

Who does the law seek to protect and from what? The application of international law on child labour in an African context

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Summary

Since time immemorial, African indigenous societies have viewed childhood in terms of intergenerational obligations of support and reciprocity, and deemed the period of childhood as that for 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 their families and the communities at large. International human rights instruments embody a contemporary approach to childhood which views it as a distinct and separate stage of innocence, physical weakness, mental immaturity and general vulnerability – a period ideologically excluded from the production of value. With these differences in the approaches to child development, the potential for discordance between African customary laws and practices on the one hand and the objectives of the international children's rights instruments, on the other hand, is real. Can a world of such social and cultural diversity possibly attain universal interpretation, application and acceptance of the international norms of children's rights? The article highlights the challenges involved in applying the international prohibition on child labour to traditional societies of Southern Africa and offers a few compromises for a relevant regime for the region.

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Introduction

'The term "child labour" is an emotive one.'¹ For some people it conjures up images of dirty, malnourished children shackled in chains, while for others, particularly those of the developing world, the term simply means the work done by children with no negative connotation attached to it. It is, however, the media images of suffering children that have prompted a global explosion of interest in the activities of children and fuelled the crusade against child labour.

Human rights activists and 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 or rest, not to mention the time to devote to their education.² All these factors cause 'irreversible physical and psychological damage' to a child or even death.

Between 1919 and the early 1970s, the International Labour Organization (ILO) enacted numerous conventions regulating the minimum age of employment of children in various sectors.³ 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).⁴ By applying its provisions to all areas of economic activity, the Convention expanded prior sectoral coverage to include 'all employment or work'. With this Convention, the ILO committed itself, for the first time, 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

¹ J McKechnie & S Hobbs 'Child labour: A global phenomenon?' (1999) 8 *Child Abuse Review* 87.

² Human Rights watch 'Child labor' <http://hrw.org/children/labor.htm> (accessed 14 June 2007).

³ Eg, the Convention Fixing the Minimum Age for Admission of Children to Industrial Employment (C 005) of 1919; the Convention Concerning the Night Work of Young Persons Employed in Industry (C 006) of 1919; the Convention Fixing the Minimum Age for Admission of Children to Employment at Sea (C 007) of 1920; the Convention Concerning the Age for Admission of Children to Employment in Agriculture (C 010) of 1921; the Convention Fixing the Minimum Age for the Admission of Young Persons to Employment as Trimmers or Stokers (C 015) of 1921; the Convention concerning the Age for Admission of Children to Non-Industrial Employment (C 033) of 1932; the Convention Concerning the Restriction of Night Work of Children and Young Persons in Non-Industrial Occupations (C 079) of 1946; the Convention Concerning the Minimum Age for Admission to Employment as Fishermen (C 112) of 1959; the Convention Concerning the Minimum Age for Admission to Employment Underground in Mines (C 123) of 1965.

⁴ C 138 adopted on 26 June 1973 and entered into force on 19 June 1976. K Hanson & A Vandaele 'Working children and international labour law' (2003) 11 *International Journal of Children's Rights* 99.

progressively raise the minimum age for admission to work, 'consistent with the fullest physical and mental development of young persons'.⁵

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'.⁶ 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 mid-adolescence. It set the minimum age at 15.⁷ Countries with relatively undeveloped economies and educational facilities were allowed temporarily to adopt a lower standard of 14, as long as employers' and workers' organisations were in agreement.⁸

The Convention also applied different minimum ages to light and hazardous work. It set the minimum age for light work at 13,⁹ but that could be lowered to 12 in developing countries on condition that it did not impede schooling.¹⁰ 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.¹¹

Standards set in this Convention, like those preceding it, were linked to schooling. The treaty expressed this tradition by stipulating that 'the minimum age shall not be less than the age of completion of compulsory schooling'.¹² Where the maximum age of compulsory schooling was above 15 years, the minimum age of employment was accordingly raised.¹³

From the early 1980s, international concerns about children's rights produced more instruments on children's issues which brought a new understanding of the phenomenon of child labour. In November 1989, the United Nations (UN) General Assembly adopted the Convention on the Rights of the Child (CRC), an instrument providing a wide range of entitlements for children.¹⁴ By September 1990, the Convention had

⁵ Art 1; J Boyden *et al* *What works for working children* (1998) 188.

⁶ Boyden *et al* (n 5 above) 195.

⁷ Art 2(3). The Convention was supplemented by Recommendation 146 which advocated the raising of the minimum age to 16 years. In general, the recommendation provides the broad framework 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.

⁸ Art 2(4). Boyden *et al* (n 5 above) 195 188.

⁹ Art 7(1).

¹⁰ Art 7(4).

¹¹ Arts 3(1) & (3).

¹² Art 3. Hanson & Vandaele (n 4 above) 99.

¹³ Art 2(3).

¹⁴ GA Res 44/25, annex, 44 UN GAOR Supp (No 49) 167, UN Doc A/44/49 (1989), entered into force 2 September 1990.

entered into force and, by the turn of the century, a record 191 states had ratified it.¹⁵ With regard to child labour, the Convention specifically provided as follows:¹⁶

State parties [are to] recognise 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.

With this provision, CRC laid the foundation for a renewed understanding of the concept of child labour (although it did not define the term). Child labour could now be determined not according to the activity (as previous ILO Conventions provided), but according to the effect of the activity on the children concerned. Using the effects of the activity on the child as a point of departure altered numerous aspects of dealing with child labour. Firstly, any labour activity, regardless of whether it takes place at a work place or in the child's home, could be deemed unacceptable if it was detrimental to the development of the child. This meant that the millions of children (mainly girls) taken out of school to do housework were now classified as children engaging in child labour. Although CRC was not the first UN Convention to provide for child labour, it enlarged the scope of the prohibition of economic exploitation.¹⁷

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).¹⁸ By November 2000, the Convention had entered into force. To date, 171 of the 183 member states of the ILO have ratified it.¹⁹

The Worst Forms of Child Labour Convention reflects a global consensus that there should be an immediate end to offensive forms of child labour. It seeks to complement existing international instruments such as the Minimum Age Convention (which is aimed at the overall abolition of child labour).²⁰

The Convention came up with two categories of unacceptable labour: the worst forms and work hazardous to the physical, emotional and moral wellbeing of the child. The worst forms include slavery, debt bondage, prostitution, pornography, forced recruitment of children for use in armed conflict, use of children in drug trafficking and other illicit

¹⁵ United Nations treaty collection <http://www.treaties.un.org> (accessed 26 March 2010).

¹⁶ Art 32(1).

¹⁷ Art 10(3) of the International Covenant on Economic, Social and Cultural Rights prohibited the exploitation of children.

¹⁸ ILO Convention 182.

¹⁹ List of ratifications for ILO Convention 182 <http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C182> (accessed 26 March 2010).

²⁰ It also stipulates the minimum age for admission to employment which must not be less than the age of completion of compulsory schooling.

activities, and all other work harmful or hazardous to the health, safety or morals of children.²¹ Article 4(1) leaves it to state members to define hazardous forms of child labour in their national legislation. Such types of work are usually conducted in legitimate sectors of economic activity and are thus called 'worst forms by condition'. These forms may be improved if, for example, they are currently affecting the health and safety of the children who engage in them. A good example are 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 the Worst Forms of Child Labour Convention.

Meanwhile, Africa became the first continent to adopt a children's rights 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 (African Children's Charter). It would take another nine years before the instrument entered into force.²²

Scholars contend that the instrument was born out of the feeling by African member-states that CRC missed important socio-cultural and economic realities of the African experience. The African Children's Charter 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.²³

Nevertheless, it was inspired by the trends evident in the UN system. In line with CRC, the African Children's Charter provides that²⁴

[e]very 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.

²¹ Arts 3(a)-(c). This article will not dwell on the worst forms of child labour.

²² To date, 45 countries out of the 53 members of the AU have ratified the Charter. <http://www.africa-union.org/root/au/Documents/Treaties/treaties.htm> (accessed 26 March 2010); A Lloyd 'Evolution of the African Charter on the Rights and Welfare of the Child and the African Committee of Experts: Raising the gauntlet' (2002) 10 *International Journal of Children's Rights* 179, DM Chirwa 'The merits and demerits of the African Charter on the Rights and Welfare of the Child' (2002) 10 *International Journal of Children's Rights* 157.

²³ Lloyd (n 22 above) 180-183.

²⁴ Art 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.

It also provides for protection against sexual exploitation,²⁵ and the prevention of the sale, trafficking and abduction of children.²⁶ The African Children's Charter recognises the right of children to play and leisure²⁷ and, like 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.²⁸

Notwithstanding this section on best interests, the African Children's Charter takes its cue from its predecessor, the African Charter on Human and Peoples' Rights (African Charter),²⁹ 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:

- (a) 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;
- (b) to serve his national community by placing his physical and intellectual abilities at its service;
- (c) to preserve and strengthen social and national solidarity;
- (d) to preserve and strengthen African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and to contribute to the moral well-being of society;
- (e) to preserve and strengthen the independence and the integrity of his country;
- (f) to contribute to the best of his abilities at all times and at all levels, to the promotion and achievement of African unity.

Children's rights 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 the preservation of African cultural norms may actually encourage child labour.³⁰ As such, the Charter's provision of duties is often viewed as 'little more than the formulation, entrenchment and legitimisation of adult and state rights and privileges against children'.³¹

²⁵ Art 27 African Children's Charter.

²⁶ Art 29 African Children's Charter.

²⁷ Art 12 African Children's Charter.

²⁸ Art 4(1) African Children's Charter.

²⁹ OAU Doc CAB/LEG/67/3 Rev 5, reprinted in C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2006) 23, adopted on 27 June 1981 and entered into force on 21 October 1986.

³⁰ M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The system in practice, 1986-2000* (2002) 229.

³¹ M Mutua 'The African human rights system: A critical evaluation' http://hdr.undp.org/docs/publications/background_papers/MUTUA.PDF (accessed 4 March 2004).

The excitement over this provision in the African Charter is, however, astounding, considering that article 29(1) of the Universal Declaration of Human Rights (Universal Declaration) provides that '[e]veryone has duties to the community in which alone the free and full development of his personality is possible'. The Preambles of both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) also make reference to the individual's 'duties to other individuals and to the community to which he belongs'.³² One would contend that the African Children's Charter only goes further in providing a 'more specific and detailed range of duties of the individual'. Moreover, those objecting to the provision on the duties of the child in the African Children's Charter seem not to have noticed that inherent in article 31 are two limitations: that the duties of the children are subject to their age and ability (thus paying credence to the evolving capacities of the child); and that these responsibilities of children are subject to 'such limitations as may be contained in the present Charter' (in this case those which guard against the various forms of abuse of the child).³³

It is, however, the international community's apparently overwhelming support for CRC and the Worst Forms of Child Labour Convention that 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, there is nevertheless disagreement on the conception of childhood, the period of growth that should be protected, and the laws and policies needed to bring about an improvement in child welfare, particularly those designed to tackle child labour.

The following discussion seeks to explore the extent and complexities of the challenges involved in identifying an effective and comprehensive set of legal measures for dealing with child labour in African cultural settings. It must be borne in mind from the outset that this article focuses on the general forms of child labour which most children are engaged in, rather than the worst forms (covered by the ILO Worst Forms of Child Labour Convention on the Rights of the Child), the dangers of which are universally acknowledged and condemned.

Without intending to polarise the debate, the article generalises the ideologies underlying international instruments and those of African societies (found in rural areas, where the majority of the continent's population resides) and concedes from the onset that in as much as

³² These provisions, however, seem to be at odds with the human rights regime's general emphasis on individuality. J Sloth-Nielsen & BD Mezmur 'A dutiful child: The implications of article 31 of the African Children's Charter' (2008) 52 *Journal of African Law* 159 160.

³³ Sloth-Nielsen & Mezmur (n 32 above) 170.

there are differences, there are also shared commonalities between them. As a matter of fact, both share the concern for the child, impose restraints on the abuse of children and assure human dignity in all material respects. Today, they place great value on the health, education and general welfare of the child even if in different ways. There are also some sections of Western society where children work.³⁴

While this article essentially calls for the formulation, interpretation and implementation of all internationally-recognised human rights in their proper cultural context, it takes note of the limits of culture, and warns of the dangers of essentialising culture and acknowledges the changes that have been brought to African societies by urbanisation, globalisation and multi-culturalism.

2 Cultural influences

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 the raising of children.³⁵ In societies of the developed world, family life is based on a nuclear unit, often in isolation from other kin.³⁶ They value an underlying 'individualistic' culture in the developmental goals of childhood which promote the individual's acquisition of competence and independence.³⁷

CRC and the ILO Conventions embody such contemporary ideals. These instruments emphasise individuality and professional interventions, and they de-emphasise the influence of wider social, economic and cultural circumstances.³⁸ 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.³⁹ International jurisprudence has added an interesting yet significant dimension to this conception of childhood: the agency of the child which stipulates a child's right to be heard and taken seriously, to be an active participant in issues that concerns it and recognition of

³⁴ In several parts of Europe and the United States, children work for pay, particularly in seasonal activities, street trades, small workshops and at home. B Creighton 'Combating child labour: The role of international labour standards' (1996–1997) 18 *Comparative Labour Law Journal* 362 364.

³⁵ Boyden *et al* (n 5 above) 140.

³⁶ Due to the labour migration and Western influences, African families who have moved to urban areas have adopted this kind of social structure, although they still maintain some links (even if limited) with their extended family remaining in the rural areas.

³⁷ S Wise & A Sanson 'Child care in cultural context: issues for new research' (2000) 22 *Australian Institute of Family Studies* 3.

³⁸ As above.

³⁹ V Pupavac 'The infantilisation of the south and the UN Convention on the Rights of the Child' (1998) 3 *Human Rights Law Review* 3.

a child's evolving capacities. CRC's provisions on respect for the views of the child, the child's right to freedom of expression, freedom of thought, conscience and religion, and freedom of association⁴⁰ underline children's status as individuals with fundamental human rights and views and feelings of their own.⁴¹

The social organisation of ethnic groups in Lesotho, Zimbabwe and South Africa from pre-colonial times to the present, however, tells 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 ndir*, meaning 'I am because we are and because we are, therefore I am'. African societies are thus characterised by collectivist or inter-dependent cultural scripts which stress the importance of kinship.⁴²

At the heart of the African socio-political order lies the family, a unit which extends both vertically and horizontally.⁴³ Family members are linked in strong reciprocal aid relationships which entail complex rights and responsibilities. African societies value collective goals highly, such as learning to live in harmony with one another, competent participation in social events, obedience to authority, and a co-operative and altruistic orientation.⁴⁴

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.⁴⁵ Such a system tends to stress duties rather than rights.⁴⁶ Society would deem invoking one's rights as anti-social behaviour. Indeed, each person is expected to compromise personal interests for the good of the community. From infancy, this sense of sacrifice is instilled in everyone.⁴⁷

These ideas of development define childhood and express beliefs about children's nature, what they are capable of doing and how they

⁴⁰ Arts 12, 13, 14 & 15.

⁴¹ This illustrates the complexity of the child labour discourse whereby one has to balance protecting the child from abuse and exploitation while promoting and respecting the child's right to self-determination. R Hodgkin & P Newel *Implementation handbook for the Convention on the Rights of the Child* (2001) 149.

⁴² JAM Cobbah 'African values and the human rights debate: An African perspective' (1987) 9 *Human Rights Quarterly* 309-320.

⁴³ TW Bennett *Human rights and African customary law under the South African Constitution* (1995) 5.

⁴⁴ Wise & Sanson (n 37 above) 3; W Ncube *Law, culture, tradition and children's rights in Eastern and Southern Africa* (1998) 203.

⁴⁵ RT Nhlapo 'International protection of human rights and the family: African variations on a common theme' (1989) 3 *International Journal of Law and the Family* 1-4.

⁴⁶ AA An-Na'im & FM Deng (eds) *Human rights in Africa: Cross-cultural perspectives* (1990) 16.

⁴⁷ As above.

should be integrated into society.⁴⁸ African societies deem childhood 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.

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.⁴⁹ Today, African children are still considered to have a responsibility to work for the cohesion and sustenance of their families, to put their physical and intellectual abilities at the service of their communities and to preserve cultural values in their relations with others.⁵⁰

In this regard, an African girl child has the 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 the 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, some traditional ideals may have been lost or modified, particularly in urban areas, the duty to contribute to the survival of the family and community remains.⁵¹

At first glance one could say that CRC accepts this diversity of cultures, since it places a considerable emphasis on non-discrimination and the importance of children's cultural rights.⁵² It also calls for respect for the responsibilities, rights and duties of parents or the members of

⁴⁸ Boyden *et al* (n 5 above) 32.

⁴⁹ 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. A Pollis & P Schwab *Human rights: Cultural and ideological perspectives* (1979) 8-9.

⁵⁰ Art 31 African Children's Charter.

⁵¹ It may be noted at this point that 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 in with the realities of developing countries. WE Myers 'Considering child labour: Changing terms, issues and actors at the international level' (1999) 6 *Childhood* 13; see also T Nhenga 'International prohibition on child labour in an African perspective: Lesotho, Zimbabwe and South Africa' unpublished PhD thesis, University of Cape Town, 2008 156-180.

⁵² Art 31: '(1) 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. (2) 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.'

the extended family or community, as provided for by local custom, to provide appropriate direction and guidance in a child's exercise of rights.⁵³

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', CRC acknowledges the potentially harmful effects of culture.⁵⁴ The instrument is thus ambivalent on the role of culture in the lives of children. It sends mixed signals, thus obscuring these cultural practices to be condemned or condoned.⁵⁵

The differences between the ideologies that informed human rights treaties and those of African cultures raise serious concerns. Can international human rights instruments, given the preconceptions of their drafters, apply effectively to peoples from different cultures? Can the latter peoples identify with the notions of child labour contained in the international instruments? If some cultures do not possess the conception of children's rights as enshrined in international instruments, should their customs and norms on child development be dismissed as bad?⁵⁶

The best way to answer these questions is to consider child labour within the context of both cultural perspectives. This involves a critical analysis of the following issues: the period of life protected by law, child development and the conceptualisation of child labour.

2.1 Childhood

To determine who the law seeks to protect, one first has to deal with the question of childhood. 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?⁵⁷ Is it a universal condition, or is the concept understood differently in different cultures and contexts? If it is not universally understood, can there be universal child labour standards?⁵⁸

Most people distinguish a child from an adult by referring to physical differences and a power relationship. This distinction, however, is

⁵³ Art 5.

⁵⁴ Art 24(3).

⁵⁵ E Verhellen (ed) *Understanding children's rights* (1996) 58.

⁵⁶ Cobbah (n 42 above) 309.

⁵⁷ The concept of child has sometimes been used to give information about certain relationships. Eg, 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. J Gabarino *Children and families in the social environment* (1992) 99.

⁵⁸ KA Bentley 'Can there be any universal children's rights?' (2005) 9 *International Journal of Human Rights* 107.

complicated by a diversity of possible relationships within each cultural group.⁵⁹ 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 amounts to the setting of a boundary between childhood and adulthood. Examples are rites of passage or initiation ceremonies which celebrate the end of childhood.⁶⁰

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.⁶¹

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 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.⁶²

The conception of childhood reflected in international child rights instruments derives from seventeenth and eighteenth century philosophers, notably John Locke and Jean-Jacques Rousseau. Locke perceived children as 'ignorant persons requiring literacy, education, reason, self-

⁵⁹ In African cultures, eg, the duration of child dependence and subordination is not fixed. The age roles for all individuals also vary; A Fletcher & S Hussey (eds) *Childhood in question: Children, parents and the state* (1999) 32.

⁶⁰ Hence, the various dimensions of childhood need not converge in defining one consistent and agreed-upon period of human life. D Archard *Children: Rights and childhood* (1993) 32-3.

⁶¹ As above.

⁶² As above.

control and shame before they could be transformed into a civilised adult'.⁶³ Locke said childhood was mainly something that had to be overcome, which offered opportunities, for a step-by-step conversion into maturity. Locke advocated the gradual hardening of children by subjecting them to cold baths, giving them leaky shoes, feeding them little meat and allowing them only adequate sleep.⁶⁴

Rousseau, the French philosopher, 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.⁶⁵ He believed in the 'spontaneity, purity, strength and joy of childhood', and saw these as capacities to be celebrated.⁶⁶ Rousseau regarded 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.⁶⁷ Instead, he demanded that education recognises its identity and peculiar nature. Rousseau's romantic perception of the child was a major factor in paving the way for modern ideas of child development which are reflected in international instruments on children's rights.⁶⁸

Today, the significance of childhood is well pronounced in modern societies which perceive it 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.⁶⁹ 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, a weak intellect and the incapacity to make decisions that are in their interests.⁷⁰ Here children are depicted as helpless (or potential victims), dependent on adult protection.

This 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 of a living or the raising of a family. Such a view of childhood leaves

⁶³ 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. S Lugtig 'A review of David Archard's *Children: Rights and childhood*' (1996) 41 *Mcgill Law Journal* 893.

⁶⁴ L Abernethie 'Child labour in contemporary society: Why do we care?' (1998) 6 *International Journal of Children's Rights* 81-87.

⁶⁵ 'Child psychology' University of Kansas http://www.kuce.org/isc/previews/psyc/psyc333_lesson.html (accessed 16 October 2005).

⁶⁶ Abernethie (n 64 above) 87.

⁶⁷ Curator 'Centuries of childhood', Kent University Museum <http://dept.kent.edu/museum/exhibit/kids/kids.html> (accessed 16 October 2005).

⁶⁸ Abernethie (n 64 above) 87-88.

⁶⁹ Archard (n 60 above) 39.

⁷⁰ Boyden *et al* (n 5 above) 27; Archard (n 60 above) 37.

children largely free of responsibility.⁷¹ In line with this conception, children must spend their time in school, with 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 and health systems that stress individual rights and responsibilities.

The modern conception of childhood has two key features. The first is a rigid hierarchy, which separates children from adults by special dress, games, language and behaviour. The 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 family which is determined materially, if in no other way, to make these the 'best years of life'.⁷²

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 definition, makes children ill-suited to make rational, reasonable and wise decisions.⁷³ 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.⁷⁴ It is from this 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.⁷⁵

The ILO Conventions and CRC define a child as 'every human being below the age of 18 years'. 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'.⁷⁶ The African Children's Charter, on the other hand, simply states that a child is 'every human being below the age of 18 years'.⁷⁷ The ILO Worst Forms of Child Labour Convention also defines a child as one who is below the age of 18. The African Children's Charter and the ILO Convention therefore leave no allowance for variation.

⁷¹ WE Myers 'Appreciating diverse approaches to child labour' presentation during the symposium 'Child Labour and the Globalising Economy: Lessons from Asia/Pacific Countries' 7-9 February 2001, Child Labour website <http://www.childlabor.org/symposium/myers.htm> (accessed 5 October 2006).

⁷² A Fyfe *Child labour* (1989) 13.

⁷³ Ncube (n 44 above) 17.

⁷⁴ As above.

⁷⁵ It is clear that these prescriptions have been codified into international standards and domestic legislation. Eg, arts 19, 24, 28, 31, 32 & 36 of CRC; secs 28(e) & (f) of the Constitution of South Africa; sec 43 of the South African Basic Conditions of Employment Act 75 of 1997.

⁷⁶ Art 1 CRC.

⁷⁷ Art 2 African Children's Charter.

The arbitrary setting of the upper age limit for childhood at 18 by the African Children's Charter⁷⁸ and the Worst Forms of Child Labour Convention⁷⁹ is problematic when applied to African cultures where the determinants of adulthood are both biologically and socially constructed.⁸⁰ International agencies and industrialised countries use this yardstick of modernity as a tool to condemn those countries with a high incidence of child labour as 'backward' and 'undemocratic'.⁸¹

While international law marks the end of childhood at a certain age, in Africa the movement of individuals through childhood is not marked by arbitrary fixed ages, but by rites of passage that lack chronological specificity.⁸² 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'.⁸³

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 preparation for their entry into the harsh world of adulthood.⁸⁴ It was also perceived in terms of intergenerational obligations of support and reciprocity.⁸⁵ 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.⁸⁶

⁷⁸ Art 2 African Children's Charter.

⁷⁹ Art 2 Worst Forms of Child Labour Convention.

⁸⁰ Refer to the 'African conception' of child above.

⁸¹ O Nieuwenhuys 'The paradox of child labour and anthropology' (1996) 25 *Annual Review of Anthropology* 237 246.

⁸² 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 11, February 1995 7.

⁸³ Age was treated as an approximate benchmark, not an exact record. Ncube (n 44 above) 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 (n 82 above) 7.

⁸⁴ Bhaca girls, eg, 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. P Alston (ed) *The best interests of child: Reconciling culture and human rights* (1994) 90; WD Hammond-Tooke *Bhaca society: A people of the Transkeian Uplands South Africa* (1962) 77.

⁸⁵ Ncube (n 44 above) 12.

⁸⁶ This may be the same in some Western cultures, but it is not a practice socially expected. JF Holleman *Shona customary law with reference to kinship, marriage, the family and the estate* (1969) 62.

African childhood was also a period of internalised and rigorously-enforced obedience to authority. The Shona maintained strict discipline, and disobedience attracted corporal punishment.⁸⁷ 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.⁸⁸ In the biological sense, a child is any person who is born to another:⁸⁹

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.

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.⁹⁰

Some African societies tie the concept of a child to the physical ability to carry out specific tasks. These decisions are influenced by any of several factors, which may 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.⁹¹

Most African societies mark the end of childhood when new economic responsibilities are acquired and entrance into the institution of marriage takes place.⁹² 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.⁹³ 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.⁹⁴ Even after this, however, full adulthood is not attained until he has married

⁸⁷ As above.

⁸⁸ Ncube (n 44 above) 100.

⁸⁹ As above.

⁹⁰ As above.

⁹¹ Ncube (n 44 above) 207.

⁹² As above.

⁹³ Hammond-Tooke (n 84 above) 77.

⁹⁴ As above.

and established a family.⁹⁵ From this perspective, childhood is a state of being unmarried.⁹⁶

The problem with the contemporary ideal of childhood is that it denies children's agency in work,⁹⁷ yet CRC itself and the African Children's Charter both recognise childhood not only as a period of protection, but also as one where the agency of the child is upheld.⁹⁸ Moreover, doubt may be thrown on the developmental and moral validity of a model of childhood, which excludes children from participation in matters that are social and economic. What is the value of isolating and institutionalising children in schools buffered from the important realities of life? The rationale of 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.⁹⁹

One may argue that the 'protective view' of childhood evident in international instruments has resulted from a combination of circumstances in the first world that are not part of the experience of most developing countries. The construction of childhood reflected particularly in the ILO Conventions 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 this model of childhood, although without the industrialisation and development that prompted its evolution to what it is 'demanded' to be today – a period of dependency and protection.¹⁰⁰

2.2 Child development

The whole discussion of childhood and child labour is 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 development. But what do we mean by 'development

⁹⁵ R Macmillan & R Copher 'Families in the life course: Interdependency of roles, role configurations, and pathways' (2005) 67 *Journal of Marriage and the Family* 858-868-75.

⁹⁶ 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. 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* (n 82 above) 7.

⁹⁷ As above.

⁹⁸ Chirwa (n 22 above) 160.

⁹⁹ Art 3(1) CRC.

¹⁰⁰ HJ Steiner & P Alston *International human rights in context: Law, politics, morals* (2000) 517-518.

of the child'? Who determines the 'development of the child'? What criteria are to be used? When one talks about work that is 'detrimental to the development' of the child, what dimension of development is being referred to?

The 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.¹⁰¹ Initially, this idea of a universal process of development may be appealing.¹⁰² 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.

As already illustrated above, different cultures place significance on differing stages of a child's growth, which may be marked by chronological age, by physical abilities, biological changes, and such. Each stage 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 is insensitive. Although this model draws on supposedly 'scientific' principles, we have no conclusive evidence that it suits children's interests better than other cultural models or as a matter of fact produces happier and better-adjusted children.¹⁰³

2.3 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 concept of child labour and its application to African societies. One of the initial problems associated with the regulation of child labour is the difficulty in 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

¹⁰¹ Boyden *et al* (n 5 above) 27.

¹⁰² Eg, '[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 *et al* (n 5 above) 31.

¹⁰³ Boyden *et al* (n 5 above) 39; Hanson & Vandaele (n 4 above) 120; J Gallinetti 'Worst forms of child labour: A view from out of Africa' in J Sloth-Nielsen (ed) *Children's rights in Africa: A legal perspective* (2008) 327.

on family establishments as a contribution by children of whatever age to that economy, and, as such, perfectly acceptable.¹⁰⁴

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.¹⁰⁵ Such diversity in the understanding of child labour leaves one in a quandary as to the precise evil the law seeks to abolish.

No single international instrument explicitly defines child labour. The ILO Conventions mainly approach child labour in terms of minimum ages of employment. 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 workplace or at home.¹⁰⁶ The African Children's Charter merely prohibits the economic exploitation of a child and any work which has the same elements as those prohibited under CRC.¹⁰⁷ This clear lack of consistency in the definition of child labour in international law thus complicates its application in traditional African societies.

These provisions of international law do not describe a single phenomenon. To the contrary, the definitions imply quite dissimilar notions about what is problematic about child labour, and, in consequence, 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 as will be illustrated below.

Due to a lack of a concise definition of child labour, international organisations (such as the ILO and the United Nations Children's Emergency Fund (UNICEF)), trade unions and other interest groups have attempted to fill in this *lacuna* by coming up with their own definitions. They have therefore defined child labour by juxtaposing it with child work, by using age boundaries, by the nature of the work, by its impact

¹⁰⁴ H Cunningham 'The decline of child labour: Labour markets and family economies in Europe and North America since 1830' (2000) 3 *Economic History Review* 409-410.

¹⁰⁵ H Cullen *Role of international law in the elimination of child labour* (2007) 22; C Breen 'The role of NGOs in the formulation of and compliance with the Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflict' (2003) 25 *Human Rights Quarterly* 453.

¹⁰⁶ Art 32 of CRC provides: '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.'

¹⁰⁷ Art 15 African Children's Charter.

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 some of these ways of defining child labour is therefore necessary.

2.3.1 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.¹⁰⁸ UNICEF makes a distinction between 'dangerous and exploitative work' and 'beneficial work'.¹⁰⁹ 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.¹¹⁰ 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.¹¹¹

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.¹¹² The dichotomy between child work and child labour is, however, problematic in that many people use the terms interchangeably. Both are born of the ubiquitous human need to survive. They are interactions requiring physical and mental effort, and they are means of acquiring resources.¹¹³ 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

¹⁰⁸ '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.' SN Mishra & S Mishra *Tiny hands in unorganised sector: Towards elimination of child labour* (2004) 15.

¹⁰⁹ UNICEF is an organ of the UN mandated by the UN 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 CRC and strives to establish children's rights as enduring ethical principles and international standards of behaviour towards children.

¹¹⁰ E Ochaíta *et al* 'Child work and labour in Spain: A first approach' (2000) 8 *International Journal of Children's Rights* 15 19; 'Child protection from violence, exploitation and abuse' UNICEF website http://www.unicef.org/protection/index_childlabour.html (accessed 18 June 2008).

¹¹¹ Ochaíta (n 110 above) 19.

¹¹² National Research Council of the National Academies *Monitoring international labour standards: Techniques and sources of information* (2004) 169.

¹¹³ Mishra & Mishra (n 108 above) 15.

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.¹¹⁴ Definitions of work, particularly children's work, are highly variable and 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.¹¹⁵ The reality in some traditional African societies is that most child 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 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.¹¹⁶

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.¹¹⁷

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.¹¹⁸

Unless children are looked at within a proper context, however, there are bound to be misunderstandings in defining child labour.¹¹⁹ Recent

¹¹⁴ Eg, are boys who spend their day playing in the fields and scaring away birds working? They may not perceive their activity as work, nor may their parents, yet it may have a positive effect on productivity. G Rodgers & G Standing (eds) *Child work, poverty and underdevelopment* (1981) 91.

¹¹⁵ JC Andvig 'Child labour in sub-Saharan Africa: An exploration' (1998) 2 *Forum for Development Studies* 327-328.

¹¹⁶ Abernethie (n 64 above) 91-99.

¹¹⁷ As above.

¹¹⁸ MFC Bourdillon (ed) *Earning a life: Working children in Zimbabwe* (2000) 9.

¹¹⁹ As above.

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.¹²⁰ 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.¹²¹

In general, international law's 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.¹²²

2.3.2 Minimum age of employment

The ILO approaches child labour according to minimum ages. The whole concept of establishing minimum age reflects the concern that children of too young an age should be specially protected. Prior to the 1860s, the Western world did not consider age as an important measure for the acceptability of child work, and, at that time, the employment of nine year-olds (and below) was legal and common place.¹²³ Rather than establishing age limits, however, nineteenth century child labour legislation reduced hours of work and provided some education for child labourers.¹²⁴

With changes in the conception of childhood, the early twentieth century saw the ILO setting age limits for the employment of children in various sectors of the economy. The age limits in the 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.¹²⁵ The instrument sets the minimum age of

¹²⁰ SL Bachman 'A new economics of child labor: Searching for answer behind the headlines' (2000) 53 *Journal of International Affairs* 545 554.

¹²¹ As above.

¹²² Bourdillon (n 118 above) 10.

¹²³ VA Zelizer *Pricing the priceless child. The changing social value of children* (1985) 75.

¹²⁴ 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 nine in cotton mills. Fyfe (n 72 above) 30; Zelizer (n 123 above) 75.

¹²⁵ For developed countries, 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).

employment at 15.¹²⁶ Developing countries may set the minimum age at 14.¹²⁷ Domestic limitations on age vary according to the nature of the work, and the so-called 'development of the child' and educational obligations.¹²⁸

The Minimum Age Convention also 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 is¹²⁹

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.

This competent authority must determine what light work is, and prescribe the number of hours and conditions in which such work may be undertaken. For dangerous work, the Convention sets a limit of 18 and allows 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.¹³⁰

In determining whether work is 'light' or '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 its effect 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 or hazardous work. 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 legitimate and illegitimate forms of work.¹³¹

¹²⁶ Art 2(3) Minimum Age Convention. 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, para 140.

¹²⁷ Art 2(4) Minimum Age Convention.

¹²⁸ The Convention, however, provides flexibility for countries to establish a younger minimum age of 12 or 13 for children to partake in 'light work' (art 7). Hanson & Vandaele (n 4 above) 101.

¹²⁹ Art 7(1) Minimum Age Convention.

¹³⁰ Arts 3(1) & (3) Minimum Age Convention.

¹³¹ J McKechnie & S Hobbs 'Child labour: A global phenomenon?' (1999) 8 *Child Abuse Review* 87 88.

By implication, a child who is below the minimum ages stipulated by the Convention would be engaging in child labour if they do the work prohibited for their age. These minimum age standards express 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.

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, it is, however, still unknown whether the laws have improved the development and the welfare of the children concerned. Minimum age regulations have not received a credible analysis that empirically weighs costs and benefits to determine their net impact on children and on society. 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 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.¹³² Such a case of 'misguided good intentions' should be a warning about the costs of applying simplistic assumptions and solutions across the board without adequate attention to differences of social and economic context.

One could also argue that regulating child labour by minimum age limitations would be problematic in countries which lack the institutional wherewithal to register the birth of every child such as those of Africa. In such societies, 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.¹³³ Several factors should be considered, such as the health and nutrition of the child and its living environment.

¹³² Authors argue that 'a universalised standard excluding children below a particular age from employment or work as set out in article 2 of the [Minimum Age] Convention is unjustified ... insufficient attempts have been made to determine the impact of setting a minimum age for admission to employment or work on children; and the effort of enforcing "blanket prohibitions" affecting all work (even safe work) diverts attention away from the need to intervene in forms and conditions of work that are harmful to children'. M Bourdillon *et al* cited in Sloth-Nielsen (n 103 above) 328.

¹³³ SL Bachman 'The political economy of child labour and its impacts on international business' [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 19 September 2006).

Moreover, the ILO 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. It is for this reason that activists and child development experts judge developing societies as having failed their children because the children's lives do not conform to the image prescribed by international law. 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'.¹³⁴

2.3.3 Education

Child development experts and campaigners against child labour have thus often pointed out the negative correlation between child work and the right to education. The understanding of child labour as a practice harmful to a child's intellectual development is thus a well-established belief that has its origins in the mid-nineteenth century. Compulsory education is thus considered as an effective way of putting into effect the minimum age standards for admission to employment.¹³⁵

It is submitted, however, that the incompatibility of education and work is overstated, and 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.¹³⁶ Moreover, a large number of children, particularly in Asia and Africa, manage to combine school and work effectively.¹³⁷

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.¹³⁸ 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 the risk of over-estimating the harm of work and neglecting

¹³⁴ As above.

¹³⁵ Art 28 CRC and art 2 of the Minimum Age Convention. Boyden *et al* (n 5 above) 249-250.

¹³⁶ As above.

¹³⁷ Sixty million African children combine schooling and work. A Admassie 'Explaining the high incidence of child labour in sub-Saharan Africa' (2002) 14 *African Development Review* 251-255.

¹³⁸ R Anker 'The economics for child labour: A framework for measurement' (2000) 139 *International Labour Review* 257-261.

the relevance of poor quality education in developing countries.¹³⁹ 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.¹⁴⁰ 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.

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 an engagement in customary livelihood at home, in fields and forests with parents and communities.¹⁴¹

The model of education in international law also seems to carry with it an arrogantly negative perception of African cultural ways without acknowledging their benefits and does 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.¹⁴² Traditional education includes engaging in customary livelihoods at home, in fields and pastures with parents and communities.¹⁴³ The basic skills transmitted do indeed allow children to mature in a protective environment, at the same time preparing them for survival in an often harsh world.¹⁴⁴

Admittedly, the global fruits 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

¹³⁹ C Heady 'What is the effect of child labour on learning achievement? Evidence from Ghana' *UNICEF Innocenti Working Papers* (2000) 79.

¹⁴⁰ Anker (n 138 above) 261.

¹⁴¹ PB 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) http://www.ilo.org/public/english/standards/ipecc/publ/download/edu_indigenous_2003_en.pdf (accessed 21 September 2006).

¹⁴² Rodgers & Standing (n 114 above) 33.

¹⁴³ Larsen (n 141 above).

¹⁴⁴ As above.

children actually spend at school'.¹⁴⁵ 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 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.¹⁴⁶

2.3.4 The health risks to child development

International law also approaches child labour with 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.¹⁴⁷ Historians acknowledge 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.¹⁴⁸

However, it is quite apparent that the rhetoric relating work to child development deals superficially with physical health and safety, which include all the bodily senses required to survive in the journey to adulthood.¹⁴⁹ Little is known about the developmental and health effects of work and what makes work abuse for children and the cultural (and social and economic) forces that 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 the African way of raising children without understanding why child work in such societies continues to be an integral part of human development.

The drafters of international law, particularly ILO Conventions, seem to confuse hazards or risks with actual effects. While children should be protected from dangerous work and 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

¹⁴⁵ Boyden *et al* (n 5 above) 58.

¹⁴⁶ Boyden *et al* (n 5 above) 110.

¹⁴⁷ Art 32(1) CRC; arts 3 & 7 Minimum Age Convention; and art 3 Worst Forms of Child Labour Convention.

¹⁴⁸ Nhenga (n 51 above) 19.

¹⁴⁹ Boyden *et al* (n 5 above) 29-39.

depends on the social and normative context of work, the nature and severity of the hazard and how children respond individually.¹⁵⁰

Questions also remain as to 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.¹⁵¹

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 the emphasis on physical and safety issues, and on the adverse effects on schooling, while largely ignoring psychosocial effects 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.¹⁵²

The contemporary theory of development is thus 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, the ability to co-operate, the distinction between right and wrong, respect for laws and for the property and persons of others, resourcefulness and other capacities needed to live successfully within a social context.¹⁵³ 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.¹⁵⁴ 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. Indeed, 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.¹⁵⁵ Such limits on culture, however, seem to have driven the international campaign against child labour to seek the denial of all cultural practices and atti-

¹⁵⁰ Boyden *et al* (n 5 above) 79.

¹⁵¹ As above.

¹⁵² Boyden *et al* (n 5 above) 144 110.

¹⁵³ As above.

¹⁵⁴ As above.

¹⁵⁵ Alston (n 84 above) 20.

tudes. Notable amongst these are the expectation 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.¹⁵⁶

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 and perhaps in consideration of the evolving capacities of the child.¹⁵⁷ 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.¹⁵⁸

While the cultural differences in child rearing seem obvious at first glance, these differences are often not recognised 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 conceptual basis that denigrates local knowledge and traditional wisdom. Local practices are frequently defined as harmful without appreciating the meaning of harm.¹⁵⁹

2.3.5 African countries' ratification of international child labour instruments

Given the above discussion, the question at this point would be: How is it that African countries have ratified CRC and the ILO Conventions on child labour if the principles enshrined therein are so at odds with the cultures of their constituencies? Answering these questions would require one to look to the states' reasons for ratification and the nature

¹⁵⁶ DM Smolin 'Conflict and ideology in the international campaign against child labour' (1999) 16 *Hofstra Labour and Employment Law Journal* 401-402.

¹⁵⁷ The challenge, however, would be how to effectively and objectively assess the capacities of each child.

¹⁵⁸ As above.

¹⁵⁹ Verhellen (n 55 above) 59.

of the said countries' participation at the negotiation and drafting stages of the Conventions.

True as it may be that African countries have ratified the international laws on children's rights, it is well known that the motivation for the ratification is always a combination of various factors, with international diplomacy being a primary consideration. States always want to be seen as supporters of human rights. While some have ratified human rights treaties with the genuine intention to establish a universal normative framework and strengthen such a system worldwide, there is also evidence that developing countries simply succumbed to political pressure to ratify from other states and international non-governmental organisations (NGOs).¹⁶⁰

Some countries have ratified human rights instruments to facilitate reintegration into the international community after a period of isolation, symbolising a break with an authoritarian past or to prevent a recurrence of wide-scale human rights abuses. An example of countries which have done so is South Africa at the demise of apartheid in 1994, and Zimbabwe and Namibia after their independence in 1980 and 1990 respectively.¹⁶¹ It is also common knowledge that developing countries have often ratified a human rights instrument for the sole purpose of receiving international aid. Governments that have ratified treaties for such reasons often lack a moral motivation to improve the lives of their citizens as they are obliged under the instruments and hence reduce the ratification to a mere academic exercise. As a consequence, most countries never bother to incorporate the treaties into domestic law.

One could also argue that 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.¹⁶² Moreover, the few representatives of developing countries who do attend are usually late participants in a

¹⁶⁰ Eg, India ratified CEDAW and CRC in response to the increasing international scrutiny of its human rights record, after Pakistan tabled a resolution to the Commission of Human Rights on the state of human rights in Kashmir. Iran also acceded to CRC because it was under pressure at the time due to its human rights record. 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. PE Veerman *The rights of the child and the changing image of childhood* (1992) 183.

¹⁶¹ South Africa ratified five treaties shortly after the end of apartheid. Institute for Human Rights and Development in Africa (IHRDA) 'The African Charter on the Rights and Welfare of the Child' <http://212.60.76.30/modules/news/index.php?storytopic=16> (accessed 11 September 2007).

¹⁶² Boyden *et al* (n 5 above) 68.

predetermined process.¹⁶³ Hence they have to work with concepts and mechanisms already called from sources other than their own.¹⁶⁴

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.¹⁶⁵ At the negotiating sessions, they often lack a sense of familiarity and support from home. Such negotiators, particularly those from developing countries, are therefore ill-equipped to make a meaningful contribution to the proceedings.¹⁶⁶

Moreover, many 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 thus dominated the discussion on child labour and been the ones to define it and to stipulate its remedies in accordance with interests and ideologies of these countries of origin. A serious inequality in the negotiating positions therefore exists. It is for this reason that one has to 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.¹⁶⁷

The ILO has tried to remedy this inequality by providing different child labour standards for poor nations and their developed counterparts.¹⁶⁸ Such attempts have hardly been successful considering that international values and imperatives are still imposed on the latter without due consideration of the different methods of rearing children,

¹⁶³ CRC came about as a result of long-term advocacy by voluntary organisations such as Save the Children 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. M Freeman *The moral status of children: Essays on the rights of the child* (1997) 53.

¹⁶⁴ As above.

¹⁶⁵ As above.

¹⁶⁶ Only four developing countries had representation at the CRC sessions of the Open-Ended Working Group, namely, Algeria, Morocco, Senegal and Egypt. Their participation, however, was sporadic. The rest of the African countries (including Lesotho, Zimbabwe and South Africa) never took part at all. Throughout the proceedings, NGOs representing the interests of children were involved only periodically and their participation was badly co-ordinated. Freeman (n 163 above) 53; Veerman (n 160 above); IHRDA (n 161 above).

¹⁶⁷ 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 to whether or not the representatives of countries have done the necessary consultations with their national constituencies.

¹⁶⁸ The gradation of standards has thus historically been part of ILO Minimum Age Conventions.

and varying conceptions of childhood. Moreover, it is not clear how the degree of difference in child labour standards was determined between developed and developing nations (as exemplified by the terms of the 1973 Minimum Age Convention).¹⁶⁹

3 Conclusion

It should be clear at this point that, while there is an international consensus on the concern for children, societies differ on the conception of childhood, how a child's welfare may best be secured and the acceptable forms of child activity. The discord between international law and African cultures on the laws and policies needed to deal with child labour represents fundamental differences on 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 a recognition that the international law has a one-dimensional view of the problem which begs relevance in the societies of developing countries.¹⁷⁰

Clearly, it is difficult to come to a common understanding of what is hazardous to a child, besides the more obvious dangers to health and social development of extreme forms of child labour 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, while members of more modern societies would never send a child to a 'big bad forest' to fetch wood or to a well to fetch water 'where there is a risk of drowning'. To the latter, 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. 'We are confronted ... with the very weak state of knowledge and understanding of the causes of abuse, exploitation and harm in work situations ...'¹⁷¹ There has, therefore, been a tendency to 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

¹⁶⁹ Smolin (n 156 above) 393.

¹⁷⁰ Myers (n 51 above) 22.

¹⁷¹ B White 'Defining the intolerable: Child work, global standards and cultural relativism' (1999) 6 *Childhood* 133 135.

ill-suited to the children whose work was not particularly hazardous or exploitative, and could be combined successfully with school work. The specific circumstances and needs have not been understood.¹⁷²

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.

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.¹⁷³ 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.¹⁷⁴ The rights codified in international instruments leave little room for compromise or an allowance for competing cultural values and foreclose reflection on intricate issues that are not soluble by simplistic formulae.¹⁷⁵

What is apparent 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, thereby facing a potential backlash by those concerned with cultural, familial or personal autonomy.¹⁷⁶

While it is vital to retain or recapture cherished traditional values, one must be cautious about relying on dying, lost and even mythical cultural norms.¹⁷⁷ 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

¹⁷² See A Bekele & WE Myers *First things first in child labour: Eliminating work detrimental to children* (1995) 29.

¹⁷³ As above.

¹⁷⁴ Boyden *et al* (n 5 above) 324-326.

¹⁷⁵ C Sunstein 'Rights and their critics' (1995) 70 *Notre Dame Law Review* 727 730-2.

¹⁷⁶ 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 (n 156 above) 400.

¹⁷⁷ '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.' J Donnelly *Universal human rights in theory and practice* (1989) 118.

and about the possibly harmful way in which certain social institutions safeguard rights'.¹⁷⁸

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, apparent in African traditional societies, assured children of nurture and protection within families. The African social and legal system does in fact assure human dignity in all material respects.¹⁷⁹

Child labour principles, as with other human rights principles, have thus 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 has led to generalised and one-dimensional legal remedies that are likely to be weak or counter-productive for the children involved.¹⁸⁰

There is a need to move beyond the narrow education, health and safety concerns of the current international child labour laws 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.¹⁸¹ Instead of having a blanket prohibition of child labour, there is a need for the retention of work that builds character, initiative, and qualities of organisation, discipline and love of knowledge.

Child labour must be approached from the perspective 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 'one-size-fits-all' approach to childhood and child labour on all societies, 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

¹⁷⁸ Steiner & Alston (n 100 above) 336-337.

¹⁷⁹ Bennett (n 43 above) 5.

¹⁸⁰ Myers (n 51 above) 42.

¹⁸¹ R Himes (ed) *Implementing the Convention on the Rights of the Child: Resource mobilisation in low-income countries* (1995) 190-191.

processes and be supported by social, economic, and educational measures.¹⁸²

Unfortunately, the imposition of these international laws based on modern economic and social practice has so far created problems, due primarily to a failure to consider sufficiently the state of development of the communities upon which they imposed or the full social and economic implications.¹⁸³ 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'.¹⁸⁴ 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.¹⁸⁵

The success of child labour laws in Africa will depend on the level of cultural legitimacy accorded to the norms contained therein.¹⁸⁶ If the law is found to be lower than the plane of public opinion, then it would be wise to consider changing it in conformity with that opinion and with certain well-defined principles.¹⁸⁷ 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.¹⁸⁸ 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.¹⁸⁹

In creating children's rights norms that are suitable for Southern African societies, it is vital that we do not reinforce much of the taken

¹⁸² Eg, in Zimbabwe, the Labour Relations Regulations of Statutory Instrument 72 of 1997 and sec 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.

¹⁸³ A St J Hannigan 'The imposition of Western law forms upon primitive societies' (1961) 4 *Comparative Studies in Society and History* 1-5.

¹⁸⁴ Hanson & Vandaele (n 4 above) 75.

¹⁸⁵ 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. LM Friedman 'Borders: On the emerging sociology of transnational law' (1996) 32 *Stanford Journal of International Law* 65 72-75.

¹⁸⁶ T Kaime 'The Convention on the Rights of the Child and the cultural legitimacy of children's rights in Africa: Some reflections' (2005) 5 *African Human Rights Law Journal* 223.

¹⁸⁷ OR Lovejoy 'The test of effective child labor legislation' (1905) 25 *Annals of the American Academy of Political and Social Science* 45-52.

¹⁸⁸ SB Burman & BE Harrell-Bond *The imposition of law: Studies on law and social control* (1979) 16.

¹⁸⁹ As above.

for granted assumptions about our cultures.¹⁹⁰ The ways of reframing and reformulating the law on child labour in the sub-region must avoid falling into the trap of essentialising culture.¹⁹¹ 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.¹⁹²

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.¹⁹³ 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.¹⁹⁴ Such essentialism plays into the hands of economists and political strategists, who depend on the labour of children.

The effect of essentialising culture is for one 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.¹⁹⁵ 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 and the way in which that policy or law may affect the power relations within those groups.¹⁹⁶

¹⁹⁰ V Sewpaul 'Challenging East-West value dichotomies and essentialising discourse on culture and social work' (2007) 16 *International Journal of Social Welfare* 398.

¹⁹¹ Essentialism regards culture as separate, clearly bounded, internally uniform and static. S Laden & D Owen *Multiculturalism and political theory* (2007) 227.

¹⁹² K Pakesa & S Roy-Chowdhury 'Examining the practice of cross-cultural family therapy' (2007) 29 *Journal of Family Therapy* 268.

¹⁹³ R Mahalingam 'Essentialism, culture and power: Rethinking social class' (2003) 59 *Journal of Social Issues* 733 735.

¹⁹⁴ U Narayan & S Harding (eds) *Decentering the center: Philosophy for a multicultural, post-colonial and feminist world* (2000) 80.

¹⁹⁵ Y Abu-Laban 'Liberalism, multiculturalism and the problem of essentialism' (2002) 6 *Citizenship Studies* 459 465.

¹⁹⁶ Laden & Owen (n 191 above) 227. Also see Sewpaul (n 190 above) 404 and ME Goodhart 'Origins and universality in the human rights debates: Cultural essentialism and the challenge of globalisation origins and universality in the human rights debates' (2003) 25 *Human Rights Quarterly* 935 941.