authorities, also attracted some women, who moved into mining towns in search of jobs and an independent income.¹²⁵ In Zimbabwe, the Native Authority forbade women from leaving their tribal areas except in the company of their husbands or with passes.¹²⁶ Children under the age of 16 needed permission to leave, while those above that age could migrate as long as they had paid tax for one year while at home.¹²⁷

When women began to enter the labour market they left their offspring with their elderly parents. They first went to the white-owned farms surrounding the reserves where they performed duties they were accustomed to doing in the home. The great majority, however, went to the towns where they often engaged in new types of work. A fair number entered into domestic service, which, although conflicting with all traditional ideas about the proper division of labour between sexes, appealed to them as being light work, comparatively well paying and providing them with plenty of food.¹²⁸

As individuals began to produce for the market, kinship ties weakened and the traditional way of life began to disintegrate.¹²⁹ Communal solidarity, which was the key to traditional methods of making and sharing wealth, was lessened. Previously, a man

¹²⁴ Ibid.

¹²⁵ Alston (note 101) 92.

¹²⁶ Breastfeeding children could accompany a mother who had that authority.

¹²⁷ Colson and Gluckman *Seven Tribes of Central Africa* 245.

¹²⁸ Schapera (note 14) 368.

¹²⁹ Hammond-Tooke *The Bantu* (note 19) 406.

had worked in a traditional set up, not only for the benefit of his immediate family but also for the relations living with him in the household. When he went to work in urban areas, however, the fruits of his labour were for himself, his wife and children.¹³⁰

(c) Impact of colonisation on children

(i) Introduction of education

Western education was undoubtedly the most potent agency in the evangelisation of the African population. The initial objective of missionary education was religious, but, for Africans to understand the Bible and church instructions, they first had to be literate.¹³¹ Such a policy was difficult to put into effect unless people could be gathered together for a sustained period of instruction. Missionaries sought to achieve this by establishing stations where they could accommodate their pupils in complete or partial isolation from their traditional environment.

The mission stations were therefore instrumental in removing Christian converts from the continuous influence of their traditional beliefs and social controls, and likewise protecting them from the consequences of social disapproval which attended defection from the traditional society. The missionary correctly foresaw that new beliefs could be more easily upheld by converts who were not the daily object of tribal disapproval and hostility.¹³² The stations were intended to be islands of salvation with a defensive standing over and against the world.¹³³ Schools therefore became auxiliary agents in the evangelisation of Africa.¹³⁴

¹³⁰ Schapera (note 14) 170-1.

¹³¹ The ultimate aim of the missionary societies was for literate church members to go out and evangelise to their own people.

¹³² Converts to Christianity were called upon to give up customs, which often meant that they had to renounce their community and family obligations. Among the cultures of Southern Africa, it was customary for a man to take over the wife and children of a brother who died. This was a very sound institution according to Bantu-speaking people's social ideas as it provided a means of caring for widows and orphans. According to Christian ideas, however, a man may have only one wife. The mission stations hence became powerful sources of social disruption and change as they interfered with the carefully balanced system of reciprocal duties and rights. Marquard and Standing (note 87) 167.

¹³³ Missiology Institute 52.

¹³⁴ Zvobgo (note 91) 149.

In their program to provide Western education, the missionaries turned their energies to children. Fr Richard Sykes of the Jesuit Mission in Zimbabwe, for example, wrote, in January 1902, that ‘the lessons of our holy religion can best sink into the minds of the natives and influence their hearts and their actions before ingrained prejudices and vicious habits have acquired a permanent hold’.¹³⁵

Initially, parents were suspicious of schools, and children were unwilling to attend. As the material advantages of Western education became evident, however, there was a veritable rush on the part of the children to be enrolled. In addition to religious instruction, missionary education was broadened to include more academic matters. It was the latter which charmed both the parents and the pupils. More and more Africans began to regard formal education as the escape route from rural poverty and manual labour, and the demand for it correspondingly increased.

Boys sought literacy with the hope of finding employment as messengers, teachers, policemen, clerks in government offices or missionaries in outlying villages. African men in these positions enjoyed prestige, higher incomes and had certain respectability among fellow Africans, when compared to their illiterate and unskilled counterparts. Female adolescents fled to mission stations to escape not only their workload in the homestead, but pledging and other forms of forced marriage. Young women became teachers, nuns, nurses and seamstresses, and were consequently valued as potential wives for educated men.¹³⁶ This demand for education compelled missionaries to improve academic standards.¹³⁷

Soon thereafter, it became missionary policy in Southern Africa, to combine or precede religious teaching with instruction in the ‘useful arts’. Much time was therefore

¹³⁵ Ibid.

¹³⁶ Schmidt *Peasants, Trades and Wives: Shona Women in the History of Zimbabwe 1890-1939* 122-54; Grier (note 17) 164.

¹³⁷ The training of African teachers was another important development during this period. In 1841 the first of these institutions was founded by the Paris Missionary Society at Morija in Lesotho. Teachers’ training colleges were also opened in Zimbabwe. The local African teachers created a new class of specialists who on account of their training often played a larger part in public life than their age or social origins. Schapera (note 14) 170-1.

devoted, not only to Christian philosophy, but also to teaching the rudiments of Western handicrafts.¹³⁸ Another important development during this period was the opening of boarding schools at major mission centres in Southern Africa followed by the launching of junior secondary school education.

In the early years of colonisation, it was quite apparent that the educational system had been designed to ensure that Africans in both childhood and adulthood would be at the service of settlers.¹³⁹ The majority of children enjoyed at most two years of school life. Hence, whatever value they got from it, did not ensure the retention of any degree of literacy, even in the vernacular. The overwhelming majority of children who were in school at any one time were thus concentrated in the lowest levels of the system where the work was menial and taxing.¹⁴⁰ This limited their employment choices and opportunities.¹⁴¹

Nevertheless, the introduction of formal education considerably changed the lives of African children. Instead of spending their days engaged in domestic, agricultural and pastoral work and play, they attended to academic pursuits. With the opening of boarding schools, the time they spent in school increased from a couple of hours, to days and months. Teachers and school peers joined the family in the ranks of agents of socialisation.

The indigenous peoples soon realised that Western forms of socialisation found in schools was not always in tandem with the traditional type. African patriarchs saw schooling as a threat to their authority and control. African women also stood to lose

¹³⁸ In Zimbabwe, teaching handicrafts also became one of the conditions for earning government grants. Zvobgo (note 91) 149.

¹³⁹ It was evident from the financial allocations for African education and the resulting shortages of schools in relationship to the demand and the level of education available to all.

¹⁴⁰ Grimston *A Survey of Native Educational Development, Southern Rhodesia 1937* Chapter 1 para 22 and Chapter 3 para 80; Grier (note 17) 166-167.

¹⁴¹ During and particularly after World War II the situation improved owing to the changing and increasing needs of the economy. The independence of Lesotho and Zimbabwe in 1966 and 1980 respectively brought about significant changes in the quality and levels of education and hence turned out more manpower trained in the skills that the industry needed and created avenues for black advancement. Zvobgo (note 91) 45-55; Grier (note 17) 167.

access to their children's labour in farming and other homestead tasks. However, as old sources of patriarchal accumulation (cattle and land) diminished, parents came to see their children's education as an investment in a new form of accumulation: higher skills and wages, and perhaps even salaried, white collar employment. Educated daughters also brought higher bride-prices. This represented a shift in the traditional construction of childhood as a source of labour in the homestead to a source of economic security and family prestige.¹⁴²

(ii) Child labour

An assumption erroneously held by most historians was that the wage labour force consisted only of adult male Africans variously defined as above the age of 14. From the earliest years of colonial rule in most Southern African countries, however, children of both sexes were an integral part of the paid and unpaid labour force. Their input became the focus not only of the senior men of their families, but also of white farmers, mine owners, town dwellers, missionaries and the state.¹⁴³

Each of these groups sought to exercise control over children's labour and to construct (or reconstruct) a childhood that suited their particular needs. In the three countries, senior African men aimed at intensifying the labour of children and other junior members of the homestead in order to expand the production and sale of grains, vegetables, stock and beer. They expected to control and benefit from the earnings of boys and male adolescents who left home to work for wages. For their own part, mine owners and commercial farmer met the growing need for cheap labour in part by engaging migrant male children, while white housewives and single men in the towns and mining compounds recruited them for domestic labour.¹⁴⁴

In Zimbabwe, men were often accompanied by boys as young as 8 years old when they went out to search for work in the commercial farms and or crossed the borders to the South African mining centres. Some young boys left home to search for paid

¹⁴² Grier (note 17) 165.

¹⁴³ Grier (note 17) 3 and 19.

¹⁴⁴ Ibid.

employment whether or not they had parental sanction. When migrant boys could not find work in the formal or wage economy, they joined thousands of other children who were already at work in the growing informal economy of the urban areas. In the towns girls helped to brew beer, sell vegetables and cook food. Indeed, so pervasive was the employment of young people in colonial Zimbabwe that a 1924 'Guide to Rhodesia for the use of settlers and tourists' brochure informed prospective settlers and tourists, in a matter of fact way that 'wages are low and the natives begin to be useful from childhood'.¹⁴⁵

In the towns, children worked for whites, Asians and Africans. Mining companies hired children to do domestic work for large numbers of adult workers living in company-owned compounds. In South Africa, they also worked on the docks, and above and below the ground in the mines, where their small size was an advantage in narrow tunnels. In 1902, a recruiting organisation, the Witwatersrand Native Labour Association, officially employed more than 2 000 male children and adolescents in South African mining operations.¹⁴⁶

So great was the demand for child workers that professional recruiters in South Africa gathered large numbers of young people and transported them over great distances by rail and road for distribution to prospective employers. Recruiters made advances to parents in cash and cattle in exchange for their children, who were in turn given over to employers in exchange for capitation fees and then bound to contracts. Colonial governments themselves soon became involved directly and indirectly in the recruitment and control of child labour. Master and servant laws in the British colonies empowered African parents to bind their children under the age of 16 to labour contracts.¹⁴⁷

¹⁴⁵ Ibid.

¹⁴⁶ Ibid.

¹⁴⁷ Masters and Servants Act of 1856 (Cape). The Act was the culmination of a series of laws designed to regulate relations between employers and employees during the 18th and 19th centuries, although it was heavily biased in favour of employers. It was instituted in 1823 in Great Britain and described its purpose as 'for the better regulations of servants, labourers and work people'. This law greatly influenced labour relations and employment law in Canada (1847), Australia (1845), New Zealand (1856) and South Africa (1856). In reality the law was designed to discipline employees and repress the 'combination' of workers in trade unions in British colonies. Grier (note 17) 20-1.

Although many employers paid children on the basis of their age and capability, it is striking how common the practice was of paying children one-half the wage rates of adults, even when they were hired to do the same type and amount of work as adults.

Adolescents, particularly males, also migrated to the towns of Southern Africa to take advantage of the spaces opened up by the rapid growth of urban areas. They also went to the towns to escape: conflicts with patriarchal authority; exploitation of their labour on farms; overcrowded reserves; the intensification of the work load in herding (as the numbers of cattle increased on the reserves); drought; economic depression and arranged marriages. Youths also moved to the urban areas to earn money for school fees or clothing.¹⁴⁸

White farmers and farming companies were the most heavily dependent upon child and female labour, which they incorporated through the widespread use of labour tenancies. In this system, the tenant was the male head of the family, but in practice the whole family was involved in working for the landlord. Thus wives and children helped the male heads in the fulfilment of tenancy obligations. In this way, children became vital economic assets for their family.¹⁴⁹ Those between the ages of 5 and 16 were involved in the production of: tea, coffee, tobacco, cotton, maize (in Zimbabwe); and grapes, sugar cane, citrus fruits and vegetables (in South Africa). They herded cattle and small animals on dairy and cattle farms.¹⁵⁰ It is a cruel irony of colonialism that white settlers had no hesitation in exploiting the labour of African children, while, in Britain, legislation was being passed to curb the very same evil.

In Zimbabwe and South Africa, older and younger children of both sexes eventually began to flee the work, harsh punishment and the appropriation of their labour on tenant farms by landlords and fathers.¹⁵¹ In 1932, the Native Service Contract Act was passed to 'curb flight' in South Africa. This Act extended the power of fathers to

¹⁴⁸ Ibid.

¹⁴⁹ Solien de Gonzalez (note 116) 1254-64.

¹⁵⁰ Ibid.

¹⁵¹ Grier (note 17) 19-20.

contract for their children from 16 to 18 years of age, and empowered landlords to evict labour tenant families if even one member of the family broke the contract by deserting. Labour tenants were prevented from acquiring 'seek work' passes without the written permission of the landlord, and whipping was introduced for contravening the Masters and Servants Act of 1856. (An attempt, though unsuccessful, was made to legalize the whipping of juveniles by landlords themselves.)¹⁵² As labour tenancies were phased out in the 1930s, children and adolescents worked at task or piece-work on white-owned farms as daily migrants from nearby reserves, or as members of resident wage-earning farm labour families.¹⁵³

Mission schools themselves were also active in exploiting child labour. Missionaries were always short of funds, and thus were constantly looking for ways to make their operations self-sufficient. They could not afford to hire staff, except at their central stations, to teach industrial skills such as carpentry, masonry, leather working and sewing. Unpaid student labour was thus an integral part of the school day and the financial sustainability of the mission. Children constructed buildings and roads, cooked, cleaned and sewed.¹⁵⁴

¹⁵² Ibid.

¹⁵³ To take one example: two retired British tea planters from India had earlier begun to experiment with tea growing in the Eastern Highlands of Zimbabwe.¹⁵³ These experiments were so successful that they embarked on commercial tea growing. This perennial crop required labour all year round, unlike seasonal crops. Based on their experience in India, small hands were the best to do the main work of plucking the tender tea leaves. The solution to their labour problem took the form of a boarding school for African children and adolescents. Students worked on the tea estate for the first half of the day and attended school for the remaining part of the day, just like those in mission schools. The company went on to buy three more estates and again built boarding schools whose students provided three-quarters of their work force. The Native Development Act which had been enacted earlier encouraged farmers and non-mission bodies to establish schools on their farms by making their institutions eligible for government aid. All the children enrolled in such farms were there on a 'learn while you earn' basis. Grier (note 17) 1 and 174-7.

¹⁵⁴ A closer look at the early mission system of unpaid student labour in Zimbabwe provides a glimpse into how, from the beginning, labour was integral to the way in which the missionaries (and settlers) conceptualised African childhood. The Jesuits developed two successful stations, on which they used unpaid adult, child, and adolescent labour. The adult labour was that of the tenants residing on Jesuit lands. As a condition of occupancy, under the landlord-tenant agreements of Proclamation 1896, they were required to work for the landlord for a certain number of months (usually three) each year. The child labour was that of the tenants' children who were compelled to attend the mission schools. Students also came in from other areas, paying fees in cattle and cash but also unpaid labour. Challiss noted that during the 1890s, '[a]s land was granted to missionaries by the BSACo ... missionaries rather naturally wished to cut their costs to a minimum by using pupils as labourers in fulfilment of this obligation'. Consequently where industrial training was concerned, purely educational or civilizing considerations were not the only factors involved. A few missionaries were known to enrich themselves personally. Grier (note 17) 165.

Farm schools and compulsory unpaid labour at mission schools presented African children with a 'catch-22' situation. They went to school with the hope of escaping unskilled and low waged manual work when they grew up, but they had to perform such work at school in order to get an education. As the education they expected did not meet their expectations, and the work proved too much to bear, adolescents often ran away from the farms and mission schools and either returned home or joined the ranks of youngsters trekking to the urban areas in search for work. While some found work, others ended up spending their days roaming the streets in search for a livelihood. This created a new breed of children which was to be a constant concern to state administrations to this day: street kids, prostitutes and felons.¹⁵⁵

3. Post-colonial period

Although this chapter is divided into pre-colonial, colonial and post-colonial periods, it is, in fact, difficult to discern any clear differences between the colonial and post colonial periods. Moreover, it is difficult to make generalized comments on the nature of post-colonial child activities due to the differences in the type and manner of colonisation in Lesotho, Zimbabwe and South Africa and the circumstances under which it ended.

Strictly speaking, Lesotho never became a colony. Rather, in 1868, it became a British protectorate at the request of the king of the Sotho-speaking peoples, Moshoeshoe I. Lesotho gained its independence in 1966.¹⁵⁶ Zimbabwe, on the other hand, became a fully fledged colony in the 19th century and only gained its independence in 1980 after an intense guerrilla war.¹⁵⁷

See also the 'Report of the Director of Native Development' in the Chief Native Commissioner Report of 1920 of Rhodesia 21.

¹⁵⁵ Ibid. See also Van Onselen *Chibalo: African Mine Labour in Southern Rhodesia 1900-1933* 24-5.

¹⁵⁶ After a negotiation process with the British, who were only too happy to oblige as the protectorate had become an administrative liability. Murray (1980) 6 *South African Labour Bulletin* 3. Refer to 'Colonial Occupation' above.

¹⁵⁷ There had been earlier attempts by white minorities in the country to declare it an independent state. On November 11, 1965 the Unilateral Declaration of Independence (UDI) of Rhodesia (now Zimbabwe) was

South Africa, meanwhile, has indistinct points of transition from colonisation to apartheid. Prior to 1910, parts of the country, such as the Cape and Natal (now known as KwaZulu Natal), were under British colonial rule, others, the Transvaal and the Orange Free State, were independent states. In 1910, after the Anglo-Boer war, however, the Union of South Africa incorporated all four territories into what is now South Africa.¹⁵⁸ In 1934, the Union became a dominion within the British Empire, but in 1961, South Africa declared itself a republic, ending all formal ties with Britain.¹⁵⁹ The apartheid period ended only in 1994, with the country's first democratic election.

The absence of major socio-economic change makes it difficult to mark the differences between colonial and post colonial child activities. Recounting post-colonial child labour in the three countries under discussion is further complicated by the absence of an appropriate survey methodology for probing the work of children, which, for the most part, is a 'hidden' phenomenon. Moreover, scholarly attention on child labour in Africa began to emerge only in the early 1980s, prompted by an increase of international awareness of the problem. A vacuum in the literature therefore exists on the work of children in the period prior to the 1980s.

Because of these difficulties, it makes more sense to pursue the analysis of child labour according to social and economic factors, mainly according to the rural and urban dichotomy, the controlling sector of child work and their causes. While there may be overlaps in the discussion, it will nevertheless provide a clearer understanding of activities and the influences that have shaped the nature and amount of work done by children in sub-Saharan Africa today. (An analysis according to ethnic groups will not be

signed by the white minority government of Ian Smith, whose Rhodesian Front party opposed rushed moves by the United Kingdom towards black majority rule in the then British colony. It was a declaration of independence from the United Kingdom (not from the British Sovereign, Queen Elizabeth II). The move was swiftly condemned as illegal by the British government, as well as the Commonwealth and the United Nations (UN). Rhodesia reverted to *de facto* and *de jure* British control as 'the British Dependency of Southern Rhodesia' for a brief period in 1979 to 1980, before becoming fully independent as Zimbabwe in the same year.

¹⁵⁸ Mouton (2006) 51 *Historia* 29-48.

¹⁵⁹ Lambert (2000) 43 *South African Historical J* 198-9.

very useful as these groups have intermingled, thus making them less distinct than they were in pre-colonial times.)

(a) The rural/urban dichotomy

In Africa, as in Europe, the shift from the familial mode of production in rural areas to the labour market of urban areas undermined the economic power of kin networks. The conceptualisation of childhood therefore changed with demographic and socio-economic conditions.¹⁶⁰

Since the 1960s, when most African countries gained their independence, urbanisation has taken place at an accelerated rate, particularly in Sub-Saharan Africa. Through to the 1980s, governments and international donors were biased towards urban development, and they neglected the needs of the rural areas. As a result, the 'rural-urban divide' deepened.¹⁶¹

This division introduced differences between the conceptions of childhood and child activities, with differing values and expectations in formal schooling and child work. The rural/urban dichotomy patterned the development of partnerships or couple-centred marriages in urban areas and maintained the traditional lineage-based marriages in rural areas. Two divergent parental perspectives thus developed on what childhood should be and how children should spend their time. Nuclear families tended to view their children as objects of affection and pleasure, whereas lineage-based units regarded their offspring as necessary for labour needs in the immediate term and as future investments and old-age insurance.¹⁶²

¹⁶⁰ Bass (note 59) 74.

¹⁶¹ By 1999 about 12 out of 40 African states had 40 percent or more of their citizens living in the towns. It must nevertheless be noted that statistics are based on different national definitions of what is urban. Cross-country comparisons should, however, be treated with caution. World Bank 'World Development Report' (2001) 162-4; Bass (note 59) 77.

¹⁶² Bass (note 59) 37 and 97.

The rural-urban divide further corresponds with differences between subsistence agriculture and the post-colonial cash economy. This, however, is not a clear-cut demarcation, as some families straddle both economies in trying to provide for their members. There are rural-urban migrants who still take part in the urban cash economy, and foster a new type of nuclear family which often exists alongside one that is lineage-based. Some people have also adapted to partnership models of the family in rural areas where there are cash inputs from the urban economy. Across Africa, therefore, many families bridge both economies in trying to provide for their members.¹⁶³

Rural living and child work go hand in hand for several reasons. Firstly, despite Western influences, the cultural expectations of the duties of the child to its parents and kin network remain largely unchanged from the pre-colonial era. Secondly, parents in lineage-based families are more likely to reside in rural areas, where they are tied to the land. They regard their children as necessary for immediate labour and insurance for old age. The rural folk therefore exhibit higher levels of fertility. Children from families of numerous offspring are more likely to work.¹⁶⁴

Thirdly, distance, lack of transport and low mechanisation often combine to make rural life extremely labour intensive. Everyone in the family is expected to contribute. Tasks that take little time and effort in an urban setting are extremely cumbersome in the rural areas where basic infrastructure and services are missing. The rural folk plant, weed, harvest, transport, process and cook manually, and they use technologically primitive implements. Scenes of women and children pounding maize or rice, shelling seeds, drying foods, and carrying firewood and water on their heads are typical of rural Africa.¹⁶⁵

The variety and characteristics of local geography directly condition child work. In savannah areas, cattle-raising is predominant. The climate also entails a sharp difference in the activities between the rainy and dry seasons. In the rainy season,

¹⁶³ Hollos and Larson *The Cultural Construction of Childhood* 4.

¹⁶⁴ Kielland & Tovo (note 45) 26.

¹⁶⁵ *Ibid.*

children plant, weed and harvest. In the dry season, the girls pound grain and tend the garden, while the boys herd livestock. In areas where the climate is hot and vegetation dense, agriculture requires the forest to be cleared, entailing a stricter division of labour by gender, among both children and adults.¹⁶⁶

In most cases, rural areas lack the necessary educational infrastructure. Where there are schools, parents cannot afford the costs and would rather use their children to meet the family production needs in agrarian work. While education is open to both sexes, rural girls are more often absent from school, because of household commitments, which are predominantly female-oriented. Rural folk generally do not highly value the school performance of girls, thus education becomes secondary to training as home makers. Some sections of rural societies also view formal education as potentially dangerous for girls, 'as it may lead to female promiscuity and insubordination towards men'. School is therefore a more prominent activity for boys during middle childhood.¹⁶⁷

Some rural families continue to treat work as education mainly because there is an absence of alternatives. Not every village has a primary school let alone a secondary school. Recruiting and keeping teachers in existing institutions is difficult.¹⁶⁸

The work that children do in the rural areas may be divided into three major categories. The first consists of domestic chores, which begin well before the school-going age. Children do some household work to allow their parents to devote themselves to activities which are economically more profitable.¹⁶⁹ Girls often find themselves in this category where they have to spend their time fetching water and firewood, cooking, cleaning, gardening, grinding and taking care of younger siblings.

¹⁶⁶ Bonnet (1993) 132 *Int Lab Rev* 371 at 382.

¹⁶⁷ Robson (2000) 32 *Area* 59 at 66.

¹⁶⁸ Some parents deem socialisation training as adequate preparation for adult life in the village. Bass (note 59) 38 and 85.

¹⁶⁹ Girls inevitably play a greater part than boys as they are taught by their mothers to be farmers and servants in the kinship network.

The second category is that of farm work, which has always been deemed relatively well-suited for children, as most of it requires moderate or no supervision. Household income in farming communities is mainly restricted by limitations in the available work force. Ninety percent of rural children participate in mainly subsistence farming.¹⁷⁰ In the mid-1980s, a study of the Tonga people in Zimbabwe confirmed that children provided substantial contributions to rural households. They did an average of 28 percent of weeding, 35 percent of the planting and 51 percent of the harvesting in subsistence rural farming.¹⁷¹

Children who work within their households, however, do less than those on commercial farms away from the supervision and protection of their families. Child participation in subsistence farming has been reduced in recent years with increasing attendance in formal schooling.¹⁷² It has also decreased in the commercial farming sector of Zimbabwe due to the disturbances caused by the government's land redistribution exercise.¹⁷³

The third category, although usually overlooked, is that of child work in the informal sector of the rural economy. Children are involved in pottery and basket-making and in carving traditional artefacts and utensils. They are also engaged in small trades that are essential to village life, especially shop-keeping.¹⁷⁴

Urban economies on the other hand created families that were partnership- or couple-centred. As they also began to earn in the wage economy, fewer and fewer children were tied to the wishes of their parents. The lineage based system was thus turned on its head. Urban families placed greater value on formal schooling, as the employment sector in the urban areas demanded literacy and professional qualifications,

¹⁷⁰ Indeed some children are employed in large agricultural enterprises which have nothing to do with family life, particularly in cotton, tea and coffee plantations. Bonnet (note 166) 382.

¹⁷¹ Reynolds *Dance Civet Cat: Child Labour in the Zambezi Valley* 106-7.

¹⁷² This, nevertheless, is not so evident in some societies where men have migrated to join the labour force in the mines, commercial farms and the urban areas. Bass (note 59) 85 and 76.

¹⁷³ This exercise saw many white farmers lose their farms to indigenous people.

¹⁷⁴ ILO Report available at <http://www.ilo.org/public/english/employment/infeco/download/report6.pdf> accessed on 29 [accessed on August 2007].

and children had greater access to these qualifications than their rural counterparts.¹⁷⁵ Childhood thus took on meanings that were similar to those in Western culture.

Today, people residing in the urban areas or those connected to them through remittances, are more likely to have higher incomes, which in turn should translate into lower rates of child labour. Indeed, sub-Saharan African countries, with low average incomes or higher proportions of their national income derived from agricultural production, have the highest levels of child labour.¹⁷⁶ In countries with higher rates of urbanisation, the prevalence of working children is less. For instance, South Africa, which is the most urbanised country in Africa, has a rate of less than 20 percent of child labour, while Zimbabwe and Lesotho, with somewhat lower percentages of urbanisation, have higher percentages.¹⁷⁷

Urban areas continue to be a destination for rural or peri-urban children under fostering arrangements or on their own initiative. On arrival in the towns, they are engaged in several types of activities. Since it is still typical for a child to be placed in the home of an extended family member, domestic work is the most common form of urban employment for the girls.

An increasing trend in Southern Africa is for non-kin agents to comb rural villages for children.¹⁷⁸ The agents offer parents of little means advance payments towards domestic work to be performed by children in towns. (This practice may, of course, constitute child trafficking and attract criminal penalties.)¹⁷⁹ In 1994, about 67 percent of the child domestic servants in sub-Saharan Africa came from poor rural peasants. Sixty percent of the girls had been recruited through an agent or intervening person, while 21 percent had been placed by an aunt or uncle. Only five percent had

¹⁷⁵ Ibid.

¹⁷⁶ World Bank 'World Development Indicators' (2001) 74-6.

¹⁷⁷ Ibid.

¹⁷⁸ Bass (note 59) 91.

¹⁷⁹ For instance, according to Chapter 18 of the South African Children's Act No. 38 of 2005.

found work without assistance. Child workers were most likely to come from unstable families, which had numerous dependents or had experienced the death of a parent.¹⁸⁰

Boys who come from the rural areas under fostering arrangements are usually engaged in apprenticeships in various trades or in vending. Children selling fruits, vegetables, sweets and cigarettes are a common sight in Zimbabwe and Lesotho, and to a lesser extent in South Africa. Some sell goods as an extension of their domestic work while others work alongside their parents to increase their families' earning potential.¹⁸¹

From the 1980s, a new breed of street children emerged when most sub-Saharan countries underwent economic structural adjustment programmes.¹⁸² In Zimbabwe, for instance, the reforms placed greater tax burdens on middle and low income groups, and eliminated subsidies and price controls. The poor were thus exposed to higher costs of living. The deregulation of the banking system led to very high interest rates which made goods unaffordable to the majority, while the privatisation of state parastatals resulted in massive retrenchments.¹⁸³ Inevitably, children were prejudiced, which was evidenced by their increasing presence in the central business districts of the towns and cities.

Today, children continue to beg in the middle of busy roads, particularly at traffic light intersections (usually accompanied by a blind or crippled parent), or they beg under the watchful eyes of older siblings. Others spend their days washing, guarding and finding parking for cars. Some children who migrate for work to urban areas remain tied to their rural families through remittances, visits, and the exchange of labour and goods.¹⁸⁴

¹⁸⁰ Ibid.

¹⁸¹ Ibid. Nieuwenhuys (1996) *25 Annual Rev of Anthropology* 237 at 343.

¹⁸² Structural adjustment programmes have been implemented in many developing countries since the 1980s and were designed and imposed by the International Monetary Fund and the World Bank as conditions for further loans.

¹⁸³ Jauch 'Structural Adjustment Programmes: Their origin and international experiences: Background Paper' (1999) *Labour Resource and Research Institute* 1 at 4.

¹⁸⁴ Ibid.

(b) Analysis according to the controlling agent

Child labour may be analysed according to the agent controlling the activities. In pre-colonial times, child activities were dictated by the family. Today, other people and entities have joined the ranks of the ‘managers’ of child activities. They and include employers, traffickers and the children themselves.

(i) Own household

Africa presents us with a household framework in which everyone works for the entire family network to secure sustenance and training opportunities. The household remains the main regulator of child work. Studies from Southern African countries provide a fairly consistent picture in terms of the types of activities carried out by children around the home.¹⁸⁵

Children controlled by their own households normally do work within the domestic sphere. They are likely to do less arduous work under better conditions than those labouring in other people’s households. The work of children living with their parents is allocated predominantly for socialisation purposes and is hence based on age, gender and physical abilities. The heavy work is left to the adults. Children are also given time to study and play depending on the economic status of the parents and the value the family places on education.¹⁸⁶

The amount of time devoted to different tasks in a household normally reflects national specificities. For instance, in Lesotho herding occupies boys more than those in neighbouring countries, because of the importance of livestock production in that country. In Zimbabwe, a predominantly agricultural country, more children will be found working in the fields than in neighbouring countries.¹⁸⁷ There are also variations on time allocations for child activities depending on their areas of residence and the economic status of the parents. Urban parents and those who can afford domestic help

¹⁸⁵ Kielland & Tovo (note 45) 57-8.

¹⁸⁶ Ibid.

¹⁸⁷ ‘Child Labour on Commercial Agriculture in Africa’ ILO publication available at <http://www.ilo.org/public/english/comp/child/papers/africa/index.htm> [accessed on 20 April 2007].

would most likely give their children more time to study than would their rural counterparts.¹⁸⁸

Household heads also give work according to the climatic patterns. Subsistence farming is thus the predominant activity for children during the planting season. When land is abundant, child work availability, particularly in peak seasons, decides the ceiling for household production and represents the adjustable labour of an otherwise altruistic family.¹⁸⁹

(ii) Foster household

Since pre-colonial times, the practice of placing children in informal foster care with extended family members or non-related families has been common. Around 14 percent of children in Africa under the age of 14 live away from their parents, so their daily activities are determined by foster parents. South Africa has one of the highest figures of fostering, with approximately 25 percent of children living under such arrangements. In most cases, both parents are still alive.¹⁹⁰

These modern forms of child fostering, differ, however, from those in the past, in both their benefits and motivations. Today, the effects of such arrangements on child work are more apparent and diverse. Fostering arrangements may be placed into five main categories, namely: kinship fostering, crisis fostering, alliance and apprentice fostering, domestic fostering and educational fostering.¹⁹¹

Sending children to live with foster families is a result of a combination of demand and supply factors in the receiving household and the child's parental home. The considerations influencing fostering arrangements may be the interests of the child, the parents or the entire family. The primary concern may be to give the child an opportunity for a better life. This is often the case for academically gifted children who need to move

¹⁸⁸ Ibid.

¹⁸⁹ Kielland & Tovo (note 45) 57-8.

¹⁹⁰ Data from Macro International survey results from African countries. Kielland & Tovo (note 45) 31-2.

¹⁹¹ Ibid.

to a place where their abilities may be harnessed. This kind of placement is more common for boys than for girls.¹⁹²

Sometimes immigrants sent their offspring back to their areas of origin in order to be raised by kinsmen in a safe environment or to learn about their family's culture. Parents may have placed their children in more prosperous areas or with more educated people around. Not surprisingly, this is often the case for girls. The aim may be for them to find a relatively well-off husband, which is a particularly important consideration.¹⁹³

Parents have also placed their children in foster families for their own (the parents') benefit. Typical examples are where a parent wants to remarry or migrate without offspring in tow or s/he wants to obtain goodwill from the host family. In some cases, the labour contribution of a placed child is reimbursed by a monthly sum to the child's parents, but, even when it is not, it may be to the parents' advantage to have one less mouth to feed. Sometimes the receiving household may be the main beneficiary, as in the case of child domestic servitude. Children are also typically moved to keep elderly family members company, to enhance the lives of childless couples, or to provide services typical of a child of a given sex to families that only have working age children of the other sex.¹⁹⁴

Child placement may be undertaken primarily to benefit kin. A child may be moved to other parts of the extended family where there is a higher labour demand. In this case, the kin network as a whole will benefit, if the child's labour capacity is used where it gives the highest return. Moving children around may also strengthen the mutual interdependency of family members.¹⁹⁵

Although originally a well intended and valuable institution, the type and amount of work a child does in foster arrangements, depends on the reasons that motivate the

¹⁹² Nieuwenhuys (note 180) 237 at 343.

¹⁹³ Ibid. Kielland and Tovo (note 45) 31-2.

¹⁹⁴ Kielland and Tovo (note 45) 31-2.

¹⁹⁵ Ibid.

placement decision on the sending and receiving ends. African child placement systems increasingly conceal the exploitation of children. Poor rural children are sent to the towns to do work that school-going urban children no longer do. Foster children are assigned the domestic chores that women employed in the formal sector no longer have time for or want to do. Richer families will be able to afford professional hands but most settle for cheaper alternatives.¹⁹⁶

Children who had to leave a crisis ridden home run an even greater risk of economic exploitation as their parents are not in a position to negotiate the placement conditions. It is often the case that receiving parents that have not asked for the child feel little responsibility for its welfare. Similarly, children invited into a foster family for economic reasons, are more likely to be exploited and emotionally neglected than those intended to fulfil the lives of childless couples.¹⁹⁷

Foster children do mainly domestic work. They wake up earlier than anyone else in the morning, cook breakfast and prepare the other children for school. When everyone has left for their daily engagements, the girl child has to clean the house, wash everyone's clothes, prepare lunch and baby-sit if there are infants. In the afternoon she does the ironing and prepares supper. Later in the evenings, she cleans up and does other chores as the 'madam' of the house may assign. She is always the last to retire to bed. Where the foster family lives on a farm, the child also has to do agricultural work.¹⁹⁸

Children in foster arrangements have lower school participation rates than those of the families they have joined, although they constitute an internally diverse group. Where a foster child has been placed, the school participation rates among regular children who live in a household are higher than normal.¹⁹⁹ This indicates that the work contribution of the placed child in fact enables the household to free up its own offspring and send them to school. The welfare consequences of this trend are brutal. Living in

¹⁹⁶ Ibid. Also see Rwezaura (2000) 14 *Int J of L Policy and the Family* 326 at 330-3.

¹⁹⁷ Kielland & Tovo (note 45) 32-4.

¹⁹⁸ Nkamleu 'Children at risk in the agricultural sector in Sub-Saharan Africa' Paper presented at the Sixth Annual Global Development Conference, Dakar, Senegal: 24-26 January 2005.

¹⁹⁹ Ibid.

the same household are 'first class' children, who play and go to school, and those of the 'second class', who work all day with no time for education and rest.²⁰⁰ There is also a systematic link between school attendance and the child's biological relationship with the foster parents. The closer the kin ties with the foster family, the better the treatment and educational prospects for placed children.

Child placement in a non-related household is, in most instances, brokered by an intermediary who often benefits from the match-making between the sending and receiving families. This tends to blur the difference between brokered child placement and the clearly illicit practice of organised child trafficking.²⁰¹

(iii) Child traffickers

The trafficking of children is a well documented phenomenon and has steadily increased over the years in Africa. Like fostering, it influences the activities of placed children. It involves the recruitment, transportation, transfer, harbouring or receipt of a child for the purposes of some form of exploitation. Children are trafficked for various reasons. Girls are recruited mainly for prostitution, and, to a lesser extent, for domestic work, while boys are recruited for labour on plantations (though the latter is not common in Southern Africa).²⁰²

Modern day trafficking is facilitated by the custom of child fostering, whereby parents send their children to live with relations and friends for economic or social reasons. Today, this tradition has been seriously corrupted by a mixture of various motives, both the agents' and parents', who often collude to send children to work in exchange for money. Children from poor and uneducated families are trafficked whether from rural or urban families.²⁰³

²⁰⁰ Kielland & Tovo (note 45) 32- 4.

²⁰¹ Ibid.

²⁰² 'Africa' ILO's IPEC available at <http://www.ilo.org/ipec/Regionsandcountries/Africa/lang--en/index.htm> [accessed on 20 August 2007].

²⁰³ Bass (note 59) 154-5.

Sexual trafficking is controlled by relatively sophisticated crime syndicates which have developed advanced routes through which they buy the complicity of police and customs officials.²⁰⁴ In addition to these groups, unscrupulous individuals take advantage of children in difficult situations, typically promising them a better life. Only later will the child find that she has been forced into prostitution. While occasional trading of sex for fees or services occurs among the urban youth in many African countries, the victims of sex trafficking are terrorised psychologically and physically to deter them from running away. They rarely get much of the income from their services.²⁰⁵

Compared to other African countries, the trafficking of children for commercial sexual exploitation is most prevalent in South Africa.²⁰⁶ Child pornography and prostitution are a big source of revenue for crime syndicates, parents, family friends, taxi drivers, gangs and brothel owners in Cape Town, Johannesburg and Durban.²⁰⁷ Girls between the ages of 12 and 16 years are the most vulnerable. They may be abducted in broad daylight at shopping centres, taxi ranks and schools and are often gang-raped, assaulted, threatened and drugged into submission by their captors. An attempt to escape is risky as those who try have sometimes been killed in the process.²⁰⁸

Although at a low scale, Lesotho is a source of children for domestic work and prostitution in South Africa. The 20-kilometer road from Maseru in Lesotho to Ladybrand in South Africa may be the world's shortest international trafficking route.²⁰⁹ There is also internal child trafficking in the country although it does not appear to be organized by criminal syndicates. Some anecdotal information suggests it may be

²⁰⁴ Traffickers operating in Southern Africa include Nigerian networks, Chinese triads, Russian and Bulgarian mafia and various groups of organised criminal syndicates. Victims often end up in Europe and Asia. And those reaching South Africa come from as diverse countries as the Czech Republic, Bulgaria, Romania, Ukraine, Britain, Russia, China, Thailand and various African states. 'South Africa a major player in human trafficking' *Inter Press Service* 10 March 2005.

²⁰⁵ Kielland & Tovo (note 45) 39-40.

²⁰⁶ 'SA child trafficking horror' *Die Burger* 16 December 2003.

²⁰⁷ 'Human Trafficking Stretches Across the Region' *Inter Press Service* 23 June 2004.

²⁰⁸ Rapes and assaults are often filmed and sold as pornography. Children are forced by traffickers to sell drugs to and steal from their clients. Traffickers often exchange girls for weapons and turf. *Ibid.*

²⁰⁹ *Ibid.*

practised with the consent of the families, especially in the case of children.²¹⁰ Boys are trafficked for use in cattle herding and street vending, and girls for domestic servitude or commercial sexual exploitation. A 2005 UNICEF report referred to ‘madams’ running child brothels in exchange for provision of food and shelter.²¹¹ There are also instances where vulnerable girls become victims of child domestic labour or commercial sexual exploitation after migrating on their own to neighbouring South Africa in search of work.²¹²

Zimbabwe is also a source and transit country for a small number of children trafficked for forced labour and sexual exploitation. There is, however, little authoritative information on the extent of the problem beyond anecdotal reports of girls lured to other countries with false job promises. Immigration officials of neighbouring countries reportedly abuse girls sexually during deportation, while employers rape those with no documentation under threats of deportation.²¹³ Likewise, the media has often reported victims being transited through the country to neighbouring countries, or as far afield as East and West Africa.²¹⁴

In the case of trafficking for more common tasks, both parents and agents, to a certain degree, justify their acts by saying that it is in the interest of the child to leave the hard work and poor prospects of subsistence agriculture for wage labour in more developed areas or countries.²¹⁵

The high prevalence of child trafficking in Southern African, however, casts doubt on the efficacy of the laws which the countries in this region have enacted. Zimbabwe has the Sexual Offences Act of 2001 which criminalises the sexual

²¹⁰ ‘Trafficking in Persons Report VII. Special Cases Released by the Office to Monitor and Combat Trafficking in Persons’ *US Department of State* 5 June 2006.

²¹¹ *Ibid.*

²¹² *Ibid.*

²¹³ ‘Department of State Country Reports on Human Rights Practices- Zimbabwe’ available at the US Government website <http://www.state.gov/g/drl/rls/hrrpt/2005/61600.htm> [accessed on 21 April 2007].

²¹⁴ *Ibid.*

²¹⁵ Kielland & Tovo (note 45) 39-40.

exploitation and conspiracy or incitement abroad to exploit young persons.²¹⁶ South Africa has outlawed the practice in terms of the Prevention of the Organised Crime Act of 1998²¹⁷ and the Children's Amendment Act of 2007.²¹⁸ Meanwhile, Lesotho is yet to enact into law a Bill prohibiting child trafficking.²¹⁹ One may thus conclude that partly due to the paucity of legislative measures to curb child trafficking, and the lack of a unity of purpose in dealing with the problem among the Southern African countries, the problem will continue to persist in Southern Africa.

(iv) Employers

Since the colonial era, employers have obviously controlled the work of children. In Zimbabwe, for instance, children work in commercial agriculture,²²⁰ small-scale mining, gold panning,²²¹ quarrying and construction. They are also found in small industries such as manufacturing, trade and restaurants.²²² Those working in mines often live and work away from family members, an arrangement that leaves them without supervision and often makes them more vulnerable to exploitation.²²³ The employment of children on a direct wage in the formal sector is, however, rare in Zimbabwe. It is more common for children to be engaged in informal sector, micro-factories and small mines linked to large formal sector concerns.²²⁴

²¹⁶ No. 8 of 2001.

²¹⁷ For both children and adults. Section 141(3) of the Organised Crime Act, No. 121 of 1998.

²¹⁸ Section 141 of the Children's Amendment Act No. 41 of 2007.

²¹⁹ Section 237(3) of the Children's Protection and Welfare Bill, which was presented by the Law Reform Commission in 2004. See Chapter III.

²²⁰ There is evidence that the incidence of children working in commercial farming has decreased as farm labourers are evicted from large commercial farms seized mainly from white Zimbabweans in terms of the government's fast track land resettlement programme. In addition, as the unemployment rate grows, fewer children are employed in formal industry.

²²¹ In 2002, several officials noted a surge in illegal gold panning among children. Some are reported to be as young as 11 years old. 'Rushing Faces Food Shortage' *The Herald* (Harare) 16 August 2002.

²²² Ministry of Public Service, Labour, and Social Welfare (Zimbabwe) *National Child Labour Survey* 45 and 60.

²²³ Eight- to 10-year olds carry out benign tasks such as cooking or carrying equipment and supplies at the mines while others are sodomised and used as sexual partners. Bass (note 59) 87.

²²⁴ Children work in micro-industries such as welding, door frame and furniture manufacturing, fence and tin making, basket weaving, carpentry and bicycle repair work. Grimsrud & Stokke *Child Labour in Africa: Poverty or Institutional Failures? The Cases of Egypt and Zimbabwe* 22.

Child rights organisations estimate that of the 13.4 million children between the ages of 5 and 17 in South Africa, 17.8 percent are engaged in subsistence farming, 5.3 percent work in services, 0.4 percent in manufacturing, 0.1 percent in transport, 0.1 percent in informal finance, and 0.05 percent in construction and mining. At least one in every three child workers in the 10 to 14 years age group lives in a commercial farming area, of which 21 percent are working in the agricultural sector.²²⁵

Children aged between 12 and 15 constitute between 5 and 15 percent of the workforce in several of Lesotho's garment factories.²²⁶ Those below the age of 14 work in at least 10 different foreign owned factories that assemble and export garments. Each establishment employs between 500 and 1500 workers, and approximately 5 to 15 percent of the primarily female work force is below the legal age of 16. Like adults, children in the factories cut, sew, iron, pack and load garments. Sometimes children work late or sleep at work. Normal working hours are from 7 am to 4 pm with an hour's break for lunch.²²⁷

Apprenticeships also are quite common in sub-Saharan Africa. These are considered training for children in a marketable trade especially the children who have failed in the public school system. Compared to regular commercial work, however, apprenticeship arrangements have two basic distinguishing features. First, the overarching objective of an apprenticeship should be to learn a trade, thus they are not paid much (if at all) for their supposed educational labour. To the contrary, it is quite common for parents to pay the artisan for 'training' the child, and for the apprentices to pay a 'liberation fee' when they are ready to leave and start on their own.

²²⁵ 'South Africa' Global March, available at <http://www.globalmarch.org/resourcecentre/world/south%20africa.pdf> [accessed on 24 April 2007].

²²⁶ U.S. Department of Labour Bureau of International Labour Affairs- Lesotho, available at <http://www.dol.gov/ilab/media/reports/iclp/sweat/lesotho.htm#1> [accessed on 24 April 2007].

²²⁷ Children also contribute, through home-based production, to the manufacturing of shoes for export. Workers bring materials home so that the entire family can contribute to the manufacturing process. Children as young as six manufacture shoe parts for up to eight hours per day. Children also work in canning establishments for asparagus grown in South Africa. Ibid.

The second feature distinguishing apprenticeships from regular commercial work is the long-term perspective of the arrangement. Parents often place their children in more or less regular foster care with their instructors resulting in a relationship that encompasses much more than training.²²⁸ In some cases apprentices make up a substantial fraction of the labour force.

There is also a hierarchy among apprenticeships. Families of greater economic resources send their children for lengthy training which has the highest long-term economic returns. These children come from households that can afford to forgo short-term earnings in order to invest in their offspring. Rural children of relatively poorer households end up in the lower status and lower duration apprenticeships.²²⁹ Urban children who fail in the public school system fare better than those from the rural areas. The former enter higher-status positions, and generally continue to live with their families so that their parents can monitor the conditions of their work situation.²³⁰

(v) The children themselves

Street kids are a distinct feature of African urban areas. They 'litter' almost every city in Africa, although in varying degrees. An estimated 250 000 children are living on the streets in South Africa,²³¹ and 12 000 in Zimbabwe.²³² These numbers may be attributed to the increasing levels of adult unemployment, the drift from rural to urban areas (with no job prospects), the rapid growth of cities, the mushrooming of peri-urban informal settlements and the breakdown of African family support systems. Although there are no authoritative statistics available for Lesotho, there is nevertheless evidence of an increase in child homelessness.²³³

²²⁸ Sawyer *Children Enslaved* 139.

²²⁹ Bass (note 59) 94-6.

²³⁰ Ibid.

²³¹ Information about Street Children – South Africa, available at <http://www.streetchildren.org.uk/reports/South%20Africa%20Child.doc> [accessed on 28 April 2007].

²³² 'Zimbabwe: Street Children Vulnerable to Aids' *Inter Press Service* 7 July 2004.

²³³ 'Human Rights Practices-Lesotho Country Reports' available at the Bureau of Democracy, Human Rights and Labour website <http://www.state.gov/g/drl/rls/hrrpt/2005/61576.htm> [accessed on 28 April 2007].

The street (in the broadest sense of the word, including unoccupied dwellings and wastelands), has become the habitual abode and source of livelihood for children who are inadequately protected, supervised or directed by responsible adults.²³⁴ They may have been abandoned and rejected by their families while others may have been forced out from home due to prevailing circumstances, such as divorce, poverty, familial stress or the death of parents. In some cases the children themselves leave their families to engage in illicit activities on the streets out of a sense of adventure.²³⁵

Street children may maintain or sever links with family members. Some occasionally visit their remarried mothers or other siblings and thereafter return to their street homes. The degrees to which filial linkages are maintained and the quality of contacts differs among these children. There are also those who oscillate between sleeping on the streets and at home, a category that includes those staying with distant relatives or employers.²³⁶

The vast majority of children living on the streets control and determine their own daily activities, as parents become less able to protect, supervise, direct or provide for their families. They thus assume the roles that were originally the domain of parents. These children determine how they spend their earnings, which in most cases are used to buy food, clothing and, in some instances, cheap narcotics.²³⁷

Street children are engaged in a various activities in order to survive. In Zimbabwe, nearly 46 percent of street children are beggars while 14.7 percent are vendors. About 21.2 percent guard cars and 4.1 percent escort their blind parents.²³⁸ Adults often use very young children and babies (often born on the street by the children themselves) to elicit sympathy and obtain money when begging at busy street

²³⁴ This definition was formulated by Inter-NGOs in Switzerland in 1983. 'A Study on Street Children in Zimbabwe' available at the Unicef website http://www.unicef.org/evaldatabase/files/ZIM_01-805.pdf [accessed on 28 April 2007].

²³⁵ Ibid.

²³⁶ Ibid. Grimsrud & Stokke (note 224) 21.

²³⁷ 'A Study on Street Children in Zimbabwe' (note 234); Bonnet (note 166) 383-4.

²³⁸ Ibid.

intersections and shopping centres.²³⁹ A large number of male children engage in petty theft and other criminal activities, while both sexes (particularly the girls) are prostitutes.²⁴⁰

(c) Analysis according to cause and influences

(i) Culture

Child development is culturally constructed. Despite colonial influences, African cultural values and attitudes, to a very large extent, still regulate child rearing methods, developmental expectations and the emotional orientation of caretakers.²⁴¹ Cultural settings define parents' beliefs and practices about their children. For instance, the early childhood developmental goals valued by parents and educators in many Western societies reflect an underlying 'individualistic' cultural trend.²⁴² The aspirations are usually related to the acquisition of competence and independence. These societies value competition.

In comparison, the 'traditional' cultural groups are often characterised by a more 'collectivist' or 'inter-dependent' culture. Traditionalists value collective goals, such as learning to live in harmony with others, competent participation in social events, obedience to authority and a cooperative and altruistic orientation.²⁴³ Such a culture has been in existence since pre-colonial times.

(ii) Poverty

In 2002 children below the age of 18 comprised almost 45 percent of the 650 million total population of Africa. Approximately 45 to 50 percent of these children were poor, based

²³⁹ 'A Study on Street Children in Zimbabwe' (note 234).

²⁴⁰ Country Reports on Human Rights Practices-Lesotho released by the Bureau of Democracy, Human Rights, and Labour <http://www.state.gov/g/drl/rls/hrrpt/2005/61576.htm> [accessed on 28 April 2007].

²⁴¹ Wise and Sanson (2000) 22 *Australian Institute of Family Studies* 1 at 3.

²⁴² Ibid.

²⁴³ Ibid.

on national poverty lines and census data on households. This implies that between 130 and 144 million African children live in poverty.²⁴⁴

In 2001, statistics indicated that 47 percent of the population of sub-Saharan Africa was living on less than US\$1 a day.²⁴⁵ This is the only region in the world where the proportion of the poor has been increasing during the past decade. Thus sub-Saharan countries are today poorer than they were before their independence. Between 1961 and 1980, real growth of gross domestic product in sub-Saharan Africa was 3.8 percent compared to 2.9 percent between 1981 and 2002. Inevitably, poverty has had very serious implications for children.²⁴⁶

The link between poverty and child labour is a well acknowledged fact. Where there is scarcity in the home, children have no option but to make a productive economic contribution to their families. In this way they help feed, shelter and clothe themselves, their siblings and other family members. Poor families tend to be large thereby increasing the likelihood of children having to work to generate income. This also decreases their educational prospects.²⁴⁷

Schools to which poor parents can afford to send their children are often unavailable or are of such low quality that child work is the only option. When other opportunities do exist, parents still opt for child labour because it substantially lessens the family's poverty. This state of affairs is particularly hard on girls who are made to drop out of school to better the chances of their male siblings. The logic is that girls get married and will be taken care of by their husbands, so that they will no longer contribute

²⁴⁴ Hope (2005) 11 *J of Children & Poverty* 19 at 22-3.

²⁴⁵ When combined with North Africa, more than one-half of the population of the African continent lives on less than US\$1 per day. Ibid.

²⁴⁶ Ibid.

²⁴⁷ Edmonds 'Understanding Child Labour: Patterns, Types, and Causes' at the US Government Journals website. Available at <http://usinfo.state.gov/journals/ites/0505/ijee/edmonds.htm> [accessed on 17 June 2007].

to their natal families. Male children, on the other hand, may in future have to take care of their own families, in addition to their parents in old age.²⁴⁸

The short term survival needs of many families are often at odds with the long-term well-being and development of children. Parents may want an education for their offspring but have a greater need for these children to mind their infant siblings while they (the parents) go out to make a living. New ideas about what is good for the socialisation and development of children collide with the daily work that must be done in order to sustain the family unit. Parents, hard pressed to provide real opportunities for their children, often strategically place their children with well-to-do families in the urban areas, or even sell their children to strangers.²⁴⁹

(iii) Illness (HIV and Aids)

AIDS is the leading cause of death worldwide for people aged between 15 and 49. In 2003, 2.9 million people died of AIDS and 4.8 million people were infected with the HIV. Sub-Saharan Africa is the most seriously affected region: over 7 000 people succumb to the disease every day.²⁵⁰ Lesotho, Zimbabwe and South Africa have infection rates that are above 20 percent in the adult population. South Africa has the highest number of people infected with HIV in the world. The life expectancy in Zimbabwe has decreased by about five years, while that in Lesotho has fallen below 40 years.²⁵¹

Although most people living with HIV/AIDS are adults, the pandemic's devastating effects on families and communities have reached down to the most vulnerable. An estimated 12.3 million children in sub-Saharan Africa have been

²⁴⁸ Weiner (1994) 2 *Int J of Children's Rts* 121; Rau 'Combating child labour and HIV/AIDS in sub-Saharan Africa: A review of policies, programmes, and projects in South Africa, the United Republic of Tanzania and Zambia to identify good practices' (2002) Paper No. 1 ILO International Programme on the Elimination of Child Labour (IPEC) 2.

²⁴⁹ Bass (note 59) 38-9.

²⁵⁰ '2004 Report on the Global AIDS Epidemic' available at the UNAIDS website http://www.unaids.org/bangkok2004/GAR2004_pdf/UNAIDSGlobalReport2004_en.pdf [accessed on 20 April 2007].

²⁵¹ Ibid.

orphaned, and their numbers will increase in the next decade as HIV-positive parents become ill and die. At least 9 percent of all children have lost at least one parent to the disease.²⁵² The UN predicts that, by 2010, there will be around 15.7 million AIDS orphans in the sub-Saharan region.²⁵³

HIV/AIDS has devastated the social and economic fabric of African societies. It affects people who fall into the productive bracket, and has broken down the capacity of families to sustain themselves. The disease has direct and indirect links with child labour. The first connection is where one or both parents are infected by the disease, and children are forced to become self-reliant. They have to look after the dying parents or younger siblings. The high cost of treatment for the disease, and associated costs, such as medical and funeral expenses, may use up a family's entire savings, especially when more than one family member dies within a short period. This has increased the pressure on children to work.²⁵⁴

Most HIV/AIDS orphans find security in the households of relatives who may be their parent's siblings or, in most cases, their grandparents. Such children usually drop out of school and work to contribute to their own and their siblings' up-keep. In most cases, the amount of work allocated to the orphaned children is greater than that of other children in the same household. An especially harsh burden is placed on girls who often have to provide care and domestic services for the entire family.²⁵⁵

The social stigma that the disease carries also has far reaching consequences for child labour. The familial ties, which previously ensured that orphaned children would be taken care of, are weakened, as people tend to shun infected relatives and their offspring.

²⁵² '2006 Report on the Global AIDS Epidemic' available at the UNAIDS website http://www.unaids.org/en/HIV_data/2006GlobalReport/default.asp [accessed on 20 April 2007].

²⁵³ 'Children on the Brink 2004: A joint report of new orphan estimates and a framework for action' available at the UNICEF website http://www.unicef.org/publications/files/cob_layout6-013.pdf [accessed on 20 April 2007].

²⁵⁴ Case et al (2004) 41 *Demography* 483 at 485; Kempe (2005) 11 *J Children & Poverty* 19 at 23.

²⁵⁵ 'Facts on the HIV/AIDS Crisis and Child Labour', available at the ILO website http://www.ilo.org/public/english/standards/ipecc/publ/download/factsheets/fs_hiv_0303.pdf [accessed on 20 April 2007].

Children are sometimes banished to the streets where they are left to their own devices. Such children often end up seeking emotional support and security through sexual and criminal relations.²⁵⁶

Another link between HIV/AIDS and child labour is where teachers become infected, resulting in less education for their pupils.²⁵⁷ The desperation to survive, that follows the death of parents or guardians, coupled with a lack of adult mentors and limited prospects for schooling lead to an overall increase in high-risk and exploitative livelihood strategies for children. Moreover, the impact of HIV/AIDS on communities and families undermines the process of a child's socialization in its broadest sense, inverting care-giving roles and giving rise to social exclusion and loss of identity.²⁵⁸

(iv) Political conflict

War and ethnic strife have further constrained children's opportunities in sub-Saharan Africa. Internal strife and wrangling over natural resources or wealth have been the main ingredients in the recipe for poverty, which in turn have forced households to place their children in work roles rather than school. Civil wars have led children to suffer from the loss of production. Some become soldiers to aid the war effort.²⁵⁹

While South Africa, Lesotho and Zimbabwe to some extent are presently enjoying a period of peace, at one point or another in their post-colonial history, each has experienced internal strife, and children were forced to play active roles in these conflicts. The child's involvement often blurred the lines between soldier and civilian,

²⁵⁶ Breton and Brusati 'Child Labour and HIV/AIDS: Exploring the interface. A brief overview of recent literature, research and organisational commitment' *Save the Children* 9.

²⁵⁷ Ibid.

²⁵⁸ 'Facts on the HIV/AIDS Crisis and Child Labour', available at the ILO website at http://www.ilo.org/public/english/standards/ipec/publ/download/factsheets/fs_hiv_0303.pdf [accessed on 20 April 2007].

²⁵⁹ 'Child labour by sector: Armed conflict (child soldiers)' ILO (IPEC) website <http://www.ilo.org/ipec/areas/Armedconflict/lang--en/index.htm> [accessed on 23 August 2007]; 'The Use of Child Soldiers Worldwide' Human Rights Watch, available at http://hrw.org/children/child_soldiers_map.html [accessed on 24 August 2007].

and between adult and child. Some children lost their family members and volunteered to fight in order to avenge their loss and to survive.²⁶⁰

4. The debate: economic exploitation or beneficial socialisation

A full analysis of the implications of the various factors described above for the proper implementation of the international prohibition on child labour will be postponed until the next Chapter. Here it should be noted that scholars are divided as to whether child exploitation existed in pre-colonial times or came as a result of industrialisation (which of course was a consequence of colonisation). One group of scholars is of the general belief that, in pre-colonial times, children were not overworked but were expected to contribute to the family through performing of tasks geared to their age and ability. In describing the life of the Lovedu, for example, Krige & Krige, remarked that the attitude of parents to children was one of indulgence. They claimed that, while children spent most of their time with those of their own age-group, they were in fact anxious to imitate their elders. There was never any compulsory element in the teaching of these skills, so in most cases children were left to their own devices.²⁶¹

Echoing the same sentiments, Oloko argued, that, since children worked with or for their parents, the latter (within the limits of their knowledge and circumstances), ensured that children's work was appropriate to their physical abilities and gender roles.²⁶² In this way, parents always had the best interests of the child at heart. The division of labour was based on gender and age. In all occupations in which children participated, there was a complementarity of tasks between adults and their children of the same sex. In some trades, children's tasks were so vital that adults' decisions on

²⁶⁰ South Africa had civil strife throughout its apartheid history, while Lesotho erupted into violence after the 1998 elections. The early 1980s there was fighting in Zimbabwe between the main ethnic groups, the Shona and the Ndebele. Presently, the country is on the brink of a civil war and the incumbent government has been drafting children into militias under the guise of the National Youth Service Programme to stamp out dissent.

²⁶¹ Krige *Realm of the Rain Queen: A Study of the Pattern of the Lovedu People* 104.

²⁶² Kielland & Tovo (note 45) 6-7.

whether to enter into a particular trade, depended on access to children's help. Society believed that such valued work enhanced the self-esteem and self-image of children.²⁶³

Oloko says that the living arrangement within the extended family provided an important pool of knowledge. Grandparents, in particular, monitored the activities of children with respect to the timing and intensity of their involvement in work. There was also a fusion of work and play, and children anticipated their economic responsibilities in early years through role play. The simplicity of work tools facilitated their use by children as play items, while singing and dancing during or after work created a positive attitude.²⁶⁴

Oloko remarks that the availability of several children within a given age group in an extended family ensured that younger children had enough opportunities to tag along and learn from the older ones. By the time children began to work on their own, they were able to meet the technical and attitudinal requirements of their tasks, and knew how to handle work problems. Moreover, the environment in which children worked was relatively safe, physically and socially, since the presence of parents and other friendly adults ensured that children were protected in case of any threat or danger. Her views rest on the assumption, however, that natural sentiment ensures the support and protection of children and that abuse of power may be remedied by any one of a wide range of relatives in the extended family.²⁶⁵

Others scholars are of the opinion that life was even more labour demanding in the past, and a child's lot was correspondingly more arduous. They say exploitation is not a colonial invention but existed on the continent since time immemorial. They attribute labour demands on children to the African family structure, which was strictly hierarchical and authoritarian. Favouritism particularly among children of polygamous families was rife. Having a step-parent could have harsh effects for a child's work life. Younger children faced a tough time among older boys. Like the new boy in a Western

²⁶³ Ibid.

²⁶⁴ Ibid.

²⁶⁵ Ibid.

school, the young herd-boy was often assigned the most unpleasant jobs. Where he failed, the wrath of the big boys would be upon him.²⁶⁶

Rwezaura remarks that, although the main objective underlying the engagement of children in various economic activities was for socialisation purposes, there is no doubt that tangible economic benefits accrued to parents and other household members.²⁶⁷ The child's economic role, however, was played down. The entire social system, as well as its survival, was organised around and geared towards the objective of acquiring as many children as the community could obtain. As these economic systems did not have advanced technology, but depended on human labour, it is clear that survival depended on how efficiently the community could reproduce itself.²⁶⁸

It is often stressed that the fact that adults cared for the child, gave them food and a proper upbringing leads to an accumulated debt to be repaid by the child with a lifetime of unquestioning obedience and loyalty. In cases where the child was pledged to other families this was viewed as service to the greater good of the family. In sum, the economic and social roles of children from pre-colonial times to today can be viewed as part of a self-propelling system of intergenerational dependence, whereby children were cared for by adults in return for future support. As they grew older, so did the child's economic roles.²⁶⁹

Whatever side one takes in this debate, there is nevertheless a consensus that African childhood is as a time for learning, character building and acquiring the social and technical skills necessary to perform the future roles of adulthood. Children represent lineage continuity and, most importantly, the material survival of families and the community at large. From pre-colonial times to the present, African children carry the duty to work for the cohesion and sustenance of their families, put their physical and

²⁶⁶ Marwick (note 31) at 149.

²⁶⁷ Alston (note 101) 91-2.

²⁶⁸ Ibid.

²⁶⁹ Ibid.

intellectual abilities at the service of their communities and preserve cultural values in their relations with others.

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Chapter VI

IMPLEMENTATION OF THE INTERNATIONAL LEGAL REGIME ON CHILD LABOUR: AN ASSESSMENT

1. The international regime on child labour

The effectiveness of any human rights strategy depends on whether its rules and institutions actually alleviate the problems they are intended to address. A discussion on the application of international law, the conceptual ambiguity of ‘child labour’ and the examination of the social order of Southern African indigenous societies in preceding chapters clearly suggests that the law, in its present state, has not (and probably never can) achieve the intended objectives. This observation extends to all the relevant ILO Conventions,¹ the United Nations Convention on the Rights of the Child (CRC) and the regional African Charter on the Rights and Welfare of the Child (ACRWC). The following puts into perspective the major weaknesses of the child labour regime with regards to its application to the Southern African countries.

(a) Participation of developing countries

Chapter III dealt extensively with the problems of the application of international law. It noted that the drafting and negotiation of all human rights instruments has always been an affair between governments, with the limited inclusion (in the case of ILO Conventions), of trade unions and employers. The following questions therefore arise: How can there be effective implementation of international standards of child labour if vitally interested parties are excluded from the process of making those laws, in this case children who, it will be remembered, are now deemed self determining individuals, with the right to decide their futures— their families and communities? How are their interests presented and considered during the drafting, negotiation and adoption process? What research is done on the relevance of the provisions being negotiated to the political, economic and cultural circumstances of each state?

¹ The Convention concerning the Minimum Age of Employment Convention 1973(ILO No.138) and the Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour of 1999 (C182).

During the drafting and negotiation of all human rights treaties, just about all delegates in attendance are usually more concerned with protecting the official positions of their governments with expedient ambiguity, than with achieving conceptual clarity, let alone representing beliefs, attitudes and practices of their national constituencies.² Moreover, the few representatives of developing countries who do attend are usually late participants in a predetermined process. Hence they have to work with concepts and mechanisms already called from Western sources.³

Often, delegates of developing countries have no alternative position to present, since their national constituencies did not have the chance to articulate different proposals based on their indigenous experiences and in response to the realities of their own countries.⁴ At the negotiating sessions, they often lack a sense of familiarity and support from home. Such negotiators, particularly those from Africa, are therefore ill-equipped to make a meaningful contribution to the proceedings.

Any initiatives on child labour have generally been based on an assumption that the problem is confined to the poor countries. The societies and groups most determined to eliminate the practice have thus tended to come from the developed world. Industrialised countries have dominated the discussion on child labour and thus been the ones to define it and to stipulate its remedies in accordance with Western interests and ideologies.

A serious inequality in the negotiating positions thus exists, with the West dominating the proceedings. As a result, one must look beyond formalistic participation in order to appreciate the realities of implementation. Countries that did not participate, or had little opportunity to contribute during the negotiating process, will most likely lack the motivation and wherewithal to implement the provisions of the instruments.⁵

² Boyden et al *What Works for Working Children* 65.

³ Ibid. Also refer to Chapter III.

⁴ Ibid.

⁵ It would also seem that before the drafting and negotiation stage, little effort is put into researching the indigenous societies of non-Western countries, which are meant to benefit from those instruments. Moreover, there is little regard paid to whether or not the representatives of countries have done the necessary consultations with their national constituencies.

The ILO has tried to remedy this inequality by providing different child labour standards for poor nations and their developed counterparts.⁶ Such attempts have hardly been successful considering that international values and imperatives are still imposed on the latter. Moreover, there is no universally acceptable means for determining the degree of difference in child labour standards between developed and developing nations (as exemplified by the terms of the 1973 Minimum Age Convention).⁷

With regard to the ratification of treaties, it is clear that Lesotho, Zimbabwe and South Africa ratified most ILO Conventions and the ACRWC several years after they were adopted.⁸ One would have expected them to have been quick to ratify the ACRWC, which was 'Africa sensitive', and had a monitoring body operating within the socio-economic conditions of the continent. It, however, took 10 years before the Charter could get the 15 ratifications required for it to enter into force.⁹ It may be that African countries lacked confidence in the instrument or were not willing to subject themselves to higher children's rights standards and more stringent obligations than those of the CRC. Whatever the reason for the slow ratification of these treaties, one is left with the impression that African countries do not have the moral and political will to guarantee the rights of their citizens.

(b) Monitoring and enforcement

It is a sad but well-known truth that the international legal regime on children's rights lacks an efficient and effective monitoring machinery to ensure that state-members abide by treaty provisions. State reporting puts only minimal pressure on countries to comply with their obligations, particularly where the standards in the instruments are vague or subject to varying interpretations. In such instances, states are inclined to

⁶ The gradation of standards has thus historically been part of ILO minimum age conventions.

⁷ Smolin (1998-1999) 16 *Hofstra Lab & Emp L J* 393.

⁸ Lesotho ratified the Minimum Age Convention of 1973 in 2001. It ratified the Worst Forms of Child Labour Convention of 1999 two years after its adoption, and three years after the adoption of the CRC of 1989. It ratified the ACRWC 10 years after its adoption. Zimbabwe ratified the Minimum Age Convention of 1973 in 2000 and the ACRWC in 1995. South Africa became party to the CRC in 1996 and the ACRWC in 2000. It also ratified the Minimum Age Convention in 2000. Also see Chapter III.

⁹ The Children's Charter was adopted on 11 July 1990 by the 26th Ordinary Session of the Assembly Heads of State and Government in Addis Ababa, Ethiopia and entered into force on 29 November 1999. Lloyd (2002) 10 *Int J of Children's Rts* 179 at 180.

interpret their obligations loosely. Moreover, state reports are written so as to put the relevant countries in the best possible light.

The ILO Conventions, the CRC and the ACRWC lack provisions which allow for the censure or sanction of delinquent states. The monitoring bodies of these instruments have no mandate to remedy individual human rights violations, while their comments are merely recommendations without the force of law. These deficiencies make the bodies irrelevant, if not redundant.

This system of human rights protection, which is based, essentially, on self criticism and good faith, is inherently problematic, as it encourages states to view compliance only in the context of a sporadic reporting procedure, with no follow up mechanisms.¹⁰ This procedure can be seen as ‘an ad hoc activity which states only have to deal with once in a while and not a continuous effort that involves an on-going cycle of reporting on implementation, the dissemination of concluding observations and the drafting of new reports’.¹¹ In short, the human rights monitoring and evaluation mechanisms have, so far, proven to be incapable of providing an effective method for enforcing the international child labour prohibition and ensuring accountability for the violations that occur.¹²

(c) State compliance

In short, Lesotho, Zimbabwe and South Africa have done little to ensure the full incorporation of the treaties on child welfare into their systems of domestic law suggesting that ratification of international instruments by these countries is merely a diplomatic exercise.¹³ The countries lack clear and concise rules on the incorporation of international human rights principles into domestic legislation¹⁴ and in the

¹⁰ Heyns & Viljoen (2001) 23 *Hum Rts Q* 482 at 521.

¹¹ *Ibid.*

¹² Murison et al *Remaking Law in Africa: Transnationalism, Persons and Rights* 103.

¹³ Lesotho and Zimbabwe, for instance, have both ratified the CRC, ACRWC and the Worst Forms of Child Labour Convention, but are yet to incorporate these instruments into domestic law. South Africa has not incorporated all the provisions of these instruments into domestic law.

¹⁴ All the states in question all follow a dualist approach whereby international treaties require parliamentary approval before becoming applicable in domestic law. Zimbabwe, however, only applies this approach to treaties which impose fiscal obligations. The law of the country is silent on the incorporation of human rights treaties which do not carry such financial obligations. Section 17 of the Constitutional Amendment Act 7 of 1987.

instances where the three countries actually did incorporate the international conventions, they watered down the provisions by subjecting them to the Constitution and existing legislation.¹⁵

The system of legal pluralism prevailing in the three countries presents further serious problems in deciding when principles of human rights apply. The Constitutions and legislation of these countries do not clearly regulate in which way and to what extent the human rights principles are to be applied to customary law. The mode of life test used by Lesotho courts to determine whether an individual is subject to customary or the common law is not useful particularly in an era where most people carry on a lives which are both European and African. Although such conflict of laws is somewhat more clearly regulated in Zimbabwe and South Africa, the courts in these countries have had to resolve a number of sensitive problems with minimum legislative guidance.

The three countries have, however, made various attempts to implement some of the provisions of the treaties, particularly those relating to minimum ages of employment.¹⁶ Nevertheless, national legislation and practice fall short of the provisions international instruments in three main areas. The first relates to the scope of coverage of relevant provisions; the second to the minimum ages; and the third to the effective enforcement of these provisions.

It is apparent from Chapter V that some serious situations of abuse occur in the common situations of unregulated employment, such as work in family enterprises, domestic work and street trading. These countries, nevertheless, have adopted legislation which applies only to persons working under a contract of employment. Thus domestic law does not apply to all sectors of economic activity covered by the ILO Conventions. For instance, only major industries such as mining

¹⁵ Section 2 of the Constitution of South Africa; art 3 of the Constitution of Zimbabwe; s 2 of the Constitution of Lesotho. In addition, s 23(3)(b) Constitution of Zimbabwe provides that the principles of non-discrimination cannot be invoked in matters of customary law, while that of Lesotho is conspicuously silent on the status of international law in domestic law.

¹⁶ Refer to Chapters III and IV.

and construction are covered, while small enterprises, such as those involving apprenticeships, are excluded.¹⁷

Zimbabwe Lesotho and South Africa have implemented the minimum age standards as provided for in the Minimum Age Convention.¹⁸ However, they have not set the maximum age of compulsory schooling in order to put into effect the standards of the instrument.¹⁹ Instead, they have made only primary education compulsory,²⁰ leaving secondary school children exposed.

Lax enforcement is another major obstacle to the effective legal protection of working children. The continued prevalence of child labour is evidence of a wide gap between law and practice. As indicated in Chapter II, the civil service inspectorate was invented in England specifically to monitor child employment in factories and to enforce the child labour laws.²¹ Today, a basic task of visiting inspectors is to confirm that only registered children are working at the site of employment, their ages are in accordance with minimum age laws, and their hours, conditions and types of work meet the standards laid down by the law.²²

Countries (including those with progressive child labour laws, such as South Africa), will find it difficult to put all these regulations into practice. Child labour law violations are usually only detected in the course of routine inspections, or during interventions made on the basis of complaints received. Although inspection was originally intended to deal specifically with child labour, it has, over time, taken on so many other functions that child labour concerns occupy only a small portion of an

¹⁷ Myers *Protecting Working Children* 71-72.

¹⁸ Article 124 of the Lesotho Labour Code provides that the minimum age of employment is 15. As for Zimbabwe, s 11(1)(a) of the Labour Relations Act (LRA) sets the minimum age for admission to employment at 15 years, but it does not link this age to that for the completion of compulsory schooling. In South Africa, s 43(1)(a) and (b) of the Basic Conditions of Employment Act provides that 'no person may employ a child who is under 15 years of age, or who is under the minimum school-leaving age in terms of any law, if he/she is 15 or older'.

¹⁹ 'The minimum age specified in pursuance of paragraph 1 of this Article shall not be less than the age of completion of compulsory schooling and, in any case, shall not be less than 15 years.' Article 2(3).

²⁰ Refer to Chapter III.

²¹ Refer to Chapter VI.

²² For instance, Zimbabwe's Manpower Development Act of Zimbabwe. See Chapter III.

inspector's duties today. This is reflected in the lack of prominence of the provisions on the employment of children in the legislation regulating employment.²³

Enforcement problems are acute in the informal sector where most children work usually under verbal contracts or by subcontractors. Such children are usually found in the country, in agriculture, or are employed in small businesses (such as shops and hotels), street trading, or in domestic service within their natal households. Here law enforcement is virtually entirely absent. This is the case in most countries, regardless of their levels of development.²⁴

Numerous other factors impede the capacity of inspectorates to live up to their mandate. In most countries in Africa, Latin America and South-East Asia, a common complaint by inspectors is poor working conditions. For example, the lack of sufficient staff creates overwork and frustration.²⁵ Another problem is the lack of transport to reach establishments outside cities, which makes it virtually impossible to monitor agricultural areas, where most children work.²⁶ Although lack of resources makes enforcement a futile exercise, it must be noted that the conventional procedures are also not working well in developed countries. Here inspectorate case loads are not necessarily lighter or easier to handle than those in many developing countries.²⁷

(d) Definition of child

Laws which impose duties must be unambiguous if they are to be effective. However, with regards to the definition of 'child', international instruments on children's rights

²³ See the Lesotho Labour Code, the Zimbabwe Labour Relations Regulations and the South African Basic Conditions of Employment Act. 'Child Labour: Targeting the Intolerable' report submitted to the 86th Session (1998) of the International Labour Conference, International Labour Office 46, available at <http://www.oit.org/public/english/comp/child/publ/target/target.pdf> [accessed on 20 September 2007].

²⁴ Boyden (note 2) 207.

²⁵ 'Child Labour: Targeting the Intolerable' (note 23) 46.

²⁶ Ibid.

²⁷ The developed country child labour law violations mostly tend to revolve around relatively minor issues such as working hours and seldom include gross abuses, such as bonded labour, hazardous work and violence against workers, that are rampant in developing countries. In addition, inspection techniques that are used in the formal and industrial sector tend to be ill-suited for the informal and agricultural sectors. In Zimbabwe, the current economic and political instability makes the inspection of child employment highly unlikely. In Lesotho and South Africa it is not clear whether or not such inspections are carried out in practice and if they, as a matter of fact, yield results. Boyden (note 2) 207; 'Child Labour: Targeting the Intolerable' (note 23) 46.

lack consistency. Although the ILO Minimum Age Convention sets minimum ages of employment in various sectors, it is silent on the definition of child. While the ILO Worst Forms of Child Labour Convention and the ACRWC define a child as a person up to the age of 18, with no allowance for flexibility,²⁸ the CRC allows state members to set the maximum age of childhood to below 18.²⁹

Not only is the CRC definition of child at variance with other international instruments, it also contradicts other provisions of the text. For instance, art 2 ostensibly prohibits discrimination on any ground, including national origin, while at the same time it is qualified by its inequitable premise in the definition of child which allow countries to have different upper limits for childhood.³⁰ Such confusion is particularly problematic in countries such as Lesotho, Zimbabwe and South Africa which have plural legal systems. In these cases, different systems of law define the child differently.³¹ There is therefore a likelihood that some children in these countries may not fall under the principles on child labour if the applicable legal system (such as African customary law) considers them adults³² before they reach the age of 18. The CRC definition also misleadingly suggests that the age of majority and the maximum age of childhood mean one and the same thing. Countries such as Lesotho, however, have separated majority and the maximum age of childhood.³³

The discord in the definition of child is also evident in domestic legislation. As illustrated in Chapter IV, different laws of Lesotho and Zimbabwe define 'child' in various ways. This apparent lack of consensus and confusion in international and domestic law on the definition of 'child' leaves one in quandary as to the actual persons the law seeks to protect.

²⁸ The ILO Worst Forms of Child Labour, CRC and ACRWC.

²⁹ Article 1 provides that '[f]or the purposes of the present Convention, a child means every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier'.

³⁰ Article 1.

³¹ For instance, the definition of a child is according to most cultures in the Southern African region tied to the child's ability to carry out the task at hand, on attainment of marital status, on puberty, on procreation or on circumcision. The domestic laws define child according to biological age.

³² For example, if they have been circumcised, reached puberty, got married or procreated.

³³ One becomes an adult at 18 and a major at 21.

(e) Definition of child labour

(i) Minimum Age

No single international instrument explicitly defines child labour, which has created much confusion. The CRC views child labour not according to the activity but according to the effect of the activity on the child concerned. It deems any labour activity as unacceptable, if that activity is detrimental to the development of the child, regardless of whether it takes place at a work place or in the child's home. The ACRWC merely prohibits the economic exploitation of the child, and any work which has the same elements as those prohibited under the CRC.³⁴

The ILO approaches child labour according to minimum ages. While it is generally conceded that minimum age laws have been effective in removing children from formal employment, an issue which has been well researched, we still do not know whether the laws have improved the development and the welfare of the children concerned. It seems that governments, activists and child development experts simply assume that the effect would 'naturally' be beneficial.

Minimum age regulations, however, have not received a credible analysis that empirically weighs costs and benefits to determine their net impact on children, and on society. There is no evidence, from research findings into the general field of child welfare and development, that the minimum age standards will produce happier, better adjusted or well developed children. What one chooses to believe is a matter of faith, and on this issue there are divergent views.³⁵ This is astounding, considering that the minimum age policy has been in place for over 150 years, and the Minimum Age Convention for over 25 years.

An example of this oversight is in instances where children are orphaned due to HIV/Aids or any other reasons. Taking such children out of employment because they are under age would be counter-productive as they will be left with no means of survival. Such a case of 'misguided good intentions' should be a warning about the

³⁴ Article 32(2). The drafters of the CRC and ACRWC clearly made some attempt to complement the ILO Conventions. The CRC thus refers to and broadens the ILO concept that the minimum age should be set at levels that will promote children's fullest physical and mental development. Article 15(2) of the ACRWC also acknowledges the application of ILO Conventions relating to child labour.

³⁵ Boyden (note 2) 199.

costs of applying simplistic Western assumptions and solutions to developing countries without adequate attention to differences of social and economic context.

In light of the variety of social roles children play and the many avenues they may take to development, the notion of universal minimum age standards seems outdated. The age of 15, as specified by the Minimum Age Convention,³⁶ and endorsed by the CRC as the minimum age for employment,³⁷ is particularly puzzling in societies where children by that age are free to marry. In rural areas, many children have completed school by the age of 15, and cannot be taken seriously by their societies unless they have assumed proper work and family roles.³⁸ The minimum age of 15 thus becomes more acceptable only when we recognise that the type of work on which it is based is highly industrialised. This conception of work envisages child labour primarily in terms of full time paid employment, in mostly urban-based undertakings outside the family.³⁹

The Western setting of specific age standards for children, the prescription of their participation in some spheres of activity whilst proscribing others, pathologises those child activities which take place outside the limits set for childhood. Activists and child development experts judge developing societies as having failed their children because the children's lives do not conform to the image held in the West. Consequently, the discourse of children's rights suggests that the plight of children in the Third World 'is due to the moral failings of their societies'.⁴⁰

(ii) Education

Human rights law assumes that compulsory education will be an effective way of putting into effect the minimum age standards for admission to employment. The laws mark the end of compulsory education as the minimum age of employment.⁴¹ Campaigners against child labour have thus often pointed out the negative correlation between child work and formal education. The understanding of child labour as a practice harmful to a child's intellectual development is a well-established belief that

³⁶ Article 3.

³⁷ Article 32(2).

³⁸ Boyden (note 2) 200.

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ Article 28 of the CRC and art 2 of the ILO Minimum Age Convention. Boyden (note 2) 249-50.

has its origins in the mid-19th century. Activists thus often define child labour as work that keeps children from participating in education. The belief is that tiring work leaves children with no energy, time or inclination to attend and learn in school.

It is submitted, however, that the incompatibility of education and work is overstated, and that the benefits of abandoning work for schooling overrated. History has shown that condemning all child work and compelling children to go to school without first securing viable alternatives have made them even more vulnerable to poverty.⁴² Moreover, a large number of children, particularly in Asia and Africa, manage to combine school and work effectively.⁴³

Although full time work (whether hazardous or not) is clearly incompatible with school attendance and performance, part-time child labour does not necessarily interfere with education when it occurs during vacations, or for a few hours a week during the academic year.⁴⁴ Furthermore, there is no authoritative data based on empirical and scientific research to support the rhetoric about the dangers of combining all forms of work with education. One therefore has to be careful about making automatic assumptions that all child work impairs education and intellectual development.

Defining child labour as work that keeps children from school also creates a risk of over-estimating the harm of work and neglecting the relevance of poor quality education in developing countries.⁴⁵ The definition neglects the fact that schools can sometimes drive children of poverty stricken families to labour. They are left with no option but to go out to earn money to help pay for school costs.⁴⁶ Institutions, such as the missionary and farm schools of Southern Africa, have been known to actually perpetuate child labour rather than provide solutions for it. Hordes of children in rural Zimbabwe, for instance, have to wake up early to work on commercial farms and plantations or for missionary enterprises in exchange for education. This brings into question all the rhetoric of the human rights movement on the benefits of education.

⁴² Ibid.

⁴³ Sixty million African children combine schooling and work. Admasie (2002) 14 *African Development Rev* 251 at 255.

⁴⁴ Anker (2000) 139 *Int Lab Rev* 257 at 261.

⁴⁵ Heady (2000) *UNICEF Innocenti Working Papers* 79.

⁴⁶ Anker (note 44) 261.

Another important question that arises with defining child labour as work that hampers schooling is the nature of education. More than one form of education exists. There is, first, formal education, which involves going to school and equipping the child with the necessary skills for formal employment. The second is traditional education, which includes engagement in customary livelihoods at home, in fields and forests with parents and communities.⁴⁷ The basic skills transmitted in both allow children to grow up and survive in often harsh environments to prepare them for adulthood that is likely to span both 'modern' and 'traditional' spheres.

The current definitions relating to education do not take into account the existence of these different forms of education in African societies. They assume that a formal school is the only acceptable form of education. Southern African societies, however, consider child work an important component of education, especially in the household-based production system and various apprenticeship arrangements.⁴⁸

Admittedly, the global achievements of formal schooling have been considerable. Notwithstanding this, schooling should not be viewed uncritically, since it is eventually 'limited by technology of the classroom, formal instruction and uniform stages of progression, prescribed knowledge, a curriculum of self-contained bits and by the restricted amount of time children actually spend at school'.⁴⁹ In other words, education has not been fine-tuned to suit local circumstances.

When considering schools as routes to education and development, two major issues need to be taken into account. Firstly, given the multiplicity of values and goals of development in the world today, it is not evident that school alone can satisfy children's many developmental capacities and needs. Secondly, it is questionable whether the kind of schooling on offer in many parts of the world is of much benefit

⁴⁷ Larsen 'Indigenous and Tribal Children: Assessing child labour and education challenges' Child Labour and Education Working Paper, International Programme on the Elimination of Child Labour (IPEC), available at http://www.ilo.org/public/english/standards/ipec/publ/download/edu_indigenous_2003_en.pdf [accessed on 21 September 2006].

⁴⁸ Rodgers and Standing (eds) *Child Work, Poverty and Underdevelopment* 33.

⁴⁹ Boyden (note 2) 58.

to children. It may be that, in some cases, work has a more positive developmental effect, especially on the psychological well-being of the child.⁵⁰

(iii) Labour/work dichotomy

It would seem that organisations, such as UNICEF, and children's rights activists more generally have attempted to fill the lacuna in the definition of child labour by juxtaposing labour and work; the former is deemed harmful and the latter acceptable. This distinction, however, is unhelpful because it fails to provide any effective method of deciding which is 'labour' and which is 'work'. The dichotomy is too simplistic to allow us to understand the range and forms of work done by children, and it may lead one to consider child work as acceptable and labour unacceptable without any evaluation why.⁵¹

(iv) Child development

It would seem that the laws regulating child work are not informed by results from research on the relationship between child development and child work or by effects of different sorts of intervention in children's work. Little is known about the developmental and health effects of work vis-à-vis schooling and health. There is still much to be discovered about how children under different cultural and socio-economic conditions develop their psycho-social competencies and the role that work plays in that process.⁵²

It is also apparent that there has been little investigation into what makes work abuse for children and what cultural (and social and economic) forces provoke and sustain that abuse. Scholars pay attention only to the hazards of work. There is little consideration of the possible benefits of work on child development. As a result, human rights activists and child development experts condemn African ways of raising children without understanding why child work in such societies continues to be an integral part of human development.

⁵⁰ Boyden (note 2) 110.

⁵¹ McKechnie and Hobbs (1999) 8 *Child Abuse Rev* 87 at 88

⁵² *Ibid.*

(v) Harm and hazard

The drafters of international laws, such as those for the Worst Forms of Child Labour Convention, seemed to confuse hazards or risks with actual effects. While children should be protected from dangerous work and should not be encouraged to endure hazards, merely because they are resilient, the mere presence of risk tells us very little about the precise outcome of work for children. Exposure to a hazard does not necessarily have damaging consequences. Much depends on the social and normative context of work, the nature and severity of the hazard and how children respond individually.⁵³

Questions also remain on how to quantify the amount of time a child needs for rest, leisure and play, on who determines how much time a child may work and on which factors shall inform the decision as to the appropriate number of hours that may be allocated to child activities. Given differences in children's physical capabilities and adaptations, it is difficult to answer these questions. International and domestic instruments on children's rights do not provide any guidelines and thus the answers will inevitably be based on subjective deduction.⁵⁴

In international discourse, 'child labour' has often carried the connotation of employment. When people try to redefine the latter term as harmful, they create an untenable association. This association usually works against the interests of African children and their families, who in reality need an income, particularly those affected by HIV/AIDS (or any other terminal illness).⁵⁵ The connotation is also at odds with African culture, where intergenerational obligations of support and reciprocity bind parents and children together in long lasting relationships.

The child development experts' assumption that most children's work is grim, distasteful and stultifying to their development has seriously distorted both national and international activities dealing with it. Experts have usually placed emphasis on physical and safety issues, and on the adverse effects on schooling, while largely ignoring psycho-social effects. International law follows suit. Work can have

⁵³ Boyden (note 2) 79.

⁵⁴ Ibid.

⁵⁵ Bourdillon 'Problems with "Child Labour"' Seminar Paper available at (Draft for Discussion) <http://www.ascleiden.nl/Pdf/paper1112961027-mbourdillon.pdf>. [accessed on 20 January 2008].

important emotional advantages, which mitigate against detrimental outcomes, contribute to a child's resilience and facilitate development. It can actually bring important rewards, such as teaching children endurance, giving them a sense of pride and self worth, and making self sufficiency possible.⁵⁶

In conclusion, most ILO Conventions and the CRC approach child work in industrially oriented terms, using concepts and suppositions derived mostly from urban and formal sector experience, whereas the vast majority of working children in the three countries under consideration are found in rural areas and the informal sector. These countries have dutifully adopted legislation which applies only to children working in formal employment, and have defined child labour in a piecemeal fashion, approaching it as a series of separate issues rather than as whole.

By addressing child labour primarily as an issue of labour policy, Lesotho, Zimbabwe and South Africa ignore the fundamental connections to the economy, culture, education, health, and family. Purely sectoral definitions of labour lead to the absurdity in which the police would regard working children as a law enforcement problem, welfare agencies as a social assistance problem, child rights advocates as a rights problem and educators as a school drop-out issue, while no-one appreciates the problem as it is experienced by the children themselves.⁵⁷

2. Culture

(a) Western versus African forms of child rearing

Chapters IV and V considered in some detail the Western and African systems of child rearing and how they play out in attitudes towards children's work. The chapters highlighted the fact that culture is a major influence on a child's upbringing. It determines the context in which children work, the prevailing opinions about the value of that work and the attitudes to childhood and the raising of children.⁵⁸ These chapters revealed that while there is an international consensus on the concern for

⁵⁶ Boyden (note 2) 144 and 110.

⁵⁷ Myers (note 17) 4.

⁵⁸ Boyden (note 2) 140.

children, Western and traditional societies differ on how a child's welfare may best be secured.

In the traditional Western conception, family life is based on a nuclear unit, often in isolation from other kin. Childhood is separated from adulthood by keeping children dependent through adolescence and discouraging their participation in most adult concerns, notably the economic maintenance of the family. Children are raised in a context of privacy and autonomy.

The CRC and the ILO reflect such thinking. They emphasise the role of individual causations and professional interventions, and they de-emphasise the influence of the wider social, economic and cultural circumstances.⁵⁹ These instruments also assume a model of childhood based on the notion that children everywhere have the same basic needs and that these can be met with a standard set of responses.⁶⁰

The accounts of childhood in Africa, however, from pre-colonial times to the present, tell of different social systems and ideas of child development. The African philosophy of existence can be summed up in Shona as '*ndiri nokuti tiri, uye nekuti tiri, neniwo ndiri*', meaning 'I am because we are and because we are, therefore I am'. An analysis of the social organisation of ethnic groups in Lesotho, Zimbabwe and South Africa clearly reveals the cohesiveness of African society and the importance of kinship to the African lifestyle.⁶¹ At the heart of the African socio-political order lies the family, a unit which extends both vertically and horizontally.⁶²

The indigenous cultures of these countries, therefore, do not view the individual as an autonomous being possessed of rights above and prior to society. Whatever the specific social relations, such societies conceive of the individual as an integral part of a greater whole: the family within which each has a defined role and status.⁶³ Such a system tends to stress duties rather than rights.⁶⁴ Society would

⁵⁹ Ibid.

⁶⁰ Pupavac (1998) *Hum Rts L Rev* 3.

⁶¹ Cobbah (1987) 9 *Hum Rts Q* 309 at 320.

⁶² Bennett *Human Rights and African Customary Law* 5.

⁶³ Nhlapo (1989) 3 *Int J of Law & the Family* 1 at 4.

deem invoking one's rights as anti-social behaviour. Indeed, in Africa each person is expected to compromise personal interests for the good of the community. From infancy, this sense of sacrifice is instilled in everyone.⁶⁵

These ideas of development define childhood and express beliefs about children's nature, what they are capable of doing and how they should be integrated into society. African conceptions of the child therefore determine the types of activities and the social and economic responsibilities of children together with the appropriate methods of socialisation and care.⁶⁶ Colonial influences did little to alter traditional thinking. Even after the independence of African countries, the notion of the primacy of the group and the submission of the individual persisted.⁶⁷

Such ideas are widely different from those in the West,⁶⁸ which means that there is a lack of 'fit' between international law and the society in which it is to be applied. At first glance, one could say that the CRC accepts a diversity of cultures, since it places considerable emphasis on non-discrimination and the importance of children's cultural rights.⁶⁹ It also calls for the respect of the responsibilities, rights and duties of parents or the members of the extended family or community, as provided for by local custom, to provide appropriate direction and guidance in a child's exercise of rights.⁷⁰

⁶⁴ Ahmed A-Na'im *Human Rights in Africa: Cross-Cultural Perspectives* 16.

⁶⁵ Ibid.

⁶⁶ Boyden (note 2) 32.

⁶⁷ This led to African support for collective rights and for restrictions on individual rights in the interest of the community, as well as for an emphasis on responsibilities. Pollis and Schwab *Human Rights: New Perspectives, New Realities* 8-9.

⁶⁸ Practical experience also demonstrates the existence of an international divide between rich and poor societies, according to which the industrialised countries of Europe and North America (and often Western-educated elites in poorer countries) tend to conceive of childhood and raise their children differently than the less economically developed societies of Africa, Asia, and elsewhere. Those in developing countries often reject Western-influenced international child labour standards because the views of children and childhood implicit in such standards do not adequately fit with the realities of developing countries. Myers (note 17) 40.

⁶⁹ Art 31. 'States Parties recognize the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts. States Parties shall respect and promote the right of the child to participate fully in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.'

⁷⁰ Article 5.

On closer scrutiny, however, when describing the need for state members to ‘take all effective measures with a view to abolishing traditional practices prejudicial to the health of the child’, the CRC acknowledges the potentially harmful effects of culture.⁷¹ The instrument is thus ambivalent on the role of culture in the lives of children. It sends mixed signals, thus obscuring the cultural practices to be condemned or condoned.⁷²

(b) Problems with the ideologies underlining international human rights

While the near-universal ratification of the CRC may be said to represent the most significant commitment to children’s rights ever made, its objective of laying down universally applicable standards, places it at the forefront of the question whether human rights norms are capable of attaining universal application or whether they should be relative to each culture.⁷³ The answer to this question involves three key issues: how childhood is conceived, how child development is conceived, who is responsible for a child, that is, in realising children’s rights, (in other words, who are the duty bearers).⁷⁴

(i) Childhood

Chapter IV dealt with the questions: What is a child? Is childhood a universal condition, or is the concept of childhood understood differently in different cultures and contexts? If it is not universally understood, can there be any universal children’s rights as provided for in international law?⁷⁵

The chapter showed how, for the past two centuries, most thinking on children’s rights had been based on homogenising the concept of childhood as a biologically driven natural phenomenon, characterised by physical and mental growth stages that are everywhere roughly the same, even if culturally inflected. This modern thinking dissociates childhood from work. International agencies and industrialized

⁷¹ Article 24(3).

⁷² Verhellen (ed) *Understanding Children’s Rights* 58.

⁷³ Alston (ed) *The Best Interests of Child: Reconciling Culture and Human Rights* 1-2.

⁷⁴ *Ibid.*

⁷⁵ Bentley (2005) 9 *Int J Hum Rts* 107.

countries use this yardstick of modernity as a tool to condemn those countries with a high incidence of child labour as ‘backward’ and ‘undemocratic’.⁷⁶

The problem with this ideal of childhood, however, is that it denies children’s agency in work⁷⁷ yet the CRC itself and the ACRWC both recognise childhood not only as a period of protection but also as one of autonomy.⁷⁸ Moreover, doubt may be thrown on the developmental and moral validity of the conventional Western model of childhood, which excludes children from participation in matters social and economic. What is the value of isolating and institutionalising children in schools buffered from the important realities of life? The rationale of the CRC, however, is that irrespective of the level of development of a country, children must have a childhood of dependency during which they are empowered with rights, and social policy must be re-orientated to ensure that their best interests are the primary concern.⁷⁹

One may argue that the ‘protective view’ of childhood which the international instruments attempt to universalise, has resulted from a combination of circumstances that are not part of the experience of most developing countries. The construction of childhood reflected particularly in the CRC arose in the particular circumstances of the developed countries, late in their industrialisation, which consequently led to the removal of children from the labour market into education. International law thus unfairly requires developing countries to adopt a Western model of childhood, although without the industrialisation and development that was considered a prerequisite to the modern construction of childhood as a period of dependency and protection.⁸⁰

(ii) Child labour and development

The whole discussion of childhood and the definitions of child labour are centred on the ‘development of the child’. Childhood is the first stage of development in the life of a human being, and labour is deemed to be detrimental to that stage of

⁷⁶ Nieuwenhuys (1996) 25 *Annual Rev of Anthropology* 237 at 246.

⁷⁷ Ibid.

⁷⁸ Chirwa (2002) 10 *Int J of Children’s Rts* 157 at 160.

⁷⁹ Article 3(1).

⁸⁰ Steiner and Alston *International Human Rights in Context: Law, Politics, Morals* 517-8.

development. But what do we mean by ‘development of the child’? Who determines the ‘development of the child’, using what criteria?

The universalist theory of child development, as embodied in international law, is built on a belief that it is in the best interests of the child to be economically dependent, at least until a specified minimum age, school being a more appropriate context for growth and development than work.⁸¹ Initially, this idea of a universal process of development may appear appealing.⁸² To embrace it blindly, however, would be to ignore the fact that different societies have their own ideas about children’s capacities and vulnerabilities, the ways in which a child learns and develops, and what is good or bad for them.

Different cultures place significance on differing stages of a child’s growth, which may be marked by chronological age, by physical abilities, biological changes, etc. Each stage of growth will have different implications for the child. Children thrive, and indeed flourish in widely contrasting conditions and circumstances, and they have different capacities and needs, to which the universal child development model (based on the Western notion of childhood) is not sensitive. Although the universal model draws on supposedly ‘scientific’ principles, we have no conclusive evidence that it suits children’s interests better than other cultural models.⁸³

The Western model of education also seems to carry with it an arrogantly negative perception of African cultural ways without acknowledging their benefits. Traditional education includes engagement in customary livelihoods at home, in fields and pastures with parents and communities.⁸⁴ The basic skills transmitted do indeed

⁸¹ Boyden (note 2) 27.

⁸² For instance, ‘[d]efining development in terms of progressive stages fits the empirical observation that children everywhere grow bigger and stronger with age and master new skills and new insights daily. It also seems to make feasible the measurement of developmental progress in individual children through the application of behavioural and developmental tests.’ Boyden (note 2) 31.

⁸³ Boyden (note 2) 39.

⁸⁴ Larsen ‘Indigenous and Tribal Children: Assessing child labour and education challenges’ Child Labour and Education Working Paper, International Programme on the elimination of Child Labour (IPEC), available at http://www.ilo.org/public/english/standards/ipec/publ/download/edu_indigenous_2003_en.pdf [accessed on 21 September 2006].

allow children to mature in a protective environment, at the same time preparing them for survival in an often harsh world.⁸⁵

When one talks about work that is ‘detrimental to the development’ of the child, the question is what dimension of development is being referred to? It is quite apparent that most literature relating work to child development deals superficially with physical health and safety, which includes all the bodily senses required to survive to the journey to adulthood, and the cognitive development of literacy, numeracy, basic cultural knowledge, vocational skills and other knowledge required to live a successful life.⁸⁶

Yet the Western theory of development is restrictive in that it overlooks the existence of the social and moral dimensions of human development, which include concern for others, sharing, a sense of belonging, ability to cooperate, distinction between right from wrong, respect for laws and for the property and persons of others, resourcefulness and other capacities needed to live successfully within a social context.⁸⁷ Little attention is paid to emotional development, which relates to adequate self esteem, family attachment, feelings of love, acceptance and the affection necessary to maintain family ties.⁸⁸ Such dimensions of development may be enhanced by child work, and are essential in African cultures. Moreover, there are so many kinds of work and working conditions, some facilitating and some hindering children’s growth, that it is presumptuous to make blanket judgments about the morality of child work and the legal standards involved.

The limits of culture must, however, be noted. Just as culture should not be excluded from the human rights equation, so too must it not be used consistently to trump rights. There are cultural practices, which, by today’s standards, are difficult to justify, for instance, taking the girl child out of school because she is to be married.⁸⁹ Such limits on culture, however, seem to have driven the international campaign against child labour to seek the denial of all cultural practices and attitudes. Notable

⁸⁵ Rodgers and Standing (note 48) 33.

⁸⁶ Boyden (note 2) 29-39.

⁸⁷ Ibid.

⁸⁸ Ibid.

⁸⁹ Alston (note 73) 20.

amongst these are the expectations that children will contribute economically to their families, and the belief that children working is an appropriate preparation for adulthood. While such African attitudes can indeed significantly perpetuate child labour, they cannot, with their associated practices, be entirely condemned.⁹⁰

African attitudes exist in a wide variety of forms, not all of which can necessarily be linked to exploitative types of child labour. Modifying the forms of those cultural attitudes and practices, therefore, should be a finely nuanced, context specific task. The ways and degree to which children are expected to contribute to their families, the best mix of formal education, paid employment and apprenticeship to prepare children for adulthood, and the appropriate way to handle biologically and culturally gendered differences, are intrinsically context-oriented decisions. Hence, any attempt to modify them should be sufficiently local to take account of the circumstances in which they occur. Further, decisions about such matters would normally fall within the spheres of family privacy, religious liberty and cultural autonomy. Hence, attempts to modify those attitudes coercively or without sensitivity to local conditions are likely to be met with resistance.⁹¹

While the cultural differences in childrearing seem obvious at first glance, these differences are often unrecognised by those charged with implementing the law, as they apply 'scientific' ways of approaching problems. The economic, social and political conditions for urban, middle class individuals, who shape policy and programming often differ dramatically from those on the receiving end: the rural folk. This expert knowledge is often derived from a Western conceptual basis that denigrates local knowledge and traditional wisdom. Local practices are frequently defined as harmful without appreciating the meaning of harm.⁹²

(iii) Duty bearers

All human rights conventions place obligations on various people and entities for the realisation and protection of rights. According to the CRC, families and the state bear the duty of ensuring that children's rights are realised and protected. Indeed, both the

⁹⁰ Smolin (note 7) 401-2.

⁹¹ Ibid.

⁹² Verhellen (note 72) 59.

CRC and the ACRWC recognise that the family, however defined, plays a primary role in the upbringing of children.

As Chapter V illustrated, African perceptions of ‘parent’ or ‘family’ challenge the conventional conceptions of these terms.⁹³ Thus, it is not clear who is included in the definition of family for purposes of identifying the bearers of obligations towards a child. While parents bear the primary duty to ensure the realisation of the rights of their children, the identity of a parent is not so apparent in Africa, because various relatives or community members may play parental roles.⁹⁴ In fact, African cultures deem every child to be ‘everyone’s child’.⁹⁵

The diversity in the conception of family creates problems when determining who owes their children a duty to ensure that they are protected from child labour, and the right of control over those children. International (and even regional) human rights instruments seem to have overlooked this problem, thereby making the enforcement of the law that much more difficult.

It is also necessary to point out that international law did not anticipate the problems of HIV/Aids and the difficulties it poses for the definition of duty bearers. This scourge has wiped out the people who, for purposes of the law, are the primary duty bearers and has left in its wake many orphans and child-headed households. Hence children have prematurely had to take on the role of duty bearer for themselves and their younger siblings.

(c) Language

The overwhelming majority of studies and laws on child labour are written in world languages, such as English and French, and they discuss child labour as it has been

⁹³ Ibid.

⁹⁴ *Women and Law in Southern Africa Towards a Cultural Understanding of the interplay between Children and Women’s Rights: An Eastern and Southern African Perspective* 4.

⁹⁵ The identity of a family member is determined by the purpose for which the term is being used. For purposes of inheritance, a married woman may not be included as a member of the family, yet she may be deemed family for purposes of performing certain duties. What is family in Africa may also depend on whether that entity is being externally or internally defined. Members of a group may deem themselves to be family by virtue of sharing residence, while non-members may not define such a group as constituting a family due to the members’ lack of biological connection.

observed in their continent of origin. The images and historical and cultural references that bring words to life do not originate in Africa. Experts, and subsequently law makers, use terms describing child labour at such a level of abstraction that they often speak of ideas beyond the experience of the African populations.⁹⁶ In Lesotho, Zimbabwe and South Africa, all the laws relating to the welfare of children are written in English and to date, no attempts have been made to translate them into vernacular languages.

In most African societies, the term 'child labour' has no negative linguistic connotation and hence has not been considered a problem.⁹⁷ What is more, the words associated with child labour such as 'exploitation', 'abuse' and 'intolerable', do not have any vernacular equivalent. For instance, in the Shona language, some these terms do not exist (for instance exploitation and intolerable). African societies perceive a child working alongside a parent as an expression of an essential obligation that ensures normal socialisation.⁹⁸

The term 'exploitation', for instance, may allow a particular activity to be described as permitted or forbidden by a labour code, but bears no relation to vernacular language. As a result, it is of little use in assessing whether a given activity is a help or a hindrance to a child's development, although it is precisely this crucial question which concerns a child's parents- for which they must find an immediate answer.⁹⁹

The hazy distinction between work and labour in the languages of origin, and the non-existence of such a dichotomy in most African languages worsens the problem. In simple English, 'labour' carries the connotation of being strenuous, but not necessarily harmful. In a variety of contexts, both the terms 'labour' and 'work' carry connotations of employment. Labour, in particular, refers to formal employment in such phrases as 'labour law' or 'the labour movement'. When you use the term 'child labour', people's usual reaction will be to think of children in employment. But

⁹⁶ Such as labour, exploitation, harmful to health and morals. Bonnet (1993) 132 *Int Lab Rev* 371 at 372.

⁹⁷ Bass *Child Labour in Sub-Saharan Africa* 15.

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

a person's 'work' can also refer to their formal employment. African culture deems 'all work as work which is good for everyone'. In some African languages, child work and child labour mean one and the same thing. For instance the Shona translation for both these two terms is 'basa'. The universal human rights concepts are, therefore, alien ethical theories, which are far removed from the realities of most of the African agrarian developing countries.¹⁰⁰

3. Conclusion

In conclusion, the debate over what is meant by child labour represents fundamental disagreement over what a child is, and the social problem that should be eliminated. There is a growing consensus on the existence of a definitional problem, which appears to spring from two sources. The first is that developing countries which had tended to regard child labour as necessary are now being forced to view it as only harmful. The second is recognition that the international community has a one-dimensional view of the problem which is irrelevant to non-Western societies.¹⁰¹

Clearly, it is difficult to come to a universal understanding of what is hazardous to a child, besides the more obvious dangers to health and social development of work such as sexual exploitation, mining and construction. Social and economic considerations will subjectively influence the determination. For instance, African societies do not consider the fetching of firewood and water as in anyway hazardous, but as an integral part of the socialisation process. European parents, however, would never send a child to a 'big bad forest' to fetch wood or to a well 'where there is a risk of drowning'. To them, such work is of no value to a child's social development.

Given the questions that come up about the current and dominant perceptions of child labour, it is apparent that international law is based on assumptions which lack the substantiation of comprehensive research. There has been a tendency to

¹⁰⁰ Ajayi and Torimiro (2004) 174 *Early Child Development & Care* 83 at 190.

¹⁰¹ Myers (1999) 6 *Childhood* 13 at 22.

define work generally, and vaguely, as a problem for children, and to base inquiries on individual case studies, many of which focused on situations of serious peril. A consequence has been the formulation of blanket legal (and policy and programme) measures which were ill-suited to the children whose work was not particularly hazardous or exploitative, and could be combined successfully with school work.

Many of the studies provide a fairly static picture of children's working lives, neglecting their work histories. These lead to misleading conclusions. The intensity of children's work and their schedules sometimes change over short periods of time. This general lack of theoretical and methodological rigour results in a poor conceptualisation of working children as victims, and their classification, often erroneously, into categories defined very loosely by their circumstances or situation.

The CRC and the ILO instruments on child labour therefore attempt to achieve the impossible: imposing a set of general standards of right treatment for children in a world with vastly different understandings about childhood and child development.¹⁰² This indicates Western society's belief that its way of raising children is the best way, which is all very well for that society's own reality and purposes, but is irrelevant for Africans and other non-Western countries.

The crusading moralism that characterises the child rights movement poses a problem for the practical and objective reconsideration of child labour (and other issues on child welfare). It leads to a rigidity of thought and action in an era when more flexibility is essential to the successful adaptation of child protection methods to the exigencies of a changing world.¹⁰³ The rights codified in international instruments have a strident and absolutist character which impoverishes the discourse: there is no room for compromise or an allowance for competing cultural values. The current character of human rights forecloses reflection on intricate issues that are not soluble by simplistic formulae.¹⁰⁴

¹⁰² Ibid.

¹⁰³ Boyden et al (note 2) 324-6.

¹⁰⁴ Sunstein (1995) 70 *Notre Dame L Rev* 727 at 730-2.

What is apparent throughout this thesis is that the principles of human rights do not permit people, in particular cases, to make individual judgments about whether abolishing child labour is in fact reasonable in the circumstances. The laws on child labour are ill-adapted to what Africans expect: a careful discussion of trade-offs and competing concerns. By presenting itself as an ultimately abolitionist oar of the international human rights movement, the child labour campaign thus faces a potential backlash by those concerned with cultural, familial or personal autonomy.¹⁰⁵

While it is vital to retain or recapture cherished traditional values, caution must be taken against relying on dying, lost and even mythical cultural norms.¹⁰⁶ The relativist critique of human rights should not support a general challenge to children's rights but rather 'create a contingent, partial warning about the appropriate content of rights and about the possibly harmful way in which certain social institutions safeguard rights'.¹⁰⁷

In short, one must always bear in mind that the absence of individual 'rights' in the African cultural context does not mean that children are systematically abused or neglected as a matter of policy. Such treatment is not deliberate. The powerful ethic of generosity towards all kinfolk illustrated in Chapter V, assured children of nurture and protection within families. The African social and legal system does in fact assure human dignity in all material respects.¹⁰⁸

In conclusion, child labour principles, as with other human rights principles, have not had full effect on African society because cultural practices persist. Human rights instruments have not sought to address the tensions between their provisions and local cultures. The lack of attention to the particularities of children's situations

¹⁰⁵ In addition, the rules which the human rights movement seeks to impose would, if actually enforced, severely limit cultural, familial, religious and personal freedom. Smolin (note 7) 400.

¹⁰⁶ 'Leaders sing the praises of traditional communities – while they wield arbitrary power antithetical to traditional values, pursue development policies that systematically undermine traditional communities and replace traditional leaders with corrupt cronies and party hacks. Such cynical manipulation of tradition occurs everywhere.' Donnelly *Universal Human Rights in Theory and Practice* 118.

¹⁰⁷ Steiner and Alston (note 80) 336-7.

¹⁰⁸ Bennett (note 62) 5.

has led to generalised and one-dimensional legal remedies that are likely to be weak or counter-productive for the children involved.¹⁰⁹

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¹⁰⁹ Myers (note 17) 42.

Chapter VII

FINDINGS AND RECOMMENDATIONS

1. An overview of the thesis

I come from a family and a society which firmly believes that ‘nothing is more favourable to morals than early habits of industry’. From about the age of 4 to the time we left home, my siblings and I cooked, cleaned, ran errands and did all the chores that my parents expected of us. Thus domestic work was an integral part of my childhood which I believe moulded me into the person I am today.

Until I enrolled for postgraduate study in human rights law, I had considered myself to have received an upbringing which was normal and well worth emulating. But, as my studies progressed, I soon realised how child rights activists, the world media and child development experts had pathologised my parents’ child rearing methods and those of the generations before them. The work which I had engaged in as a child, and which my parents believed had been in my best interests, was by international standards ‘abusive’, ‘exploitative’, ‘harmful’, ‘dangerous’ and generally satisfied most of institutionalised elements of child labour.

I therefore became aware of the discord between, cultural norms which had shaped my childhood, and the Western-inspired universal children’s rights principles which I was now being taught. As I pondered this apparent conflict of ideologies I also became aware that there was, in fact, a global explosion of interest in the activities of children, yet there had been little, if any, scholarly attention to the applicability or relevance of child labour principles to the cultural realities of African societies (and those of the rest of the developing world). This motivated me to embark on this study.

This thesis therefore posed the question: Can a world that is so diverse socially and culturally effectively implement the international law on child labour? This research therefore set out to examine the efficacy and appropriateness of the universal standards in the context of Lesotho, Zimbabwe and South Africa. While

acknowledging the noble intentions behind the child labour principles, I set out to identify the problems with the regime and highlight the difficulties of applying global norms in specific contexts.

The thesis began by giving an account of the development of the law governing child labour in Britain, where the campaign against the exploitation of children began.¹ It described how events in that country influenced the beginnings of the global movement against child labour which subsequently led to the development of international law. An outline of all the treaties on children's rights and welfare, laid the ground for an appraisal of the international child labour regime.²

The ensuing assessment of the international instruments saw the thesis scrutinising the process of treaty-making, the texts of the instruments, the monitoring procedures and state compliance in the three countries selected. It identified the following as the major flaws of the system:

- (a) Lack of participation and representation of developing countries at the drafting stages of the conventions;
- (b) conceptual ambiguity of the texts particularly with regards to the definition of child and labour;³
- (c) ineffective monitoring and reporting systems;
- (d) lax enforcement procedures; and
- (e) poor state compliance aggravated by
 - (i) only partial incorporation of international law into the domestic arena;
 - (ii) constitutional limitations on human rights; and
 - (iii) pluralistic legal systems.⁴

¹ Refer to Chapter IV.

² Such as the Convention on the Rights of the Child (CRC), the ILO Convention concerning Minimum Age for Admission to Employment (Minimum Age Convention), the ILO Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (Worst Forms of Child Labour Convention) and the African Charter on the Rights and Welfare of the Child (ACRWC).

³ The precise 'evil' to be abolished in international law, in fact, remains unclear.

⁴ Refer to Chapter III.

The thesis acknowledged that a society's conceptualisation of children determined the kind of work that was acceptable or otherwise for its children. An examination of the evolution of the concept of childhood in Europe and Africa showed how contemporary Western thinking and social practice portrayed children as weak and vulnerable beings, entitled to adult care and concern. Nonetheless, they were considered 'autonomous'.⁵ Accordingly, children were to spend their time in educational pursuits, resting, playing and generally being exempt from work. Such thinking forms the basis of the international legal interventions on child labour.

The analysis of the social order of Southern African indigenous societies from the pre-colonial era to the present illustrated how differently these societies conceptualised childhood and hence child rearing methods.⁶ Pre-colonial children were economically and socially accountable to a wider kin-group. They had important productive responsibilities and played mature roles in preparation for adulthood.⁷

The thesis related how colonialism prompted the transition from subsistence to a modern industrial economy, which in turn affected the activities of the child. As a result of labour migration and the subsequent breakdown of family structures, children found themselves playing adult roles earlier in their lives. They were burdened with an increased workload as they took on the duties of absent family members, and became crucial participants of the capitalist economy. The thesis highlighted the on-going debate among scholars on whether child labour was a direct consequence of colonialism or pre-existed the colonial era.⁸

Despite the impact of colonisation on the social and economic structure of African societies, the thesis showed that traditional norms, to this day, retain power and influence over their communities and continue to impose certain roles and duties on the vast majority of their members. Children thus continue to have the responsibility to work for the cohesion and sustenance of their families, put their

⁵ Refer to Chapter IV.

⁶ Refer to Chapter V.

⁷ Childhood was typically a period of internalised and rigorously enforced obedience to traditional authority. The family and the community not only managed the socialisation of children, but also determined the tasks, traditions and customs which had to be complied with before 'childhood' (in its narrow sense) could be said to have ended.

⁸ Refer to Chapter V.

physical and intellectual abilities at the service of their communities and preserve cultural values in their relations with others.⁹

Putting the entire thesis into perspective, I cast doubt on the relevance and hence efficacy of the international child labour regime, particularly when applied to the realities of countries with pluralistic legal systems. While acknowledging some of the shortcomings of African cultural norms, and the plight of children in the three states under study, I have taken a 'liberal' relativist stance, which basically insists that law makers, child development experts and activists must consider children's work from its proper cultural context. It is from this standpoint that I make the following suggestions for the improvement of the international regime on child labour.

2. The need for new approaches

In view of the magnitude and complexity of the phenomenon of child labour in Lesotho, Zimbabwe and South Africa, tackling the issue would require taking careful note of the various child development theories and values, the dynamics of social forces, the relevance of education, the impact on health and the pressures of global, regional and domestic economics.¹⁰ The problem must, therefore, be treated holistically in a manner which will ultimately serve the best interests of the child. To do so, three important areas need attention. The first is further research into the phenomenon of child labour from as many angles as possible. The second relates to the revision of legal regime itself and its approaches to child labour (and children's rights generally). The third involves a social, economic and political commitment to put into effect suggested changes.

(a) Further research

To date, international laws on children's welfare have been largely based on the ideas of Western child development experts. Laws and policies have been focused mainly on prohibiting the engagement of children in any production of value, disregarding cultural values, familial obligations, and other vital aspects of their lives. Legal

⁹ This is reflected by the African Charter on the Rights and Welfare of the Child's veneration of the responsibilities of the child: Article 31.

¹⁰ Skolnick (1975) 39 *Law & Contemporary Problems* 38-77.

interventions have been based on intuitive feelings about the outcomes for children. Hence much of the existing knowledge on child labour makes an unreliable basis for legal action.¹¹ At present, there is a dearth of information that is sensitive to the different situations of 'real' children. It is thus imperative for the assumptions on child labour to be tested by appropriate interdisciplinary research.

(i) Culture

By now it is apparent that childhood is as much a culturally constructed concept as it is a phenomenon of biological immaturity. There is thus a need to think, not only in terms of many different childhoods linked to particular contexts, 'neither timeless nor universal', but also in terms of childhood rooted in the past and shaped in the present.¹²

There is an urgent need for empirical research into how various cultures conceptualise 'child' and childhood. Such an investigation will provide an insight into how various cultures view the work of children, the values they place on it and how they regulate it. Careful attention is required to determining the parameters for acceptable and unacceptable child work, both between and within cultures. There should be more satisfactory answers to the following questions: What is the spectrum of child activities accepted by different cultures? Under what conditions does child work exceed the cultural continuum of acceptability?¹³ This inquiry may, in the long run, purge the entrenched and ill-informed assumptions about child labour in developing countries along with Western prejudices about the child rearing methods of African cultures.¹⁴

It will be more useful to design research concerning the factors that promote or prevent child labour cross-culturally rather than to try to compare the incidence and prevalence statistics (that are unreliable even in nations with legally mandated reporting systems).¹⁵ Based on available cross-cultural evidence, we can begin to

¹¹ Refer to Chapter VI.

¹² Myers (2001) 575 *Annals of the American Academy of Political & Social Science* 38 at 41.

¹³ Korbin (1991) 15 *Child Abuse & Neglect: Int J* 67.

¹⁴ Boyden et al *What Works for Working Children* 342-5.

¹⁵ Such as those of the West. Ibid.

identify vulnerable categories of children and circumstances in which children are at greater risk of abuse.¹⁶

Such research should be on-going so as to note the changes that inevitably happen as cultures intermingle and change. It should provide up-to-date information on prevailing cultural trends, and could even motivate countries to amend law periodically, so that it remains in tune with the realities of the day.

This research would also reveal the shared commonalities between the cultures of Western and developing countries on the value of children. The current human rights thinking seems oblivious to the fact that African societies also impose restraints on the abuse of children.¹⁷

There is still much to be discovered about how children under different cultural conditions develop their psychosocial competencies during school years, and the role work plays in that process. Virtually no recognition is given to traditional methods of education. Research into the cultures will lead to an appreciation of the differences in child rearing methods, particularly between the North and the South and between rural and urban dwellers, together with the benefits of alternative methods of education.¹⁸

It is imperative for social scientists to conduct comparative research on specific behaviour patterns, values and structural features within different cultural systems. The information gathered will be useful in formulating realistic policies and laws aimed at correcting deleterious methods of rearing children.¹⁹

(ii) Causes of child labour

Good laws and policies against child labour are those informed by accurate information about its causes.²⁰ Most literature from human rights organisations

¹⁶ Ibid.

¹⁷ Pollis and Schwab *Human Rights: New Perspectives, New Realities* 15.

¹⁸ Boyden (note 14) 342-5.

¹⁹ Cobbah (1987) 9 *Hum Rts Q* 309 at 329.

²⁰ Pierk & Houwerzijl (2006) 20 *Ethics & Int Affairs* 193 at 195.

attributes child labour in Africa, and the rest of the developing world, to poverty and cultural practices.²¹ The limits as explanations of child labour, however, must be noted. The highest rates of child labour are not always found in the poorest of circumstances or in traditional societies.²² Moreover, researchers have paid little attention to children from well-to-do families or in developed countries. The relationship between poverty and culture, on one hand, and child work, on the other, while real, is unclear and indirect. There is therefore a need for closer scrutiny of causes, some of which may seem insignificant, but might have potentially dangerous consequences.²³

(iii) The impact of work on child development

Little is known about the developmental effects of work, except the extreme forms of child labour.²⁴ Assumptions which arose in reaction to the abuse of children in the industrial revolution in Europe continue to inform the laws of today. More research is thus needed to understand the current types of work and their impact on present day children.

Answers should be sought on what makes certain types of work unacceptable for children.²⁵ This may require scientific and social study. Attention should not only be focused on the harmful effects of work on child development, but should also be an acknowledgement of its benefits.²⁶ Such a balanced and objective approach would, hopefully, result in the creation of laws which protect the children who most need it. Without a comprehensive study of the nature or dynamics of the role of work in the development of the child's personality and competencies, it will be impossible to formulate laws which best promote children's overall growth, and successfully protect them against work-related harm.²⁷

²¹ See for instance Grootaert & Kanbur (1995) 134 *Int Lab Rev* 187 at 198.

²² Korbin (note 13) 640.

²³ *Ibid.*

²⁴ Heady (2003) 31 *World Development* 385 at 386.

²⁵ McKechnie and Hobbs (1999) 8 *Child Abuse Rev* 87 at 88.

²⁶ Boyden (note 14) 199.

²⁷ McKechnie and Hobbs (note 25) 88.

Child labour interventions regulating the minimum age of employment and enforcing compulsory education have been around since the beginnings of the British legislation on child labour in 19th century England.²⁸ Indeed, as a result of these standards, a significant number of children have been removed from the world of work. Despite their long existence, however, the principles are yet to receive a credible policy analysis empirically weighing their pros and cons to determine their net impact on those they are supposed to benefit.²⁹ Evaluative research therefore needs to be conducted to determine the effects of legal interventions on the well-being and development of the children involved and their families.³⁰

There is a need for a thorough assessment of whether the exclusion of children from the world of work leads to improved child development and welfare, and, as a matter of fact, produces better adjusted children. Scholars and law makers need to appreciate how the societies in which the children live understand development and maturity.³¹ The continued existence of legal interventions must be justified by their demonstrated benefits to children of all social backgrounds, and must be based on research that reflects the actual impact of work. The potential counter-productiveness of such standards would also have to be considered. Nothing must be based on mere speculation.³²

Since the 19th century, child labour laws have been based on two assumptions. The first was that all children removed from the formal workforce would automatically attend school. The second was that, since children could effectively be kept out of the formal sector through inspection and sanction, the problem of child labour was resolvable by legal means.³³ However, the continuing and, in many cases, increasing incidences of child labour in developing countries call for different measures, together with research aimed at giving current information on the relationship between work and education.³⁴ Armed with the findings of such

²⁸ Refer to Chapter II.

²⁹ Boyden (note 14) 199.

³⁰ Ibid.

³¹ Pierik & Houwerzijl (2006) 20 *Ethics & Int Affairs* 193.

³² Ibid.

³³ Refer to Chapter II.

³⁴ Himes (ed) *Implementing the Convention on the Rights of the Child: Resource Mobilisation in Low-Income Countries* 189.

investigations, policy makers, educationists and employers must seek to encourage safe work because of its potential for teaching important life skills and reinforcing family solidarity, a sense of individual responsibility and personal growth.³⁵

Researching child work and family dynamics would require an understanding of the value laden terms which describe child labour, such as 'abusive', 'labour', 'exploitation', 'harm/danger' and 'intolerable'. The indiscriminate use of such words has often exaggerated the severity of the situation. One needs first to appreciate the meaning of these terms from the viewpoint of various cultures, families and disciplines. Such an understanding would inform legal drafters when they specify in legislation what is acceptable or otherwise for children.³⁶

(iv) Social and economic dynamics of child work

Little is known about possible consequences for children if their work contribution is curtailed. Sometimes the circumstances of children may change for the worse as has happened in Zimbabwe in recent years, where the economic meltdown of the country and the HIV/AIDS scourge has plunged families into crisis. Field workers in contact with working children have often observed informally that family emergencies and stresses may cause or increase child economic activity.³⁷

It is therefore necessary for researchers to look into the dynamics of the relationship between child work and family circumstances before states go about enforcing blanket legislation against the economic participation of children.³⁸ This would require us to observe how families under various circumstances make decisions about the work for children and then assess the importance of such decisions. It is vital to comprehend the real options that families have before them, both where there

³⁵ Himes (note 34) 190-91.

³⁶ Anker 'Conceptual and research frameworks for the economics of child labour and its elimination' ILO/IPEC Working Paper (2000) 17.

³⁷ Boyden (note 14) 139.

³⁸ Ibid.

is opportunity to make alternative decisions and where there are no viable alternatives.³⁹

States need to identify the existing variations in the effects of certain situations on children of the same family. For instance, siblings are not disadvantaged equally by dire family circumstances. Some poor families would rather pull their girl children out of school while others might chose the first born child (who may be male).

There is also need for extensive research on how various groups of people, with whom a child has contact, determine the type and amount of work engaged in. Such groups include the child's own peers, employers, teachers, extended family members, foster parents and communities.⁴⁰ Old and new fostering arrangements also warrant scrutiny with a view to understanding the driving force behind them and formulating safeguards against the abuse of children. This will shed light on to the types of work each group expects each child to do.

(v) Methodologies of research

While it is all well and good to point out the need for further research into the work of children, the choice of methods and sequence can significantly affect outcomes. Caution must thus be taken in designing studies which will bring to light the realities of child work and the dynamics which drive children to work or affect decisions on child welfare.⁴¹

Research of this nature inevitably poses a threat to those with vested interests in the work of children: it challenges governments and organisations that are unwilling to countenance criticism of their policies, as well as families or guardians who are shirking their responsibilities. The way that children are raised is the prerogative of parents, and any sort of intrusion into family life is likely to be

³⁹ Although the base of good research analysing children's work and schooling from the perspective of household composition and economy is expanding, it has been surprisingly under-utilised to inform national and international discussion of children's work issues.

⁴⁰ Anker (note 36) 23.

⁴¹ Gallacher & Gallacher (2005) *Emerging Issues in the Geography of Children* 1.

resisted.⁴² Such a research will thus have to be carefully planned and carried out in a manner which is considerate of the sensitivities of the communities under research.

Poor research preparation and design may actually be counterproductive. Most often, investigators use methods which are inappropriate for the age group and the society being studied. How a research programme is conceived, negotiated and managed can make a significant difference to the extent to which children, families and communities collaborate and participate, and the utility of the findings for legal drafters and relevant entities.⁴³

As it is clear that lawyers, child development experts, social scientists, educationists, traditionalists and human rights activists hold different views about the origins, value and effects of child work, it is necessary for all of them to cooperate in interdisciplinary research ventures to analyse the various dimensions of child labour.⁴⁴ Hence researchers must adopt a holistic view of child development rather than confining their ideas to the parameters prescribed by a particular discipline. Multiple methods of inquiry must be employed, ones which cut across sectors to generate a more comprehensive picture of children's lives.⁴⁵

Adopting such a stance would allow the nature and rationale of action regarding children to be challenged from as many different perspectives as possible. This would include asking who is taking the action in question, on what basis and for whose benefit, and how the action affects children and their relationship with their families and communities at large.⁴⁶

In the final analysis, any research on the welfare of children must be child-centred and participatory if it is effectively to assess the legal and policy performance and impact. Thus, rather than viewing children as 'objects' of study, researchers must acknowledge the importance of involving children as active participants in research that concerns them and their lives. It is vital to penetrate beyond children's token

⁴² Boyden (note 14) 156.

⁴³ Researchers may have to cautiously balance the respect for people's right to privacy with concern to study the development of the child. Ibid.

⁴⁴ Christensen & James *Conducting Research with Children: Perspectives and Practices* 1-7.

⁴⁵ Boyden (note 14) 334.

⁴⁶ Anker (note 36) 23.

participation to their authentic engagement, and to generate methodologies that are appropriate to children's developmental capacities.

However, due consideration must be given to the ethical issues of conducting research where children play an integral part. Researchers must, at all times, bear in mind the relative marginality and powerlessness of children in relation to adults in African societies.⁴⁷ The validity of 'children's voices' is very limited in the wider African community. Although there are sub-cultural variations, particularly in established urban communities, cultural norms that enshrine the power disparity of adults over children are generally powerful and pervasive in recently urbanising and rural communities. In these latter contexts, children still participate in community life through designated roles and responsibilities, but they are not involved in decision making, and they are seldom asked their opinion. Moreover, obedience to and respect for adults are values that are strongly emphasised so that children rarely voice their opinions to adults.⁴⁸

(b) Revision of the legal regime

The appraisal of the international law on child labour in Chapter III, and the analysis of the social order of Africa societies in Chapter V, clearly highlights the urgent need for a relevant and effective set of measures that would ensure that all decisions regarding the work of children would suit the best interests of every child. In my view, this would call for the 'de-universalisation' of the child rights norms, and the sub-regionalisation of the regime. Both levels would require a re-evaluation of many old assumptions about childhood and children's roles and the development and amendment of legal standards.⁴⁹

(i) De-universalising international law?

Today, many international laws are ineffective because they constitute an expression of notionally universal human values, thereby disregarding socio-cultural realities. Clearly, the current international legal formulations and interventions on child labour

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Myers (1999) 6 *Childhood* 13 at 16.

fit poorly with the realities of developing countries. For such laws to find relevance and acceptance in countries such as Lesotho, Zimbabwe and South Africa, the whole international rights legal regime would therefore need a facelift.

If we are to accept the reality that no transcendent or trans-cultural ideas of rights can be found or agreed on, then the first task would be to get rid of the universal model of child development to make way for a more pluralistic concept of childhood. This will lead to an understanding that work has different meanings for different people.

If international standards are to realise their protective potential governing child work, they need to be seen by the rest of the world as accommodating the ideologies of non-Western societies. The law must not be imposed from the top or from the outside, but rather, come from the people themselves. To be fully effective, the law must work in tandem with indigenous cultures.

For this to happen, however, developing countries need to push aggressively for multiculturalism, and to emphasise the importance of maintaining cultural integrity, whereby children can be raised to appreciate and fit into their own social milieu, as well as into an expanding world. Such countries need to articulate their perspectives with force and clarity during the drafting of international law.⁵⁰ Instead of being the 'guests' at such sessions, they must initiate negotiations themselves and take charge of the discussions on their home turf.

However, is it realistically possible to draft and negotiate international agreements to meet the demands of multiple of cultures? Is it feasible to walk a children's rights tightrope suspended between the cultural imperialism of the West and unaccountable relativism?⁵¹ African countries have attempted to remedy this problem by coming up with their own regional instrument, the African Charter on the Rights and Welfare of the Child (ACRWC), which supposedly takes into consideration the virtues of the African cultural heritage, and the values of African civilisation which are expected to inspire and characterise the African concept of the rights and

⁵⁰ Boyden (note 14) 334.

⁵¹ Myers (note 49) 43.

welfare of the child.⁵² This instrument, however, was inspired by the trends evident in the UN system and is, with the exception of the provision of the duties of the child,⁵³ essentially a carbon copy of the Convention on the Rights of the Child (CRC). It is with this in mind that I strongly advocate a ‘sub-regionalisation’ of the child rights regime.

(ii) Sub-regionalising the child rights regime

The sub-regionalisation of children’s rights entails a further break down of the current regional regime to smaller and more manageable portions. I would suggest, for a start, that we use the already existing structures of the various African sub-regional bodies.⁵⁴ For Southern Africa, the Southern African Development Community (SADC) with its original membership (but with the inclusion of South Africa and Namibia) would be most ideal. At its formation in 1980, it included the following nine countries: Angola, Botswana, Lesotho, Malawi, Mozambique, Swaziland, Tanzania, Zambia and Zimbabwe.⁵⁵ These countries were drawn together for their geographical proximity and their common commitment to economic liberation and integrated development. These countries share similar cultures, languages, economies and politics, history and, with the exception of Angola and Mozambique, legal systems.⁵⁶ They are well positioned to create a legal regime for themselves.⁵⁷

⁵² Refer to Chapter II.

⁵³ Article 31.

⁵⁴ Such as the Arab Maghreb Union (known by its French acronym UMA) in the north, the Economic Community of West African States (ECOWAS) in the west, the Economic Community of the Central African States (ECCAS) in the central African sub-region and the Southern African Development Community (SADC) in the south. ‘ECOWAS’ available at <http://www.ecowas.int/> [accessed on 20 March 2008]; ‘Arab Maghreb Union’ available at <http://www.fmprc.gov.cn/eng/gjhdq/dqzzywt/2633/2634/t15541.htm> [accessed on 20 March 2008].

⁵⁵ Today it also includes the Democratic Republic of Congo, Seychelles, Mauritius, Madagascar, South Africa, and Namibia. ‘SADC’ available at <http://www.sadc.int/> [accessed on 20 March 2008].

⁵⁶ Angola and Mozambique have different legal systems adopted from their Portuguese colonisers. *Ibid*

⁵⁷ Today SADC covers the whole of Southern Africa and is home to Bantu-speaking people, with the exception of the Khoi San of the Kalahari and the peoples of the islands of Madagascar, Mauritius and Seychelles. As a result of their common heritage most societies in this region speak similar languages and share the same cultures. All these countries (with the exception of Mozambique, Angola and the DRC) have British colonial influences and thus adopted English as their official language of communication. They all suffered similar consequences of colonialism, although their independence came at different times and in varying ways. The social structures of most of these societies were all affected by the labour migrations to economic hubs in Gauteng and Kwa-Zulu Natal in South Africa and the Copper Belt in Zambia. As a result of the Dutch and English influence, the southernmost members of the SADC have adopted the Roman-Dutch and English common-law legal systems. The countries therefore have broadly similar constitutional systems and follow similar approaches to international law. *Ibid*.

One would believe that, although these countries and the cultures they represent will invariably have their own agendas, they already share a commitment to some agreed concepts and processes which are advantageous to the creation of such a sub-regional regime. The laws that would come out of it are most likely to articulate such shared values and principles founded on a common respect for and sensitivity to the integrity of their indigenous cultures.

A regime fashioned in this way would be able to monitor compliance more closely, efficiently and cost effectively. Because of the geographical proximity of member states, it would be economical for the monitoring body of such a sub-region to ensure enforcement, and to investigate abuses on a regular basis. It should have the powers to publicly censure recalcitrant states and ensure that directives are in fact followed.

The effectiveness of such a monitoring entity would indeed be enhanced by perhaps bestowing on it the powers needed to supervise the execution of its own orders.⁵⁸ It would, however, be additionally necessary for a clause in the relevant laws to provide for the sanction of parties failing to implement the regional instruments or abide by the orders of monitoring body.

Broadening the base of participation in the creation of a sub-regional human rights regime would require bridging the communication gap between the activists and child development experts and their less articulate constituencies: mainly children and their parents. This means the societies will actually have a say in the formulation, interpretation and implementation of children's rights principles, in their own cultural context, thereby precluding the imposition of specific definitions of concepts (such as child, childhood and child labour) and principles (such as the best interests of the child). Dealing with smaller numbers of ethnic groups would allow for cultural and contextual diversity without leading to normative indecision and confusion.⁵⁹

⁵⁸ Nmehielle *The African Human Rights System: Its Laws, Practice, and Institution* 302.

⁵⁹ An-Na'im (1994) 8 *Int J Law Policy Family* 62-3.

An emphasis on the sub-regionalisation of strategies and resources for the local protection of children does not imply that regional and international efforts in this regard are totally irrelevant and useless. Such a position will not necessarily undermine the children's rights. Despite their limitations, the present mechanisms of international and regional protection of children's rights can provide guidelines for sub-regional regimes which will in turn articulate values, objectives and principles in terms that will allow their societies to realise the overall intent from their own realities.⁶⁰

The examination of the social order of the Southern African societies in Chapter VI reflected the dominance of certain interpretations of the major norms and institutions of each culture at a given point in time. Although anthropologists may have presented them as the only authentic position of the culture on the issue of child rearing, there are nevertheless other cultures of smaller ethnic groups such as the Tonga and Kalanga in Zimbabwe.⁶¹ A sub-regional child labour regime would allow for the positions of smaller cultural groups to be presented.⁶²

Attention would also be given to the nature, context and dynamics of power relations among the various actors and subjects of the laws in question, and the possibilities of adjusting those power relations if children are engaged in forms of child labour which in any society would be unacceptable.⁶³ To develop specific legal strategies there is thus a need for alternative perceptions of cultural norms and institutions.⁶⁴

Although clearly identifiable and distinguishable from each other, African cultures are also characterised by their own internal diversity, and propensity to change, in response to external influences as well as internal demands. A sub-regional regime would be able to evolve according to those changes thereby maintaining its relevance to the societies of the day.

⁶⁰ Boyden (note 14) 334.

⁶¹ The Kalanga is a small ethnic group found in the province of Matabeleland near the border with Botswana while the Tonga are found in the Zambezi valley north of the country.

⁶² Boyden (note 14) 334.

⁶³ An-Na'im (note 59) 62-3.

⁶⁴ Boyden (note 14) 334.

Such sub-regional regimes will give all ethnic communities a forum to present their views on particular issues at any given time. This will also open the dynamics of power relations to scrutiny and challenge. The drafters of the sub-regional instruments must not only have a credible claim to being insiders to the cultures in question, but should also be well positioned to use internally valid arguments or means of presentation.

The adoption of alternative perspectives can best be achieved through a coherent internal discourse within a sub-region where the following issues should be considered:

- (a) the absoluteness or otherwise of child labour;
- (b) the justifications of the practice;
- (c) the impact of child labour on health, education or other basic human rights; and
- (d) the nature and dynamics power relations between proponents and opponents of child labour so they may decide on the situations that need changing and how change can be achieved.⁶⁵

This internal dialogue will also provide those who oppose child labour with opportunities for contesting prevailing perceptions of the nature, rational and consequences of the phenomenon, while presenting alternative ways of responding to social, psychological and other needs the practice might be believed to satisfy.⁶⁶

This, however, does not mean that outsiders to this region could not contribute to the processes of internal discourse. They can influence an internal situation through, for instance: engaging their own internal discourse, thereby enabling participants of one sub-region to point to similar processes taking place in parts of the continent; supporting the right of the internal participants to challenge prevailing international perceptions, while avoiding overt interferences (because this will undermine the credibility of internal actors); and engaging in cross-cultural dialogue to exchange insights and strategies of internal discourse.⁶⁷

⁶⁵ An-Na'im (note 59) 79.

⁶⁶ Ibid.

⁶⁷ Lambe & Swamp *MacGill J of Education* 37 (2002) 423.

As was abundantly clear in Chapter IV, the concepts of child and child labour are far from settled. The recommended approach, however, would emphasise the criteria and procedural safeguards for the process by which the concepts of 'child', 'childhood', 'child labour' and are specified, challenged, changed or refined within a specific culture at a certain point in time. In this way, apparently insuperable problems of definition may be more effectively addressed.

The sub-regionalising of the human rights regime would actually bring closer to home the negotiation process of the legal instruments. For the first time, all the member states will have equal opportunity to present their positions since their national constituencies would have had the chance to articulate different proposals out of their own experiences and in response to the realities of their own contexts. The negotiators will thus be well equipped and informed to make a meaningful contribution to the proceedings. Such a process would actually create a forum for all societies, whether dominant or in the minority, to have an input in the process. The resultant text will also be as relevant as possible to the societies of the region.

The sub-regionalisation of the regime on child labour would also pave way for the 'vernacularisation' of the laws on child labour. Today, most members of indigenous societies are ignorant of the law as they do not understand the European languages used in the texts of the instruments. Child labour laws must be translated into the main indigenous languages of the region, such as: Shona, Venda, Ndebele, Zulu Xhosa, Sotho and Tswana etcetera. Such vernacularisation would also pave way for the interpretation of the children's rights instruments in the cultural context.⁶⁸ The laws on children's rights would thus be understood and identified with at grassroots level. Drafters would thus have to be creative.

Sensitivity to culture and the way it mediates the effects of experience on children by no means invalidates the idea of human rights standards but it does suggest the need to carefully distinguish between values based on a broad

⁶⁸ Wilson (ed) *Human Rights, Culture and Context* 18.

representation of human experience and those that are merely Western ethnocentrism projected by economic and political power onto a global arena.⁶⁹

(iii) Re-evaluation and amendment of child labour standards

There is a need to move beyond the narrow education, health and safety concerns of the current labour legislation and to place a greater emphasis on discovering other protective and promotional measures to enable children to grow and develop. These measures will look at children's work, principally in terms of its impact, both negative and positive, on their welfare and development.⁷⁰ Instead of totally outlawing the child labour, as the ILO intends to do progressively, there is need for retention of work that builds character, initiative, qualities of organisation, discipline and love of knowledge.

In formulating the law, the drafters need to look at child labour from the perspectives of all the controlling sectors of children's activities, namely, the children themselves, parents, extended family, community, educators and employers. Drafters must find a common ground between all these stakeholders so there is a unity of purpose reflected in the law.

Since it has proved to be impractical to impose a universal definition of child and child labour on non-Western societies,⁷¹ African countries must define and stipulate remedies for child labour in accordance with their own interests and ideologies. The laws governing child work must not stand in isolation but should be conceived and implemented to fit their social context and should work harmoniously with other lines of action in a national policy. To avoid being counter-productive, this legislation must, therefore, uphold healthy child development processes and be supported by social, economic, and educational measures.⁷²

⁶⁹ Myers (note 49) 43.

⁷⁰ Himes (note 34) 190-1.

⁷¹ Refer to Chapters V and VI.

⁷² For instance, in Zimbabwe, the Labour Relations Regulations of Statutory Instrument 72 of 1997 and s 10A of the Children's Act [Cap 5:06] of 2001 which regulate the work of children must be supported by policies from the Ministries of Education; Health and Child Welfare; Public Service, Labour and Social Welfare; and Youth Sports and Culture. Local government and traditional authorities must also be involved in conscientising and mobilising their respective communities in putting into effect such legal interventions.

Unfortunately, the imposition of laws based on Western economic and social practice has so far created problems, due primarily to the failure to consider sufficiently the state of development of the community upon which they imposed or the full social and economic implications.⁷³ It is thus imperative for the law to express the collective will of the people which is neither the 'idealistic opinion of the reformer, nor the opinion of a self-centred commercialism'.⁷⁴ The law must not act only as an external complex of rules to which reality is subjected but should also seek to express reality itself.⁷⁵

The success of child labour laws in Africa will depend on the level of cultural legitimacy accorded to the norms contained therein.⁷⁶ If the law is found to be lower than the plane of public opinion, then it must be changed in conformity with that opinion and with certain well-defined principles.⁷⁷ Without wide social support, child labour laws may in fact attract hostility from the communities and the very people they are intended to protect. Where belief in the legitimacy of child labour is strong in a society, the law may actually reinforce support for the outlawed custom.⁷⁸ The likelihood of a rejection of the law increases where a legal system is imported from another culture or for other reasons is not accepted as a source of authority to be obeyed out of duty. It is thus imperative for the law not to be imposed from the top or by external forces, but come from the societies themselves.⁷⁹

Taking into account the above, the law must, nevertheless, represent a compromise between the various interests groups in society, such as children, (represented by youth organisations),⁸⁰ traditional communities, and the organs of state.⁸¹ There must also be a unity of purpose and understanding between families,

⁷³ Hannigan (1961) 4 *Comparative Studies in Society & History* 1-5.

⁷⁴ Hanson & Vandaele (2003) 11 *Int J of Children's Rts* 73 at 75.

⁷⁵ Legal systems do not float in a cultural void, free of space and time and social context, but ought to reflect what is happening in the societies they regulate. Friedman (1996) 32 *Stanford J Int L* at 72; Hanson & Vandaele (note) 75.

⁷⁶ Kaime (2005) 5 *African Human Rights Law Journal* at 223.

⁷⁷ Lovejoy (1905) 25 *Annals of the American Academy of Political & Social Science* 45-52.

⁷⁸ Burman & Harrell-Bond *The Imposition of Law: Studies on Law and Social Control* 16.

⁷⁹ *Ibid.*

⁸⁰ For instance the South African National Youth Commission, created under the National Youth Commission Act 19 of 1996 which is responsible for national youth polices and action plans.

⁸¹ Burman & Harrell-Bond (note 77) 28.

local communities, labour inspectors, educational forces, health officials and law makers.⁸² When the law is enacted, its stipulations must reach its intended target: the duty bearers, employers and the children themselves.

It is all well and good to redraft the law to suit the African societies but its effectiveness will have to be constantly tested. This involves judging, first, its ability to adequately protect children from the various forces which threaten their development. Secondly, the law must provide adequate machinery and agencies for its enforcement⁸³ which must produce tangible results.⁸⁴ An effective statute should provide authority for the investigation of child labour not only in formal employment but also in informal work, where most children are found.⁸⁵ Where there is laxity in enforcement, the law will merely serve a symbolic function.⁸⁶

In creating a children's rights norms that are suitable for Southern African societies, it is vital that we do not reinforce much of the taken for granted assumptions about our cultures.⁸⁷ The ways of reframing and reformulating the law on child labour in the sub-region must avoid falling into the trap of essentialising culture.⁸⁸ Rather, law-makers must recognise its fluidity and diversity, and also recognise children as the agents of culture not simply its victims and challengers of patriarchy.⁸⁹

As the essentialism of culture all too often entails the preservation of social, political and economic power, it may, in fact, justify and perpetuate the abuse of the work of children.⁹⁰ Generalisations of a girl child's cultural role in the domestic arena can result in her being denied formal education in preference to her male counterpart.⁹¹ Such essentialism plays into the hands of economists and political strategists, who depend on the labour of children.

⁸² Lovejoy (note 75) 45-52.

⁸³ Lovejoy (note 75) 45-52.

⁸⁴ Ibid.

⁸⁵ Ibid.

⁸⁶ Ibid.

⁸⁷ Sewpaul (2007) 16 *Int J of Soc Welfare* 398.

⁸⁸ Essentialism regards culture as separate, clearly bounded, internally uniform and static. Laden & Owen *Multiculturalism and Political Theory* 227.

⁸⁹ Pakesa and Roy-Chowdhury (2007) 29 *J of Family Therapy* 267 at 268.

⁹⁰ Mahalingam (2003) 59 *J of Social Issues* 733 at 735.

⁹¹ Narayan *Decentering the Centre: Philosophy for a Multicultural, Post Colonial and Feminist World* 80.

The effect of essentialising culture is to become less mindful of its dynamism, and thus remain tied to norms that are obsolete in the present-day reality of urbanisation, globalisation and multiculturalism. South Africa, for instance, is a perfect example of a country which is *de facto* a state of racial, cultural and ethnic diversity, where the essentialism of any culture would be a distortion of reality. Essentialism rules out the possibility of belonging to multiple, hybrid and even shifting cultures.⁹² We thus need to accept that cultures within the Southern African region are internally diverse so that the evaluation of any laws and policies that aims to recognise or accommodate a cultural minority must take into account its effects on different groups within them and the way in which that policy or law may affect the power relations within those groups.⁹³

3. Commitment

In pursuing these recommendations, is it vital to identify which persons or entities will be responsible for initiating and effecting the suggested changes, the strategies they will employ and the time and financial modalities involved. As far as research is concerned, the treaty monitoring groups must facilitate such endeavours, particularly those relating to the causes and impact of child work on child development, and the effectiveness of the law. Obviously they would need to recruit experts of all the relevant disciplines, each conversant with the ways of life, languages and other circumstances of the societies they will be assigned to study.

The time it will take to undertake these researches will obviously depend on the size of the area of study, resources available, accessibility to the places involved, the subject matter being studied and the type of research methods employed. The use of questionnaires and interviews will obviously take less time than participatory methods of research. Where researchers need to study the attitudes towards the work of children, questionnaires and interviews would be most appropriate. As far as

⁹² Abu-Laban (2002) 6 *Citizenship Studies* 459 at 465.

⁹³ Laden & Owen (note 88) 227. Also see Sewpaul (note 87) 404 and Goodhart (2003) 25 *Hum Rts Q* 935 at 941.

investigating the long term effects of work on child development, or the family dynamics affecting child labour, participatory research methods would be ideal.

The responsibility for amending the laws at an international law level would fall on the state members themselves. Ideally, African states and other countries from the developing world would initiate the discussions and negotiations for the amendment of the ILO and UN Conventions.

The states have to select carefully the persons who will actually attend these negotiations. Ideally, each country would have first considered the input of various stakeholders before sending a delegation to represent the interest of children, cultural groups, relevant government ministries (in the case of Zimbabwe, it would be the Ministries of Health and Child Welfare, Arts and Culture, Education, Labour and Commerce and Agriculture), culturally predisposed individuals and/or entities. All these groups should be conversant with the disciplines and constituencies they represent, and they must present information supported by extensive research and experience.⁹⁴

Ideally, such a multi-disciplinary group would thereafter spearhead the implementation of the agreed laws in their home countries as a unit. Each legal intervention should be a consolidation of the interests each of these members represent.

Any commitment calls for economic, human and organisational resources. The economic resources will include the financial and natural resources, physical infrastructure, technology and information. The ultimate success of the suggested recommendations will largely depend on the types and amounts of resources that are available and developed over a period of time.

⁹⁴ While this idea is noble, the size of such a delegation for each country may, however, not be practical for such undertakings, unless, of course, they would go at separate times. Another option would be to streamline participants to those who will be able to represent the interests of more than one sector (which would be related sectors) of stakeholders.

4. The best interests of the child: the ultimate consideration

This thesis has illustrated how the international regime on child labour has, to date, been ineffective, irrelevant and in some instances worsened the situation of children-orphan- particularly in Southern Africa countries because of its disregard (among others) of:

- the differences in child rearing methods between Western and African cultures;
- the social and emotional advantages of some types of work (which mitigate against detrimental outcomes and, in fact, contribute to a child's resilience and facilitate development);
- the collectivist or inter-dependent cultural script of African societies; and
- the realities of child headed families.

It is in light of this that I conclude that, for any legal interventions, on child labour, to be effective, they must be guided by considerations of what is in the best interests of the child at any given time, place and circumstances.

To date, the use of this principle has been limited to child custody cases and has often been criticised for being indeterminate in that 'it requires a highly individualised choice between alternatives'.⁹⁵ This type of criticism highlights the absence of clear values to be used in determining what is best or least detrimental for the child.⁹⁶ However, I am of the strong opinion that there are, in fact, benefits of upholding a degree of indeterminacy in the standard, as certainty brings oppressive rigidity which disables the law from keeping pace with the various and changing circumstances.⁹⁷ The best interest standard is a concept allowing cultural, economic and political factors to be considered and weighed in decision-making.⁹⁸

⁹⁵ Such as Robert Mnookin in (1975) 39 *Law & Contemporary Problems* 226. Refer to Chapter II.

⁹⁶ Breen *The Standard of the Best Interests of the Child: A Western Tradition in International and Comparative Law* 54.

⁹⁷ The flexibility should, however, not be so great as to prejudice the health and wellbeing of the child. Breen (note 98) 86.

⁹⁸ Alston (1994) 8 *Int J of L & Family* 1 at 4-5.

The best interests standard goes some way in removing the politics (between the North and the South) on what are ‘appropriate’ child activities.⁹⁹ In fact, it may allow people of different cultures to closely scrutinise and appreciate the reasoning behind adult decisions on child work in African societies. The principle calls for a higher degree of justification for the recourse to certain types of labour. It draws attention to the assertion that decisions for children should be seen as being more than those which seek to ‘protect children because they are children’. It also highlights the need for such decisions to be made in light of ‘the future adult that is within the child’.¹⁰⁰

Since there are always different perspectives and options regarding each type of action, the main issue is how to regulate the interpretation and application of the best interests principle. I therefore propose the following guidelines which ensure a dynamic diversity of perspectives in taking action regarding working children, and also opportunities for subsequent contestation and change of such action:

- (a) A clear and accurate description and characterisation of the action to which the best interests principle is applicable. In this regard, one should know who is making the description and characterisation and according to which framework or orientation.
- (b) A rigorous analysis of the action in question in order to identify its type or nature, who is taking it, on what basis and for whose benefit, who are the immediate and consequential subjects of the action and how they are affected.
- (c) An understanding of the nature and dynamics of power relations among the various actors and subjects of the actions, and of the situation in local and broader contexts as appropriate.
- (d) An appreciation of the possibilities and constraints of changing or influencing the nature and dynamics of power relations among actors and subjects, as well as in the situation at large.

⁹⁹ For instance, it might be argued that in some Western countries, the best interests of the child are best served by policies that emphasise autonomy and individuality to the greatest possible extent. In more traditional societies the links to family and the local community might be of paramount importance and the principle that the best interests of the child shall prevail will therefore be interpreted as requiring the sublimation of the individual child’s preferences to the interests of the family or even the extended family. Alston (note 100) at 5.

¹⁰⁰ Breen (note 99) 136.

In all of the above, the guiding principle should be to maximize opportunities for contesting the nature and rationale of action regarding children from different perspectives and presenting alternative positions.¹⁰¹

An assessment of a decision which purports to be in the best interests of the child thus requires an examination of the values attached to that decision and the reasoning upon which it was based.¹⁰² I believe such a model provides the clearest framework of considerations and alternatives that have to be taken into account when determining whether a particular course of action is appropriate for the child.¹⁰³

These guidelines also suggest that what is in the best interests of the child should not be arbitrarily tied to a particular way of thinking, but must, instead, be viewed in a way which takes into cognisance the social, economic and cultural dynamics at hand. It should be a mediating principle which can assist in resolving the conflicts between child labour provisions and cultural norms and practices.¹⁰⁴

Given the inherent diversity and contestability of cultural attitudes towards matters (such as the best interest of the child in particular), the meaning and implications claimed for this principle in a certain society at a given point in time must not be taken as final or conclusive. Rather, the standard should always be open to reformulation.¹⁰⁵ In due course, this will lead to cohesiveness in a previously fragmented approach to child labour.¹⁰⁶ The implementation of the best interests principle in various contexts will better allow for the protection of children, without violating the integrity of local cultures.¹⁰⁷

Approaching child labour using the best interests standard will also challenge the current notion that child work should be addressed primarily as a labour issue. Focus on children's best interests will have a long term effect of redefining child labour issues away from their historical labour market orientation. Such an approach

¹⁰¹ Alston *The Best Interests of the Child: Reconciling Culture and Human Rights* 76-7.

¹⁰² Breen (note 99) 137.

¹⁰³ Alston (note 103) 76-7.

¹⁰⁴ Alston (note 100) 1-25.

¹⁰⁵ An-Na'im (1994) 8 *Int J of L & Family* 62 at 76-81.

¹⁰⁶ Breen (note 99) 136.

¹⁰⁷ An-Na'im (note 107) 63-4.

does not emphasise the reduction of children's economic activity, but rather is more concerned with a different objective: strategies to protect children from work situations that are harmful.¹⁰⁸ The principle will allow child labour to be approached in terms of its positive role in the lives of most African children.

Approaches that adopt this form of the best interests of the child principle will create a strong sense of priorities by states. Rather than becoming distracted by futile attempts to prohibit all work by children, the state can direct attention to those children who require the most urgent protection and assistance such as those in worst and intolerable forms of labour.¹⁰⁹

This principle should guide the interpretation of all instruments relating to the welfare of the child, particularly when: provisions of the law and various instruments appear to contradict each other; there is a conflict of various interests; and circumstances of children make certain prohibitions in the law counter-productive to their welfare. The best interest principle forces decision makers to strike a fair balance, when a child's interests competes with: those of other children; adults (parents or guardians); or those of the community.

The dilemma of balancing the interests of one child against those of others is evident in child headed families. When a country (such as Zimbabwe) lacks the resources to provide for the welfare of a growing number of orphaned children, would it not be better to adopt a system where older children of such families are allowed to combine certain types of employment with school work to ensure that their younger siblings do not die of starvation? Using the best interest principle, decision-makers will be able to balance the prohibition on child labour and that the needs of disadvantaged children.¹¹⁰

¹⁰⁸ Myers (1999) 6 *Childhood* 13 at 16.

¹⁰⁹ Such as slavery and work in illicit activities. Myers & Boyden *Child Labour: Promoting the Best Interests of Working Children* 18-19.

¹¹⁰ Hammerer 'The principle of the best interests of the child – What it means and what it demands from adults' available at <https://wcd.coe.int/ViewDoc.jsp?id=1303979&Site=CommDH&BackColorInternet=FEC65B&BackColorIntranet=FEC65B&BackColorLogged=FFC679> [accessed on 12 July 2008].

With regards to the conflicts between the interests of children and those of adults (their parents and guardians), the application of the best interests of the child allows for administrators of justice to demand from adults justification for decisions they have made that affect children in their custody. Such a probe would enlighten guardians on the dangers of some child activities, and will, in the long run create conditions for the healthy development of the child. It will also be helpful to the adjudicators themselves as they will be able to appreciate legitimate reasons for the choices that parents make with regards to the work of their children.

The interests of an individual child may well clash with the values of certain communities in which s/he may live in. As evident in Chapter V, such competing interests are often about resources and cultural norms. With regards to resources, the costs of responding to the needs of a child can be unacceptably high, especially in low-income countries, such as Lesotho and Zimbabwe. One example could be when a child needs education, but the only available education is costly: It will sometimes be necessary, however painful, to seek the fairest possible solution, within the family's given constraints. With regards to culture, this is evident among African societies which place duties on a child to contribute to the sustenance of the family and community, a value which conflicts with the child's right to be free from exploitation.¹¹¹

The weighing of legitimate but different interests is, thus, naturally complex, particularly in African societies and especially in matters relating to children's participation in work. Often it is a question of assessing and comparing degrees of benefit and damage. If the interests of a child or group of children would be less infringed by a certain proposed action, there would naturally be more room to accommodate the interests of others, and vice versa. The important point is that the 'best interests' principle must remain present in all processes of decision-making that have a significant impact on the child's well-being.

The balancing between child labour principles and other interests must be facilitated by impact analyses. The rationale for this process is to encourage decision

¹¹¹ Ibid.

makers to consider the child dimension seriously and routinely before decisions are taken. They should not only undertake an assessment but should also demonstrate that they have, as a matter of fact, done so. Models must be designed which guide how and when such evaluations should be carried out; the areas that should be given priority; how these analyses may be linked to ordinary political processes; the kinds of questions that should be asked and to whom and the training needed for decision makers and others in order to make all this meaningful.¹¹²

With respect to this principle, this thesis thus proposes the establishment of procedures and processes to ensure not only a dynamic diversity of perspectives as appropriate in taking any action regarding the work of children but also opportunities for subsequent contestation, revision and change for such action.

5. Conclusion

This thesis was premised on the view that international child labour principles cannot be effective or find relevance in African societies through the universalisation of the norms but should rather take account of the cultural context. The apparent lack of consensus on who the persons the law seeks to protect and the precise evil it seeks to abolish, clearly suggests the impossibility of a universal understanding of child labour.

As the examination of the societies in Lesotho, Zimbabwe and South Africa revealed, the social and economic systems of most communities in the Southern African region are organised in such a way that the interests of the child are inseparable from those of other members of the group. When these countries came under colonial rule, capitalist relations penetrated the African family and this transformed the communal mode of production along with the relations it sustained. In their efforts to maintain economic viability, many families devised a range of strategies in which children became inextricably involved. However, the push towards individualism, which the state, law and economy promoted, tended to atomise

¹¹² Ibid.

the traditional family, although the interests of children and adults remained intertwined.¹¹³

This study shows that culture is a major influence on the activities of African children. It determines the context in which children work, the prevailing opinions about the value of that work and the attitudes to childhood and the raising of children. It reveals that while there is an international consensus on the concern for children, Western and African traditional societies differ on how a child's welfare may be secured.

The creation of a sub-regional children's rights regime where the form and nature of children's rights norms come from within the region and are not imposed by outside forces is the starting point for ensuring an effective and relevant regime on child labour. Such an arrangement will provide relevant and effective legal interventions on child welfare and will also accelerate acceptance of a human rights norms in the region. As long as the work of children is not looked at within its proper cultural context, there will always be problems of defining child labour which will affect the efficacy of any legal interventions on the matter.

¹¹³ Rwezaura (1994) 8 *Int J of L, Policy & Family* 82 at 110.

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