

**An Assessment of the Significance of the International Labour Organisation's
Convention 182 in South Africa with specific reference to the Instrumental Use of
Children in the Commission of Offences as a Worst Form of Child Labour**

By

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Abstract

Child labour is a central issue in the broad scope of children's rights. Indeed, the genesis of the children's rights movement has been largely informed by the efforts to protect working children in the industrial revolution and the work of the International Labour Organisation and labour reformers during the 20th century.

An analysis of the various responses to child labour since the industrial revolution illustrates that the primary focus was on working children and regulating their admission to employment and conditions of work, as demonstrated by the eventual adoption of the International Labour Organisation's Convention No. 138 concerning the Minimum Age for Admission to Employment in 1973. Although the 20th century also ushered in international censure for human rights violations in the form of supra-national binding conventions on slavery, forced labour and trafficking, these efforts had no specific focus on children and there was no internationally binding legal instrument that recognised that the economic exploitation of children extended far beyond mere working conditions and employment issues to commercial sexual exploitation, debt bondage and slavery.

It was only with the adoption of the United Nations Convention on the Rights of the Child that international law, for the first time, provided for measures to address serious forms of exploitation of children such as commercial sexual exploitation, child trafficking, and the use of children in the drug trade.

In 1999, the International Labour Organisation adopted Convention No. 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (Convention 182), together with Recommendation 190. This Convention called for the prohibition and elimination of the worst forms of child labour, which was identified as including slavery, forced labour, trafficking, the use of children in armed conflict, the commercial sexual exploitation of children and the use of children in illicit activities. The Convention and its Recommendation No. 190 also required ratifying states to take specific measures to achieve this goal, including the adoption of time-bound

measures and national programmes of action. The Convention has been widely ratified, including by South Africa.

The adoption of this Convention has focused the attention of the international community on these intolerable forms of child labour. It has also followed a new approach to child labour, prioritising certain categories of exploitation that need immediate attention, and requiring states parties to implement time-bound programmes of action aimed at the elimination of these forms of child labour.

This thesis has sought to evaluate the theoretical and practical soundness of Convention 182 generally and in relation to South Africa more specifically. A particular reference point is the instrumental use of children in the commission of crime as a worst form of child labour. The assimilation of child labour oriented provisions in the South African Constitution, the Child Justice Bill 49 of 2002 and the Children's Act 38 of 2005 (seen together with its amending Bill 19F of 2006) is given detailed consideration. A pilot project aimed at implementing aspects of Convention 182 in local context is discussed, and used as the basis for conclusion concerning the effectiveness, aims and potential future impact of the Convention. Special attention is paid to the position of children instrumentalised in the commission of offences in the formulation of these conclusions.

This thesis argues that, given the substantive provisions of the United Nations Convention on the Rights of the Child, its Optional Protocols and the evolving jurisprudence of the Committee on the Rights of the Child, it was not strictly necessary for the International Labour Organisation to adopt Convention 182, as the forms of child labour identified therein were largely already addressed in international law. However, it is asserted that Convention 182 does contribute to the international law framework through its approach that prioritises the worst forms of child labour. It is further contended that Convention 182 enhances the international regulatory framework regarding the economic exploitation of children by creating positive obligations on states to implement the Convention. Ultimately, however, it is suggested that the Convention is also flawed, principally due to the fact that it sets as its goal the elimination, by means of

time-bound measures, of the worst forms of child labour. In formulating this objective, the Convention has not taken the nature of the conduct that it seeks to eliminate into account, to wit, economic exploitation of children that also constitutes criminal conduct in the form of child pornography, child prostitution and the use of children in the commission of crime. The goal is, in short, unlikely to be attained.

In sum, the significance of Convention 182 is assessed to be contradictory. It has, at a substantive level, not really broken new ground. As far as children used in illicit activities are concerned, their inclusion as a worst form of child labour has been shown to be problematic. But in the implementation of programmes aimed at giving effect to state parties' obligations, some impact of Convention 182 on the legal and policy landscape has been recorded, and a significantly increased awareness of the worst forms of child labour and its manifestations has come about.



Key Words

Child labour

Children's rights

Worst forms of child labour

Exploitation

Children used in the commission of crime

Child justice

Juvenile justice

Child protection

Elimination

International law



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This thesis has been a process of reflection, requiring me to reassess my thinking on areas of law, policy and practice that I am accustomed to working with, and taking me in new directions to spheres of child law that I have not previously engaged with, but now consider critical to my knowledge of the sector.

First and foremost I have to express my sincere appreciation to my supervisor, Julia Sloth-Nielsen. Not only has she been a wonderful mentor for the past 7 years, but her dedication to the pursuit of objective academic writing and scholarly thought inspired me to embark on this doctoral study. As a supervisor, Julia has been critical, supportive, patient and encouraging, values which add immeasurable weight to the process of thesis writing. I am indebted to her for her reasoned guidance and firm leadership.

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List of Acronyms

| | |
|--------|--|
| ACRWC | African Charter on the Rights and Welfare of the Child |
| AFTU | American Federation of Trade Unions |
| CEACR | Committee of Experts on the Application of Conventions and Recommendations |
| CUBAC | Children Used by Adults to Commit Crime |
| CLAP | Child Labour Action Programme for South Africa |
| CLPA | Child Labour Programme of Action |
| ECOWAS | Economic Community of West African States |
| ICCPR | International Covenant on Civil and Political Rights |
| ICESCR | International Covenant on Economic Social and Cultural Rights |
| ILC | International Labour Conference |
| ILO | International Labour Organisation |
| IOM | International Organisation of Migration |
| IPEC | Infocus Programme on the Elimination of Child Labour |

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| ISCCJ | Inter-sectoral Committee on Child Justice |
| LSMS | Living Standards Measure Survey |
| MICS | Multiple Indicator Cluster Surveys |
| SAPS | South African Polices Services |
| SIMPOC | Statistical Information and Monitoring Programme on Child Labour |
| TECL | Programme Towards the Elimination of the worst forms of Child Labour |
| UCW | Understanding Children's Work |
| UN | United Nations |
| UNCRC | United Nations Convention on the Rights of the Child |
| UNICEF | United Nations Children's Fund |



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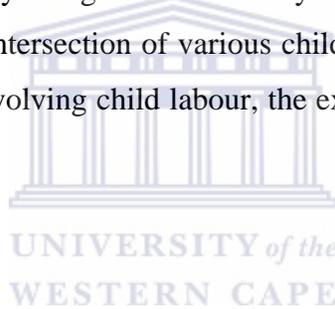


Chapter 1

Introduction

1.1 Background to the study

‘Please Sir, can I have some more?’ is the familiar quotation from Charles Dickens’ *Oliver Twist* – a novel that illuminates life during the industrial revolution in Britain and how it affected children. What is significant is that the novel not only highlights the plight of working children, widely regarded to have emerged during that particular period of history,¹ but also deals with the exploitation and use of children by adults to commit crime. This latter issue was only recognised as recently as 1999² as a worst form of child labour and in this process an intersection of various children’s rights issues was brought to the fore – an intersection involving child labour, the exploitation of children and child justice.³



¹ Cunningham H and Stromquist S, ‘Child Labor and the Rights of Children: Historical Patterns of Decline and Persistence’, in Weston BH (ed), *Child Labor and Human Rights: Making Children Matter*, Lynne Rienner Publishers: Boulder, 2005, p 55.

² Article 3 (c) of the International Labour Organisation’s Convention 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, adopted by the International Labour Conference at its 87th Session, Geneva, 17 June 1999 (hereinafter Convention 182).

³ The term child justice denotes the area of children’s rights dealing with children accused of committing crime. Internationally, the accepted term is juvenile justice, however, in its investigation into juvenile justice and a separate criminal justice system for children the South African Law Commission (as it was then known) decided to adopt the term child justice. The reasons for this included the fact that it is less stigmatising and more child rights oriented. For further discussion see the South African Law Commission, *Juvenile Justice Discussion Paper 79*, Project 106, 1998 and the South African Law Commission, *Report on Juvenile Justice*, Project 106, 2000.

Despite the widespread employment and exploitation of children during the industrial revolution,⁴ there was a simultaneous outcry of contempt for such practices and concomitant recognition that children were in need of protection against such actions in so far as they were seen to constitute abuse.⁵ In arguing that the industrial revolution heralded the view that children have special rights in the labour market, T.B. Macaulay, a 19th century poet, historian and politician, is quoted as stating:

‘[T]he practice of setting children prematurely to work, a practice which the state, the legitimate protector of those who cannot protect themselves, has, in our time, wisely and humanely interdicted, prevailed in the seventeenth century to an extent which,...seems almost incredible....The more carefully we examine the history of the past, the more reason shall we find to dissent from those who imagine that our age has been fruitful of new social evils. The truth is that evils are, with scarcely an exception, old. That which is new is the intelligence which discerns and the humanity which remedies them’.⁶

From the initial chorus of disapproval and expressions of horror at the conditions and ages of working children during the industrial revolution,⁷ set out in the works of history and literature, there developed national legislation in Europe and the United States of America to protect children by regulating working hours and conditions of work, and eventually moving towards abolishing child labour altogether.⁸ However, it was only in

⁴ Cunningham and Stromquist, p 58, note 1 where the overriding contemporary consensus during the 17th,18th and early 19th century that children should work, even from the age of three or four years, is discussed.

⁵ Cunningham and Stromquist, p 61-62, note 1.

⁶ Cunningham and Stromquist, p 61-62, note 1.

⁷ The prevailing thoughts and debates on child labour are discussed in more detail in section 3.3 of Chapter 3 of the thesis.

⁸ Cunningham and Stromquist, p 62-70, note 1. Examples of such legislation were the Factory Act of 1833 and the Factory and Workshops Act of 1878 in Britain and the Fair Labor Standards Act of 1938 in the United States of America. See also Humphries J, ‘Child Labor: Lessons from the Historical Experience of Today’s Industrial Economies’, *The World Bank Economic Review*, Vol. 17, No. 2, 2003, p 190-191.

the late 19th century and early 20th century, culminating in the establishment of the International Labour Organisation (ILO) in 1919, that international recognition of the vulnerability of children to economic exploitation began to materialise.⁹ All of these developments occurred, however, within the context of children in the workplace or employment environment, thereby confining the discussion of the violation of children's rights to this setting. The recognition that economic exploitation of children could take other forms that constitute serious human rights violations, such as forced labour, slavery and so forth or in the informal economy were not acknowledged in early labour legislation, whether at an international or national level.

The first reference to the need to protect children from economic exploitation in a human rights document is contained in Principle 4 of the 1924 Declaration on the Rights of the Child, which states 'the child must be protected against every form of exploitation'. This was then followed by Principle 9 of the 1959 Declaration on the Rights of the Child which states '[t]he child shall be protected against all forms of... exploitation. He shall not be the subject of traffic in any form'.¹⁰

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These two provisions, placed notably in children's rights instruments rather than international labour instruments, mark firstly, a move away from restricting the conceptualisation of the issue of exploitation of children to the workplace and secondly, a recognition of the potential wide ambit that the issue embraces. The provisions also start to acknowledge the vast complexities in the sphere of economic exploitation of children.

⁹ Cunningham and Stromquist, p 70–73, note 1. The international developments included a 1890 meeting in Berlin, Germany attended by 12 European countries to discuss, amongst others, the work of children in factories and mines and the 1916 Leeds Conference of Allied Trade Unions adopting a standard set by the French Confédération Générale du Travail to 'fix 14 years as the age of the admission of children to industrial, commercial and agricultural work'. In 1919 the ILO adopted its first minimum age convention – Minimum Age (Industry) Convention 1919 (No. 5), which was followed by a number of other minimum age conventions for other types of work i.e. Trimmers and Stokers (1921), Agriculture (1921), Non-Industrial Employment (1932), and Underground Work (1965) – discussed in more detail in section 2.3.1 of Chapter 2 of this thesis.

¹⁰ Both of these instruments are discussed in greater detail in section 2.3.2 of Chapter 2 of the thesis.

It has been said that while economic exploitation rarely amounts to the violation of a single right and usually involves the breach of several, often resulting in interference with the child's rights to family life, education, health and leisure, such exploitation reflects states' economic, social and cultural patterns,¹¹ which then need to be addressed in order to protect children.

The first dedicated and comprehensive international law instrument that sought to address child labour was ILO Convention 138 concerning the Minimum Age for Admission to Employment.¹² This Convention requires States to set a minimum permissible age at which children can work, namely, not below 15 years (for developed countries) and 14 years (for developing countries). The Convention also provides that such minimum age excludes 'light work' for which the minimum ages of 12 and 13 are applicable for developed and developing countries respectively.¹³

In addition, the Convention requires states to catalogue types of work which by their very nature or the circumstances in which they are carried out are likely to jeopardise the health, safety or morals of young persons and specifies that in such cases, the minimum age for admission shall not be less than 18 years.¹⁴ While this provision reflects the concern that children's fundamental rights should not be violated, the recognition of the

¹¹ Van Bueren G, *The International Law on the Rights of the Child*, Martinus Nijhoff Publishers: The Netherlands, 1995, p 262. Van Bueren notes that while not all child labour amounts to exploitation, it can generally be divided into five categories: domestic, non-domestic, non-monetary, bonded labour, wage labour and marginal economic income and it extends to paid employment, work at home or unpaid work within the family. Child labour is exploitative when it threatens the physical, mental, emotional or social development of the child. Van Bueren, p 264.

¹² Adopted by the International Labour Conference at its 86th Session, Geneva, 26 June 1973 (hereinafter Convention 138). As stated above in note 9 above, there were a number of prior ILO Conventions dealing with minimum age relevant to the employment of children, but these were not comprehensive and were only applicable to specific sectors. Thus Convention 138 constitutes the principle Convention on the minimum age of employment.

¹³ The Convention places an obligation on states to criminalise and specify the penalties for, and other measures against, any person(s) enlisting children below the prescribed age into work (article 9).

¹⁴ Article 3.

need to protect children in the context of child labour is, in this Convention, still limited to the context of the workplace or employment, or more informal work that can be seen as generating income.¹⁵

In 1989, the United Nations adopted the Convention on the Rights of the Child (UNCRC), widely regarded as the seminal children's rights treaty aimed at ensuring that children are afforded their fundamental rights and freedoms. The UNCRC, in addressing exploitation, acknowledged that the exploitation of children occurs in situations that extend beyond the workplace. Primarily, and again in the context of formal and informal income generation, Article 32 requires states to protect children from economic exploitation and any work that is likely to be hazardous or to interfere with the child's education, or be harmful to the child's health or physical, mental, spiritual, moral or social development. However, the UNCRC also requires states to protect children from other forms of exploitation, in particular the use of children in the illicit production and trafficking of narcotic drugs and psychotropic substances,¹⁶ all forms of sexual exploitation,¹⁷ the sale of or traffic in children¹⁸ and all other forms of exploitation prejudicial to the child's welfare.¹⁹

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While the conduct described in these provisions obviously constitute egregious human rights violations, contextualising them within the framework of exploitation, especially when most also involve certain economic or commercial elements, illustrates a broadening international acceptance that children are exploited in different ways and via different means. The provisions signal a recognition that economic exploitation is not limited to traditional labour concepts of employment and work, but encompass criminal activities of a commercial nature in which children are victims. Consequently specific

¹⁵ The Convention consistently refers to 'admission to employment or work' on Articles 1, 2, 3, 4 as well as 'branches of economic activity' in Article 5 and 'light work' in Article 7.

¹⁶ Article 33.

¹⁷ Article 34.

¹⁸ Article 35.

¹⁹ Article 36.

steps, as set out in the UNCRC, for instance enacting prohibitions on exploitative conduct and providing protective measures for children, need to be adopted to address the differing forms of exploitation in order to ensure appropriate and effective responses.

In the 86th session of the International Labour Conference in 1998, the ILO proposed the adoption of a new international instrument to combat the worst forms of child labour, which would also be supplemented by recommendations for practical action and assistance.²⁰ In doing so the ILO circulated Report VI(1), chronicling the exploitation and abuse of working children, surveying international and national law and practice and, through an accompanying questionnaire, seeking the views of governments, employers' and workers' organisations on the possible scope and content of a new international instrument.²¹

In motivating for this new international legal instrument, ILO Report VI(1) notes that the current climate at the time provided 'unknown opportunities and possibilities that should enable us to make a directive assault on child labour'.²² It argued that the new Convention would fill the gaps in current international legal instruments, set clear priorities for national and international action and build on Convention 138.²³ It is precisely contentions of this nature that this thesis will seek to examine and test. Was the prevailing climate really that conducive for a new set of standards and what were the gaps that needed to be filled, if any?

²⁰ International Labour Conference 86th Session, *Report VI (1) Child labour: Targeting the intolerable*, International Labour Office, Geneva, 1998 (hereinafter referred to as ILO Report VI(1)). The report is discussed in more detail in Chapter 4.

²¹ ILO Report VI(1), Introduction, note 20.

²² ILO Report VI(1), p. 57, note 20.

²³ ILO Report VI(1), p. 57, note 20. The report noted that an obstacle to the greater ratification of Convention 138 was the fact that many States viewed its provisions as too complex and difficult to apply in its entirety and therefore there was a need to complement the Minimum Age Convention and focus on the most intolerable forms of child labour.

On 17 June 1999, Convention 182 was unanimously adopted by the ILO member States at the 87th International Labour Conference together with its supplementing Recommendation (No. 190) and it came into force on 19 November 2000. In Article 3, Convention 182 deals with worst forms of child labour (WFCL) and defines the term as comprising all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour including the forced or compulsory recruitment of children for use in armed conflict; the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances; the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs; and work which by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.

1.2 Statement of the problem

The past 35 years has witnessed the adoption of the three major international children's rights conventions mentioned above that, inter alia, attempt to address the economic exploitation of children, firstly in relation to employment and the workplace and then more broadly in the context of commercial and criminal exploitation of children.

The first question that arises is why has it taken three international instruments to address these issues?

Convention 138, as stated above, principally deals with the minimum age for admission to employment as well as requiring states to identify and prohibit admission to those types of child labour which are hazardous and jeopardise children's health, safety and morals. It is therefore, of the three, the most narrow in ambit and scope of protection.²⁴ In

²⁴ Van Bueren notes particular problems with the protection that Convention 138 purports to provide. Firstly, she argues, that by allowing states to exclude limited categories of work or employment in which 'special and substantial problems of application arise', the economic exploitation of children in those types of work can occur—most in typically family undertakings and domestic service. Secondly, the protection of

addition, it has also been noted that the Convention is too difficult to apply and its provisions are too complex.²⁵

The UNCRC is almost universally hailed as the primary human rights treaty that ensures children's protection, while promoting their development and individual autonomy. Van Bueren provides a list of reasons for the Convention's significance: firstly, it incorporates rights in a global treaty which had previously only been acknowledged or refined in case law under regional human rights treaties, for example, the child's right to be heard in judicial and administrative proceedings and have those views taken into account; secondly, it creates binding standards in areas, which prior to the adoption of the Convention, were only governed by non-binding recommendations; and finally, the Convention imposes new obligations in relation to the provision for and protection of children, such as the obligation to prohibit traditional practices prejudicial to the health of children and to provide rehabilitative measures for child victims of neglect, abuse and exploitation.²⁶ In addition, a mark of its significance is the fact that it is regarded as having achieved the status of international customary law.²⁷

Finally, Convention 182, which although covering issues dealt with by both Convention 138 and the UNCRC, has been distinguished from the preceding treaties by certain unique features. These features include its call for 'immediate and effective measures' to

the Convention is weakened by allowing a state whose economy and administrative facilities are insufficiently developed to limit the scope of the Convention by making it not applicable to specific branches of economic activity or undertakings. Finally, the Convention not only exempts light work for children younger than the minimum age, but the concept of light work is not defined. See Van Bueren, p 266-268, note 11.

²⁵ ILO Report VI(1), p. 57, note 20.

²⁶ Van Bueren, p 16, note 20.

²⁷ The former Chairperson of the Committee on the Rights of the Child, Professor Jaap Doek, has confirmed the *jus cogens* nature of the UNCRC : '192 states have ratified the Convention, this means that principles of the CRC have become international customary law, which actually applies to all states', commentary delivered during the Day of General Discussion: Working Group 1 on the child's right to be heard in judicial and administrative proceedings on 15 September 2006 accessed at <http://www.crin.org/resources/infoDetail.asp?ID=10227> on 26 September 2007.

combat and eliminate the worst forms of child labour, the requirement placed on states to design and implement programmes of action as well as the requirement for the establishment of monitoring mechanisms.²⁸ In particular, the obligation to design and implement programmes of action to eliminate the worst forms of child labour together with effective and time-bound measures has been argued to take states' obligations beyond simple prohibitions.²⁹ What makes Convention 182 stand out against other ILO Conventions, and perhaps the UNCRC, that merely require their provisions to be applied in law and practice, is the fact that the Convention sets out the requirements for positive action in substantive provisions, thereby allowing for inaction by governments to be highlighted and for consequent pressure to be placed on them to comply with their undertakings.³⁰

Other commentators have highlighted the fact that Convention 182 has taken the debate about child labour further by, amongst others, extending the scope of Convention 138 from economic activities that only constitute hazardous work as opposed to criminal conduct, to activities that are clearly illegal in nature as well.³¹ Davidson also argues that Convention 182 has addressed various achilles' heels of Convention No. 138 such as the non-specificities of what measures states should take to enforce the provisions of the Convention, by imposing clear obligations on states to take practical action in addressing worst forms of child labour.

The thesis will attempt to show that while Convention 138 had a specific objective, it was too narrow in scope and had thorny implementation problems. The discussion therefore will center on whether Convention 182 actually delivers anything new and of value given

²⁸ Noguchi Y, 'ILO Convention No. 182 on the worst forms of child labour and the Convention on the Rights of the Child', *The International Journal of Children's Rights*, Vol. 10, 2002, p. 355-6. See also the discussion in section 4.4 of Chapter 4.

²⁹ Noguchi, p. 360, note 28.

³⁰ Noguchi, p 360-361, note 28.

³¹ Davidson M, 'The International Labour Organisations's latest campaign to end child labor: Will it succeed where others have failed?', *Transnational law and Contemporary Problems*, Spring 2001, p. 217-218.

the broad and comprehensive scope of the UNCRC. It will be argued that substantively it does not, and further, that while procedurally it may provide greater positive obligations for states to address worst forms of child labour, the overall goal of the elimination of worst forms of child labour may prove to difficult to achieve.

An attendant issue of concern is that while Convention 182 seems represents an attempt to concretise states' obligations in order to produce actual results, the complexity of the true nature of most of the worst forms of child labour seems to have been overlooked. In other words, the monumental difficulties of eradicating crimes such as child prostitution, child trafficking, drug trafficking and so on seems not to have been adequately acknowledged in that the overall aim of the Convention is to 'eliminate' worst forms of child labour, which in turn also constitute criminal conduct.³² The question that begs answering is whether it is true to state that the elimination of certain *crimes* (as opposed to the term 'worst forms of child labour') within time-bound measures is a 'realistic goal'? Obviously, it is not submitted that worst forms of child labour and these crimes against children should not be addressed with the full force of action that states can muster, but if one examines the true nature of worst forms of child labour, the third issue for examination in this study is whether can states reasonably be expected to 'eliminate' within 'time-bound' programmes of action conduct that their and international criminal justice systems have been grappling with for centuries? The thesis will attempt to illustrate that such an approach is misguided and unachievable, thereby considerably reducing the significance of Convention 182.

I have elected to examine the significance of Convention 182 generally, but also in the context of its implementation in South Africa as I believe this would better illustrate its potential influence, impact and effectiveness. Therefore, the thesis also needs to answer certain questions specific to South African law, policy and practice regarding the economic exploitation of children, specifically worst forms of child labour.

³² This issue is discussed in more detail in Chapters 4 and 7.

The problem of worst forms of child labour in South Africa has been incorporated into the draft South African Child Labour Programme of Action (CLPA),³³ which was provisionally approved by representatives from various government departments on 4 September 2003, and amended by an updated version namely, CLPA 2, in June 2007. It is still subject to a costing of the various recommended actions steps to be implemented by the key government departments, and approval by the South African Cabinet of Ministers.

In drafting the CLPA, certain principles were adhered to and these included the prioritisation and identification of the worst forms of child labour for South Africa, the examination of best practices elsewhere, sustainability and the avoidance of duplication.³⁴ CLPA has identified a wide range of activities that fall under the mandate of various government departments and agencies, some of which are already contained in existing policy and others that are new and will require expenditure and budgets.³⁵

The key elements of CLPA are the extension of programmes on poverty alleviation, employment, labour, and social matters to address work that is harmful to children; the promotion of new legislative measures aimed at prohibiting the worst forms of child labour; the strengthening of national capacity to enforce legislative measures and increasing public awareness and social mobilisation against the worst forms of child labour.³⁶ However, although these key elements purport to meet the requirement of

³³ Previously known as the Child Labour Action Programme (CLAP).

³⁴ National Child Labour Programme of Action for South Africa, Draft 4.10, Department of Labour,, October 2003, (hereinafter referred to as 2003 CLPA), p 3.

³⁵ 2003 CLPA, p 3-4, note 34. In doing so, Annexure A of CLPA sets out the actual action steps that have to be undertaken by designated stakeholders including the Departments of Justice, Social Development, Education, Labour, Correctional Services and the South African Police Service (SAPS) as well as employers and non-governmental organisations. These steps include policy development, public awareness campaigns, collection of data and statistics and training, amongst many others. It is important to note that the criminal justice sector departments play a critical role in the policy document – thereby recognising the nexus between worst forms of child labour and crime.

³⁶ 2003 CLPA, p. 4, note 34.

criminalising worst forms of child labour as set out in Articles 6 and 7 of Convention 182, which call for time-bound programmes of action incorporating specified measures, the fourth inquiry for this study is whether the stated key elements of CLPA constitute a comprehensive time bound plan as envisaged by Convention 182?

Fifth, given South Africa's ratification of the UNCRC and the three child law reform initiatives that have been underway since 1996,³⁷ another matter that requires further interrogation is how Convention 182 has influenced South African law. The law reform processes that resulted in the Child Justice Bill 49 of 2002, the Children's Act 38 of 2005 and the Children's Amendment Bill 19F of 2006 addressed certain forms of child exploitation that also constitute worst forms of child labour, but began at a time when South Africa had not yet ratified Convention 182. Therefore the question arises whether Convention 182 had any subsequent significance or impact on these legislative processes aimed at creating greater protection for children? However, it is in respect of this question that the thesis will produce surprising results. During the process of writing, legislative developments in South Africa relating to the Children's Amendment Act 19F of 2006, indicate that Convention 182 has had an impact on legislative reform in that South Africa has now criminalised the worst forms of child labour as set out in Convention 182. However, the thesis will then proceed to question whether this legislative reform will produce the results envisaged by Convention 182, namely the elimination of worst forms of child labour, and unfortunately, the answer, I would submit, still appears to be negative.

The final question, which draws together the discussion on both child labour and child justice relates to whether Convention 182 provides an effective framework for improving child protection in relation to the instrumental use of children in the commission of offences and reducing this worst form of child labour in South Africa? This assessment will involve an examination of the Pilot Programme aimed at addressing the instrumental use of children in the commission of crime in South Africa and will illustrate the

³⁷ The South African Law Reform Commission's investigations into juvenile justice, a review of the Child Care Act and new sexual offences legislation will be discussed in more detail in Chapter 5.

complexities of the problem, demonstrating that the lofty goals of Convention 182, while of political significance, are practically ineffective.

1.3 Aims of the study

This study seeks to evaluate the theoretical and practical soundness of Convention 182 in relation to South Africa with particular reference to the instrumental use of children in the commission of crime as a worst form of child labour.

In order to evaluate Convention 182's significance in South Africa from a theoretical perspective, it is necessary to embark on a historical synopsis of child labour; an overview of the international legal framework regarding child labour including an assessment of Convention 182; and to review of the relevant laws and policies relating to child labour in South Africa with specific reference to child justice and the instrumental use of children to commit crime.

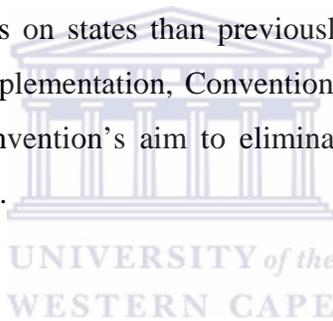
An important part of this evaluation is to trace how the economic exploitation of children is addressed in the national legislative and policy framework of South Africa. This will aim to evaluate if and how South Africa is complying with its international obligations relating to child labour under the ILO.

In order to examine its practical significance, the implementation of Convention 182 in South Africa will be examined, particularly in the context of the South African Child Labour Programme of Action. The thesis will determine whether any steps have been taken to execute this policy, and if so, what these steps are. Whether these steps have been effective will also be interrogated as far as possible. This examination will be undertaken in the context of one worst form of child labour, namely, the instrumental use of children in the commission of crime. The interface between worst forms of child labour and the South African criminal justice system as it pertains to children will be considered and in particular, if and how the various state actors are addressing the issue of children being used to commit crime. Of particular relevance is the question whether

child labour and child justice issues intersect, and how this convergence of issues is dealt with.

1.4 Premise of the study

The basic premise of this study is that there are certain extreme human rights violations that constitute the exploitation of children. These violations of children's rights are dealt with in two ways in international law. Firstly, as general children's rights violations that the UNCRC requires states to address. Secondly, as worst forms of child labour, which the International Labour Organisation has identified as requiring action within the labour context as forms of economic exploitation. The latter approach has resulted in Convention 182, which does not substantively add to international law but which does place more positive obligations on states than previously effected in international law. However, in the context of implementation, Convention 182 ultimately may prove less significant because of the Convention's aim to eliminate worst forms of child labour through 'time-bound' measures.



1.5 Hypothesis

On the one hand Convention 182 has some significance by reason of its targeted intervention measures, the strength of its enforcement mechanism (the ILO through its Infocus Programme on the Elimination of Child Labour (IPEC)) and its shaping of the nature of state obligations to progressively implement programmes to eliminate worst forms of child labour. On the other hand Convention 182, by setting an unachievable aim, will prove ineffective and its influence on children's rights discourse could be less influential compared to that of the UNCRC.

The positive obligations contained in the Convention requiring programmes of action incorporating direct measures to assist children has had some influence at a domestic level in South Africa. However, Convention 182 has had a varied influence on the development of a child labour regulatory framework in South Africa. In so far as it has

resulted in prohibition of worst forms of child labour in the Children's Amendment Bill 19F of 2006; the South African Child Labour Programme of Action; and the implementation of certain pilot projects to address worst forms of child labour, it can be argued that the Convention has some significance, but only because the strong influence of the ILO through IPEC. However, in so far as there were already parallel processes in place to address child labour and child exploitation (for example, the use of children in the commission of crime) prior to South Africa's ratification of the Convention, for example, the South African Constitution and the law reform process resulting in the Child Justice Bill 49 of 2002, it is argued that the Convention is less significant that might at first appear.

1.6 Research methodology

The research will be conducted by means of an analysis of the relevant available literature on the subject and by incorporating practical sources of research. For the analysis required regarding Convention 182, the sources will include international law such as the UNCRC and the ILO Conventions; preparatory documents and ILO texts. As far as the analysis of Convention 182 in the South African context is concerned, sources will include the Constitution, relevant legislation, reports from the South African Law Reform Commission, case law and policy documents. For both components of the study secondary sources such as books, academic articles and reports will be made use of. Electronic resources such as the internet will also be utilised.

1.7 Terminology

At the outset, it is perhaps useful to examine some of the terminology that will be used during the course of the thesis. Child labour can be seen as work that affects the child's enjoyment of his or her fundamental rights: civil, political or economic, social and cultural - particularly the broad right to survival and development of the child.³⁸ Thus when Article 2 of Convention 138 prohibits admission to employment or work under 15

³⁸ See note 11 above.

years of age, it signals that children who work under the age of 15 are victims of child labour. Likewise, Article 3 of ILO Convention 138 states that ‘the minimum age for admission to any type of employment or *work which by its nature or the circumstances in which it is carried out is likely to jeopardise the health, safety or morals of young persons* (emphasis added) shall not be less than 18 years.’ By implication such work constitutes child labour if performed by children under 18 years of age but over 15 years of age.

However, there are permissible forms of work that children may undertake. Work undertaken by children who are above the minimum age of employment and which does not jeopardise the health, safety or morals of those children, is permissible.³⁹

Likewise, Article 6 of Convention 138 states that the Convention does not apply to ‘work done by children and young persons in schools for general, vocational or technical education or in other training institutions...’.

Child labour is distinct from the worst forms of child labour, which are set out in Article 3 of Convention 182. Unfortunately Article 3 of Convention 182 does not provide definitions for the worst forms of child labour, preferring to list categories. As the study will show in relation to the use, procuring or offering of children for illicit activities, this has resulted in some conceptual problems, such as likening criminal activity to ‘labour’.

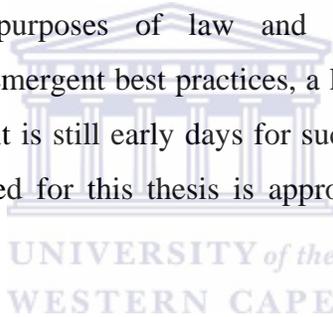
The International Labour Organisation also defines certain terms such as ‘economic activity’; ‘child labour’ and ‘hazardous work’, basing its definition of child labour on Article 3 of Convention 138.⁴⁰

³⁹ As in the case of Convention 138, Article 32 of the UNCRC also refers to ‘work’, in addition to economic exploitation. It appears that in the drafting of the article, there were submissions to the effect that the establishment of a minimum age should not prevent a child from participating in culturally related activities such as hunting, fishing and agricultural activities and other submissions wanted to limit the wording to ‘employment’ in order to allow for family subsistence activities. However, the term ‘work’ was adopted and clearly refers to activities that extend more broadly than formal employment. For a full discussion see Detrick S, *A Commentary on the United Nations Convention on the Rights of the Child*, Kluwer Law International: The Hague, 1999, p 569-570.

For the purposes of this study, the use of children, procuring or offering of a child for illicit activities will also be referred to as the instrumental use of children in the commission of crime or children used by adults to commit crime.

1.8 Limitations of the study

In so far as the study aims to examine the significance of Convention 182 with a particular focus on the instrumental use of children in the commission of offences as a worst form of child labour in South Africa, the major limitation is that this is not a scientific evaluation of the implementation of law and policy. This study is instead an analysis of law, policy and the implementation thereof in a particular context. For a proper evaluation for the purposes of law and policy amendments, practical implementation revisions and emergent best practices, a longitudinal, qualitative study is the preferred route. However, it is still early days for such a longitudinal study and it is argued that the method adopted for this thesis is appropriate and will produce useful analysis and conclusions.



1.9 Chapter outline

⁴⁰ *The end of child labour: Within Reach: Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work*, ILO: Geneva, 2006, p 6 (hereinafter referred to as the ILO 2006 Report). The ILO defines ‘economic activity’ as a broad concept that encompasses most economic activities undertaken by children, whether for the market or not, paid or unpaid, for a few hours or full time, on a casual or regular basis, legal or illegal; it excludes chores undertaken in the child’s own household or schooling. To be counted as economically active a child must have worked for at least one hour on any day during a seven- day reference period. The term is a statistical rather than legal a notion. ‘Child labour’ is seen as a narrower concept that ‘economically active children’ excluding all those children aged 12 and older working only a few hours per week in permitted light work and those aged 15 or older whose work is not classified as ‘hazardous’. The last-mentioned term is any activity or occupation that, by its nature or type, has or leads to adverse effects on the child’s safety health (physical or mental) and moral development. Even if the occupation is non-hazardous, hazards could still derive from excessive workload, physical conditions of work and/or excessive duration or hours of work.

9.1 Chapter 1

The background to the study is set out, as well as the aims of the study and the questions the study will purport to answer. It also deals with certain definitional issues and provides a chapter outline.

9.2 Chapter 2

This chapter provides a historical overview of the concept of child labour. It examines the industrial revolution as well as the different types and forms of child labour, namely, domestic work, childhood chores, cultural and artistic performances, specific occupational sectors, hazardous labour, slavery and trafficking amongst others. The chapter also looks at child work in developing countries, including current ILO statistics and what forms of work children are engaged in.

It provides a historical perspective of the ILO, examining its establishment, its objectives, and practices.

It also examines some of the early ILO Conventions on child labour as well tracing the history of general human rights treaties that have dealt with forms of economic exploitation such as trafficking and forced labour.

9.3 Chapter 3

This chapter deals with Convention 138 – its role, significance, impact and implementation as well as the status of ratifications. The chapter also examines the international legal framework relating to child labour between 1973 and 1999 including but not limited to the UNCRC, the African Charter on the Rights and Welfare of the Child, UN General Assembly Resolutions, the Special Rapporteur on the Exploitation of Child Labour and Debt Bondage, the development of the Global Movement against Child

Labour, the emergence of child labourers' voices on the right to work and consumer movements to boycott the purchase of goods produced through child labour exploitation.

The aim of the chapter is to demonstrate how a broader understanding of child exploitation developed in different sectors and in different contexts, sometimes independently of each other, yet all working towards a common goal – combatting such exploitation. It will also illustrate how a greater focus shifted to the exploitation of children outside formal and informal income-generating situations.

9.4 Chapter 4

This chapter deals with the drafting, content and adoption of the ILO Convention 182. It will examine its significance in the international child rights agenda, its monitoring mechanisms and the IPEC office established by the ILO. It will draw conclusions on whether this Convention constitutes a more effective regulatory framework for addressing worst forms of child labour than other international instruments.



9.5 Chapter 5

This chapter examines the regulatory framework relating to child labour in South Africa. It will look at the Constitution of the Republic of South Africa (1996), the Basic Conditions of Employment Act (1997), the Child Labour Programme of Action and how South Africa has responded to its obligations under Convention 182. It will also provide some insight into the law reform process that culminated in the Children's Act 38 of 2005 and the Children's Amendment Bill 19F of 2006. The latter two are pieces of legislation aimed at creating a comprehensive child protection law that also ensures children realise their rights according to international law and the South African constitution.

9.6 Chapter 6

On account of the fact that this thesis concerns one of the worst forms of child labour, namely the instrumental use of children in the commission of offences, in order to assess the significance of Convention 182 in South Africa, this chapter will examine the legislative and policy framework relating to children in conflict with the law in South Africa, as well as alluding to certain practices in the child justice system that are relevant for the following chapter. The chapter will also provide an overview of the law reform process resulting in the Child Justice Bill 49 of 2002.

9.7 Chapter 7

This chapter will interrogate the specific application of Convention 182 in South Africa. It will do so by examining the manner in which the instrumental use of children in the commission of crime has been addressed through policy, practice, case law and legislation. It will provide information on the ILO's technical assistance project to the South African Department of Labour in order to implement the Child Labour Programme of Action. It will explain the research and pilot programme designed to address children used by adults to commit crime in South Africa and how the programme was integrated into existing child justice practice. It will also examine a recent criminal case where an attempt was made, through an amicus curiae application, to obtain a legal precedent regarding children used in the commission of crime: namely judicial approval that this constitutes a worst form of child labour and that child offenders who are used in the commission of crime are also victims of exploitation, a matter affecting sentencing

9.8 Chapter 8

This chapter will provide various conclusions and recommendations on the implementation of Convention 182 in South Africa and generally with specific reference to children used by adults to commit crime as a worst form of child labour.

Chapter 2

A brief overview of historical developments regarding child labour and the legal regulatory framework prior to 1973

It would be safe to argue that globally there is a high incidence of child labour, constituting work detrimental to children, and various other forms of economic exploitation of children, resulting in serious violations of their rights to dignity, privacy, security of their persons and their survival and development.

A recent study by the ILO provides an indication of the prevalence of child labour in the 21st century. The ILO estimates that in 2004, globally, there were 317 million economically active children aged 5 – 17 years of age, of whom 218 million could be regarded as child labourers.¹ The findings from the study also illustrate that boys are more exposed to child labour than girls and that this exposure increases as does the age of the child. In addition, 69% of working children are involved in the agricultural sector, 22% of children in the services sector and 9% in industry.²

However, prior to the release of the 2004 statistics in the 2006 report, in 2002 the ILO provided a set of statistics based on 2000 data that would allow for the reliable assessment of the extent of the child labour problem.³ Overall, the statistical analysis

¹ *The end of child labour: Within reach. Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work*, ILO, Geneva, 2006, p 6 (hereinafter referred to as the ILO 2006 Report).

² ILO 2006 Report, p 8, note 1. This classification of sectors is based on the International Standard Industrial Classification of All Economic Activities, Revisions 2 (1968) and 3 (1989), which state that the agricultural sector comprises activities in agriculture, hunting, forestry and fishing; the services sector comprises the wholesale and retail trade, restaurants, hotels, transport, storage and communications, finance, insurance, real estate and business services and community, social and personal services; and the industry sector consists of mining, quarrying, manufacturing, construction and public utilities such as electricity and water.

³ ILO 2006 Report, p 5, note 1. The 2000 data and 2004 data are fully comparable. The ILO's Statistical Information and Monitoring Programme on Child Labour (SIMPOC) prepared the global estimates based on data taken from national SIMPOC surveys on child labour, the World Bank's Living Standards Measurement Study (LSMS) surveys, the Multiple Indicator Cluster Surveys (MICS) conducted by UNICEF, labour force surveys, the United Nations Population Division and the

from 2000 – 2004 illustrates that globally there was a reduction in the numbers of economically active children, child labourers and children involved in hazardous work.⁴ On a regional analysis, however, the report noted that the total number of economically active children aged between 5 – 14 years had declined in all regions except Sub-Saharan Africa.⁵

The report is at pains to stress that it is premature to speculate on the reasons for the global decline, but notes that what is clear is a growing international commitment to eliminate child labour.⁶ Likewise, it is unclear what the cause of the increase in economically active children in Sub-Saharan Africa is.⁷ As in other regions, African states have ratified Convention 182, have a number of IPEC programmes operating in certain countries and receive international assistance to combat the worst forms of child labour. In addition, there have been a range of African initiatives to address particular worst forms of child labour, for instance trafficking of children.⁸

Understanding Children's Work (UCW) Project. See section 3.2.3.1 in Chapter 3 for a discussion regarding the establishment of SIMPOC.

⁴ ILO 2006 Report, p 6, note 1. Liebel, however, raises serious doubts regarding the accuracy of the content of the report, both in relation to the statistics presented and lack of empirical proof that the 'end of child labour is within reach'. See Liebel M, 'The new ILO report on child labour: a success story, or the ILO still at a loss?', *Childhood: A journal of global child research*, Vol. 14, No. 2, 2007, p 279-284.

⁵ ILO 2006 Report, p 8, note 1. The Report also notes that the economic activity rate of children between the age of 5 to 14 years had declined, but states that this is not caused by a drop in the number of economically active children (which increased) but because of the extremely high rate of population growth.

⁶ ILO 2006 Report, p 9, note 1.

⁷ For more discussion on possible reasons for the increase in economically active children in Sub-Saharan Africa see Gallinetti, J, 'Worst forms of child labour – a view from out of Africa', in Sloth-Nielsen J (ed), *Essays on children's rights in the context of Africa*, Ashgate Publishing: United Kingdom, forthcoming.

⁸ For instance: the ECOWAS Declaration and Plan of Action Against Trafficking in Persons 2002 – 2003 and 2006-2009; the Ouagadougou Action Plan to Combat Trafficking in Human Beings, Especially Women and Children 2006 - as adopted by the Ministerial Conference on Migration and Development, Tripoli, 22-23 November 2006; the Multilateral Co-operation Agreement to Combat Child Trafficking in West Africa (Abidjan Agreement); ECOWAS-ECCAS Regional Ministerial Conference on the Fight Against Trafficking in Persons Resolution of the Fight Against Trafficking in Persons; the Multilateral Co-operation Agreement to Combat Trafficking in Persons, especially

Child labour manifests itself in many forms today and has done so in years gone by. It is perhaps testament to the changing nature of the types of work that can be described as child labour that it is described broadly in both Convention 138 and Convention 182: Article 3 of Convention 138 states that “[t]he minimum age for admission to any type of employment or work which by its nature or the circumstances in which it is carried out is likely to jeopardise the health, safety or morals of young persons shall not be less than 18 years” and Article 3(d) of Convention 182 refers to a worst form of child labour as “work, which by its nature or circumstances in which it is carried out, is likely to harm the health, safety or morals of children.” The non-specificity of the articles allows the instruments to focus rather on the harmful effects and consequences for children rather than the actual type of activity undertaken. In this manner, the Conventions cater for new and arising circumstances of work that are harmful to children and constitute child labour.

What follows in this chapter is an examination of the historical context of the concept of child labour, looking at the industrial revolution as well as the different types and forms of child labour in the 20th and 21st centuries, for example domestic work, cultural and artistic performances, specific occupational sectors, slavery and trafficking amongst others. In addition, it provides a historical perspective of the ILO, examining its establishment, its objectives, and practices. It also examines the international regulatory framework dealing with child labour and other related human rights treaties up until the ILO Minimum Age Convention of 1973. This is in order to set the foundation for the more detailed consideration of the development and impact of Convention 182 and its specific application in South Africa in later chapters.

2.1 The historical context of the concept of child labour

Women and Children, in West and Central Africa (Abuja Agreement) and the Libreville process, in particular Libreville 1 (2000) on the Constitution of a Platform of Action, Libreville 2 (2002) on Guidelines for the Elaboration of a Regional Convention on Child Trafficking in Africa and Libreville 3 (2003) on Harmonisation of National Legislations relating to Trafficking in Persons, especially Women and Children.

There is ample evidence that children have always worked.⁹ In describing life in ancient Rome, Cowell depicts boys as an integral part of Roman manpower upon which the strength of Roman society depended.¹⁰ They were engaged in activities such as ploughing, cultivating crops and even fighting in wars and civil strife if needed. Girls on the other hand were ‘thought a disaster’. The birth of a girl was not a reason for celebration - Catullus used the word ‘invisa’, meaning ‘hated’ or ‘detested’ to describe young unmarried girls and such girls generally awaited two fates: they could either be married off and consequently cut off from their family or sold as a slave if they remained unmarried.¹¹ Girls were expected to tend to the fire, fetch water, cook, spin, weave and make clothes – tasks undertaken in preparation of marriage as this was what was expected of wives and mothers.¹²

This cursory glance at life in ancient Rome illustrates that the concept of child labour existed in its various forms even in early history with children performing household chores such as tending to the fire and cooking. It also involved child work, which could be regarded as labour in 21st century thought, such as ploughing and fetching water and worst forms of child labour such as child soldiering and slavery.

Before the industrial revolution children were engaged in a wide variety of work. Children who lived on farms worked with the animals or in the fields planting seeds,

⁹ See generally Hobbs S, McKechnie J and Lavalette M, *Child Labor: A World History Companion*, ABC-CLIO, 1999. The authors note that prior to the industrial revolution, children were mainly engaged in work in rural communities and, in examining the work that children undertake, describe certain work as ‘timeless’, namely, guarding animals and harvesting, activities which have been assigned to children throughout history. See also Hemmer H R, Steger T, Wilhelm R, ‘Child Labour and International Trade: An Economic Perspective’, *Discussion Papers in Development Economics No. 22*, Institute for Development Economics, Giessen, May 1997.

¹⁰ Cowell FR, *Everyday Life in Ancient Rome*, BT Batsford Ltd, London, 1961 p 35 – 36. Yet Cowell also describes at length the Roman education system and how children were schooled in ancient Rome, thereby illustrating that child work did not necessarily forsake an education. Children were taught by schoolmasters in the main, and to paraphrase Cowell, it would appear that school was a horrid affair with the children having to rise very early in the morning and attend school for the best part of the day under severe conditions.

¹¹ Cowell, p 58-59, note 10.

¹² Cowell, p 38-39, note 10.

pulling weeds and picking crops; a high percentage of youths were working as servants in husbandry in the sixteenth century; boys looked after the draught animals, cattle and sheep while girls milked the cows and cared for the chickens; children who worked in homes were either apprentices, chimney sweeps, domestic servants; or assistants in the family business.¹³

Yet, as intimated in the previous chapter, concern for children at work only arose in the context of the industrial revolution where perhaps it can be argued that the child 'rights' discourse began in the form of a protectionist movement.

2.1.1 The Mechanical and industrial revolutions

‘Meanwhile, at social Industry's command
How quick, how vast an increase. From the germ
Of some poor hamlet, rapidly produced
Here a huge town, continuous and compact
Hiding the face of earth for leagues - and there,
Where not a habitation stood before,
Abodes of men irregularly massed
Like trees in forests, - spread through spacious tracts.
O'er which the smoke of unremitting fires
Hangs permanent, and plentiful as wreaths
Of vapour glittering in the morning sun.
And, wheresoe'er the traveller turns his steps
He sees the barren wilderness erased,
Or disappearing; triumph that proclaims
How much the mild Directress of the plough
Owes to alliance with these new-born arts!

Extract from *The Excursion*, William Wordsworth 1814

¹³ Tuttle C, “Child Labour during the British Industrial Revolution”, E.H. Net Encyclopaedia accessed at <http://eh.net/encyclopedia/article/tuttle.labor.child.britain> on 20 August 2007.

This poem clearly conveys the poet's discontent with the developments that the mechanical and industrial revolutions introduced to Britain.¹⁴ Yet, this was the beginning of the world in which today we live, work and function.

The term 'industrial revolution' refers to the period in which Britain underwent various economic changes to its way of life. It spans from when the main source of income was agriculture to the time when most earned their income from industry, especially in factories. The industrial revolution is known for the introduction of machines and can be seen as a time when work using one's hands was replaced by work involving mechanised production. The mechanical revolution produced the new means of production, trade and industry through various scientific and technological inventions and discoveries.¹⁵

As such, the mechanical and industrial revolution came about simultaneously and fed into each other. On the one hand, there was the application of science to bring about

¹⁴ The Industrial and Mechanical Revolutions were not limited to Britain, and manifested themselves in Europe in countries such as France and Italy. The United States of America was also a country that embraced the new technology and industry. This thesis will, however, concentrate on Britain in this period, partly because it is the country which is dealt with by most English language literature on the issue and partly because of the influence of the English writers of the period on the issue of child labour.

¹⁵ See generally Emmott, C (ed), *British History*, The Certificate Library, The Grolier Society Ltd: London, 1968 p289-294. The authors note that the industrialisation of the cotton industry was modelled on the first silk factory founded in 1721 and the invention of the Spinning Jenny in 1770 resulted in the mechanisation of the industry. The steam engine first saw light of day in the late 17th century but was further developed and improved on in the 18th century by inventors such as Thomas Newcomen and James Watt. The increased use of steam had a knock on effect on the coal industry as demand increased ,and this led to inventions such as John Buddle's fan to provide fresh air in mine shafts and Sir Humphry Davy's safety lamp to detect noxious gas more easily. The iron and steel industry progressed from the stage in the early 18th century when Britain's natural deposits of iron ore were virtually unworked to the early 19th century when the number of blast furnaces in Britain had grown from 59 in 1720 to 221 in 1806 due to various improvements in production processes and the discovery of different smelting methods by inventors such as John Smeaton, Henry Cort and Benjamin Huntsman. See generally also Lane P, *The industrial revolution: the birth of the modern age*, Weidenfeld & Nicolson: London, 1978 and Flinn M W, *The origins of the industrial revolution*, Longmans: London, 1966.

developments in industry through invention and the utilisation of raw materials to produce textiles, iron and steel and improved means of transport such as steam ships. On the other hand, there was the increased need for labour to give effect to this rapid development in technology and the nature of the labour required changed drastically to meet the new demands of industry.

These developments occurred in a range of different economic sectors and were effected due to favourable conditions in Britain at the time, for example, an abundance of iron ore and coal, a well-established banking system with a national capital reserve and internal political stability.¹⁶

In describing the mechanical revolution and its impact on that period of history and expressing his approbation thereof, HG Wells had the following to say:¹⁷

‘Nothing in the previous practical advances of mankind is comparable in its consequences to the complete mastery over enormous masses of steel and iron and over their texture and quality which man has now achieved.’

He also acknowledged that the mechanical revolution brought about profound differences in the character of labour. To paraphrase Wells, it can be said that prior to the development of mechanised industry, human beings were what powered the world and its development; once machines began to be the pillars of industry, man was no longer needed, as what could previously be done by man was now being done quicker and better by machines.¹⁸ He argues that the mechanical revolution resulted in the intellectual classes realising that the common man was no longer the core component of production and that he should be educated, ‘if only to secure “industrial efficiency”’. This forms the basis of his hypothesis that mass education and a proliferation of schooling was a product of the industrial revolution.¹⁹

¹⁶ Emmott (1968), p 291-2, note 15.

¹⁷ Wells HG, *The Outline of History*, Cassell and Company Ltd: London, 1930, p 950.

¹⁸ Wells, p 956, note 17. He does note, however, that at the outset of the mechanical revolution, there was still a need for human labour, for example, to man machines and to mine natural mineral deposits.

¹⁹ Wells, p 957, note 17.

It can be said that Wells' approach is most certainly a conservative one. On the one hand he seeks to extol the benefits of both the mechanical and industrial revolutions, while on the other he remains strongly critical of neither.

Yet it is incontrovertible that while the mechanical revolution brought forth an abundance of trade and created greater national wealth, the industrial revolution ushered in a time of social ills: the wealth of Britain was unevenly distributed with employers growing rich and workers remaining in poverty; in large towns the housing was inadequate and overcrowding led to the growth of slums; factory owners paid little wages and working conditions were appalling. This particular period in history resulted in an increased demand for labour, led to the employment of children in industry and larger families became the norm.²⁰

The children who were employed during this time could find themselves in varied types of work. Tuttle explains that as the first reliable *British Census* that inquired about children's work was in 1841, it is impossible to compare the number of children employed on the farms and in cottage industry with the number of children employed in the factories at the height of the British industrial revolution.²¹ She does qualify this statement, however, by noting that although there is not a consensus on the degree to which industrial manufacturers depended on child labour, research by several economic historians has uncovered certain details on the extent of child labour during the industrial revolution. There is evidence that children were used extensively in the textile industry with 4.5% of the cotton workers being under 10 and 54.5% being under the age of 19.²² Further research indicates that children under 13 comprised roughly 10 to 20 % of the work forces in

²⁰ Emmott (1968), p 293. See also Cunningham H and Stromquist S, 'Child Labor and the Rights of Children: Historical Patterns of Decline and Persistence', in Weston BH (ed), *Child Labor and Human Rights: Making Children Matter*, Lynne Rienner Publishers: Boulder, 2005, p 59. Cunningham and Stromquist note that initially the employers looked to workhouses or orphanages for children to work for them but that by the early 19th century they had turned to 'free labour' – children who had been sent by their parents to work. See also Tuttle, note 13, and Cunningham H, 'The Employment and Unemployment of Children in England c. 1680-1851', *Past and Present*, No. 126, February 1990, p 115-150 at p 148 where he discussed the effect of the industrial revolution on the size of families.

²¹ Tuttle, note 13.

²² Tuttle, note 13, referring to the work of Freuenberger, Mather and Nardinelli (1984).

the cotton, wool, flax, and silk mills in 1833, with children between the age of 13 and 18 comprising roughly 23 to 57% of the work forces in cotton, wool, flax, and silk mills.²³

Children and youth also comprised a relatively large proportion of the work forces in coal and metal mines in Britain. Tuttle notes that in 1842, the proportion of the work forces that were children and youth in coal and metal mines ranged from 19 to 40% while a large proportion of the work forces of coal mines used child labor underground,²⁴ with more children being found on the surface of metal mines ‘dressing the ores’ (a process of separating the ore from the dirt and rock).²⁵

Humphries confirms the wide scale use of children in the textile and mining industries in Britain during the industrial revolution. However, she also cautions against overemphasising children’s participation in these types of work as these activities should not detract from the fact that child labour was also used in other sectors such as agriculture, miscellaneous manufacturing and the service industry.²⁶

²³ Tuttle, note 13. She notes further that the employment of children in textile factories continued to be high until mid-nineteenth century. Quoting the *British Census*, she states that in 1841 the three most common occupations of boys were agricultural labourer, domestic servant and cotton manufacture. By 1851 the three most common occupations for boys under 15 were agricultural labourer, messenger and cotton manufacture and for girls, they were domestic servant, cotton manufacture and indoor farm servant.

²⁴ See Humphries J, ‘Short Stature among Coal-Mining Children: A Comment’, *The Economic History Review*, New Series, Vol. 50, No. 3, 1997, p531-537, where she describes the negative effects of coal-mining on children’s physical well-being.

²⁵ Tuttle, note 13. She goes on to observe that by 1842 one-third of the underground work force of coal mines was under the age of 18 and one-fourth of the work force of metal mines were children and youth. In addition, in 1851 children and youth (under 20) comprised 30% of the total population of coal miners in Great Britain. However, after the Mining Act of 1842 was passed which prohibited girls and women from working in mines, fewer children worked in mines. See Cunningham, note 20, who, while acknowledging large scale child labour during the industrial revolution, also argues that there was a considerable amount of unemployment of children.

²⁶ Humphries J, ‘Child Labor: Lessons from the Historical Experience of Today’s Industrial Economies’, *The World Bank Economic Review*, Vol. 17, No. 2, 2003, p 175 – 196 at p 178. The types of work mentioned include children being used as shepards, harvesters and bird-scarers in the agricultural industry; working in the silk, brick, garment and footwear manufacturing industries and messengers, child-minding and domestic work for the service industry. She also notes that the

An example that relates to children being used in illicit activities is found in France towards the end of the 19th century. Schafer describes in detail the debates that occurred in the French legislature in 1874 following the introduction of a report and draft bill on children in 'itinerant trades', namely street musicians, acrobats, carnival performers and 'professional' beggars.²⁷ According to the report, these children were exposed in public to physical and moral risk, not in the name of production, but in the name of entertainment: their work was to satisfy popular appetites for spectacle, or in the case of 'intentionally' maimed or disfigured children who accompanied beggars, to 'draw compassion' and money from passers by.²⁸

There are various accounts of children at work during the industrial revolution and as much as they are numerous, they are also contradictory and controversial. One only need contrast statements such as '[i]t is God's will that people avoid all idleness and should work from their earliest years'²⁹ with the writings of Richard Oastler (1789 – 1861) who is said to have dedicated himself to the cause of child workers:³⁰

'Thousands of little children, both male and female, but principally female, from 7 to 14 years of age, are daily compelled to labour from six o' clock in the morning to seven in the evening with only – Britons blush while you read it! - with only 30 minutes allowed for eating and recreation. Poor infants! Ye are indeed sacrificed at the shrine of avarice...Ye are doomed to labour from morning to night for one who cares not how soon your weak and tender frames are stretched to breaking! You are not mercifully valued at so much per head; this would assure you at least (even with the worst and most cruel masters)

prevalence of child labour in these sectors was often hidden by the familial and informal nature of the employment. This is perhaps the reason that more emphasis is placed on child labour in the textile and mining industry as their presence in those sectors was recorded.

²⁷ Schafer S, 'Law, labor and the spectacle of the body: Protecting child street performers in nineteenth-century France', *The International Journal of Children's Rights*, Vol. 4, No. 1, 1996, p 1-18 at p 8-13.

²⁸ Schafer, p 9, note 27.

²⁹ JF Fedderson in *Life of Jesus for Children* (1787) quoted in Cunningham and Stromquist, note 20.

³⁰ Quoted in Hobbs, McKechnie and Lavalette, p 179, note 9.

of the mercy shown to their labouring beasts. No, no! your soft and delicate limbs are tired and fagged, and jaded, at only so much per week, and when your joints can act no longer, your emaciated frames are instantly supplied with other victims, who in this boasted land of liberty are *hired* – not sold – as slaves and are daily forced to hear that they are free.’³¹

These different outlooks on children who worked during the industrial revolution are equally echoed in the writings of academics and historians. EP Thompson, celebrated English historian, writing about the industrial revolution in Britain, held the view that ‘the exploitation of little children, on this scale and with this intensity, was one of the most shameful events in our history.’³²

Contrast this view with that of the economic historian Clark Nardinelli who argues that the historical evidence shows that the extent of child labour has been exaggerated. He contends that greater attention should be given to the role that children played in the economy of the family; that children contributed to improvements in the standard of living enjoyed by them and their families and that the employment of children was, in the first instance, not a new phenomenon and such employment in ‘new factories’ was not a reflection of changing attitudes to children but rather a reflection that the changing technology had created different forms of work that children could do.³³

³¹ However it has been said that Oastler and other like-minded activists did not necessarily advocate the abolition of child labour, but rather that it should be regulated. See Nardinelli C, *Child Labor and the Industrial Revolution*, Indiana University Press, 1990, p 11.

³² Quoted in Hobbs, McKechnie and Lavalette, p 227, note 9. Tuttle, note 13, also mentions him describing rural textile mills as ‘places of sexual license, foul language, cruelty, violent accidents, and alien manners’. See also Cunningham and Stromquist, p 60, note 20. Nardinelli, p 24 et seq, note 31, in describing the critics of child labour also mentions historians such as Paul Mantoux, JL Hammond and Barbara Hammond as supporters of, what Nardinelli terms, the ‘necessary evil’ view of the employment of children in the industrial revolution.

³³ See generally Nardinelli, note 31; Cunningham and Stromquist, p 60-61, note 20 and Hobbs, McKechnie and Lavalette, p167-168, note 9.

While the controversies still rage today,³⁴ it is not unreasonable to argue that exploitation was rife during this period of history as why else would legislation to protect working children by setting minimum ages and maximum working hours have been passed?³⁵ However, Nardinelli discounts this argument by noting contrary views that child labour legislation was an effect, rather than the cause, of improving conditions for child workers, and that the introduction of the laws were a method to eliminate remaining abuses that had not yet disappeared rather than aiming to stop the spread of such abuses.³⁶ Nonetheless, it is submitted that society is not self-regulating and that appropriate protection for vulnerable groups is often only achieved through the enactment of law. The fact that legal intervention was necessary to protect child workers is clearly indicative of a situation that politicians could not countenance even in the face of Britain's booming economy and despite the contribution of child work to Britain's financial security.

The first chapter of this thesis could be said to have intimated that the child rights movement was initiated by concerns over the exploitation of working children during the industrial revolution. While this claim cannot be substantiated by recourse to a rights-based discourse, which emerged only in the last part of the 20th century, nonetheless it could be argued that protecting children against economic exploitation certainly had its roots in this era of history. In fact, Nardinelli, in describing the

³⁴ For instance, Hobbs, McKechnie and Lavalette, note 9, referring to the work of Sara Horrell and Jane Humphries who challenge certain of Nardinelli's arguments based on evidential data regarding the proportion of 5-9 year olds working in factories, which tends to show younger children were exploited during this period of history. See generally, Horrell S and Humphries J, "The Exploitation of Little Children: Children's Work and the Family Economy in the British Industrial Revolution", *Explorations in Economic History*, Vol. 32, No. 4, 1995, p 339 –365.

³⁵ Tuttle mentions three laws in particular - the Cotton Factories Regulation Act of 1819 (which set the minimum working age at nine years of age and maximum working hours at 12 hours per day), the Regulation of Child Labor Law of 1833, or Factory Act (which established paid inspectors to enforce the laws) and the Ten Hours Bill of 1847 (which limited working hours to ten for children and women). See Tuttle, note 13.

³⁶ Nardinelli, p 29, note 31.

contemporary critics of child labour in the industrial revolution, articulately sets out the various ways in which this protectionist approach manifested itself.³⁷

Firstly, he mentions the Factory Movement, which was a loose coalition of textile workers, sympathetic mill owners, writers and reformers led by Oastler. They advocated for the regulation of child labour and, by that means, adult labour. In particular they were ardent supporters of the Ten Hours Bill, which would limit not only the daily working hours of children of but adults as well. Nardinelli refers to the Movement regarding children as ‘the symbol of the evils of unregulated labor markets.’³⁸

Secondly, he identifies Tory Humanitarianism, at the hands of the Seventh Earl of Shaftesbury, Anthony Ashley Cooper, as a major contributor to child labour reform. Nardinelli sees him as representing the paternalistic duty of the ruling class to care for those who could not care for themselves – in this instance, children. In his view, all child labour was wrong because children were to be protected and cared for by their parents and not bear responsibility for their own subsistence. Nardinelli recounts numerous efforts by Cooper in support of this approach: his support of the Factory Act, the establishment of parliamentary commissions to investigate conditions of

³⁷ Nardinelli, p 9 – 23, note 31. The protectionist approach was not limited to Britain though. In France, according to the report on children in the ‘itinerant trades’, these children comprised a special category of child labourers and were thus in need of protection and the report ultimately resulted in the passing of a 1874 law imposing new restrictions on the employment of children in the ‘itinerant professions’, see Schafer, p 13, note 27. Schafer, however, points out that the author of the report and proposer of the law, one Eugene Tallon, distinguished ‘respectable’ industrial labour from the ‘itinerant trades’ and focused his attention on attributing responsibility for the endangerment of these children to their parents, even though he acknowledged that the majority of children involved in the itinerant trades were not employed by their own parents, Schafer, p 10, note 27.

³⁸ Nardinelli (1990), p 10–12, note 31. However, he notes that the Movement was not so concerned with the plight of working children that they supported measures such as education, sanitary and health care for working children. In fact he notes that the Movement was opposed to the Factory Act (1833) which would provide greater protection for children than the Ten Hour Bill in that it introduced factory inspectors to enforce the Act’s provisions, namely the prohibition of the employment of children under 9 years of age in textile factories; limiting the work hours of children aged 9 – 12 years to nine hours per day or 48 hours per week and requiring them to attend school.

child labour in the 1840's and 1860's, as well as efforts on behalf of children employed in agriculture and as chimney sweeps.

The third influence in the protectionist approach towards working children has been ascribed to the Romantic vision of childhood.³⁹ The Romantics are argued to have thought the industrial revolution tore workers away from the land and forced children to enter the labour market through greed. While acknowledging that children had worked in the past, the Romantics nonetheless believed that industrialisation made child labour harsher than previously experienced.⁴⁰

Finally, addressing child labour was one of the issues that the Liberals supported in the 19th century, especially Thomas Macaulay who spoke on the Ten Hours Bill in parliament calling for state intervention. It would also appear that it was the Liberals who took the issue of child labour further than their contemporaries by identifying the future ill affects of child labour and how these would seriously impact upon the health of children and negatively effect education.⁴¹ This insight into the consequences of the economic exploitation of children finds resonance today in the provisions of ILO Conventions 138 and 182, which emphasise the dangers of hazardous work on children's health and call for measures, including free access to basic education, to address child labour.⁴²

Fyfe points to child labour campaigns in Victorian Britain as being a potential learning source for contemporary campaigns against child labour.⁴³ He notes that the

³⁹ Nardinelli, p 17 – 21, note 31. The Romantic view of childhood includes a belief in a 'golden age' when (to paraphrase Nardinelli) rugged farmers toiled the land and provided for their families, and during which childhood was a time of rural innocence. Nardinelli attributes this vision to a range of writers including Wordsworth and Samuel Taylor Coleridge.

⁴⁰ Nardinelli, p 17 – 21, note 31. He argues that the Romantic view of childhood is reflected in the works of writers such as Charles Dickens.

⁴¹ Nardinelli, p 21-23, note 31. He notes that the Liberals did not assign blame for the problems of child labour. There was no portrayal of the leaders of the industrial revolution as scoundrels deliberately preying on the young. Rather they attributed the ills of child labour to poor planning and short-sightedness on the part of the employers.

⁴² See for instance Article 3 of Convention 138 and Articles 3 and 7 of Convention 182.

⁴³ Fyfe A, *Child Labour*, Polity Press: Cambridge, 1989, p 139 - 141.

first campaigns against child labour took place in the late 1700's and early 1800's over the issue of child chimney sweeps. He mentions Jonas Hanway, who used emotional appeals to public sentiment to raise awareness on the issue through his book *A Sentimental History* (1785) and the establishment, in 1803, of the Society for Superseding the Necessity of Climbing Boys. Quoting Cunningham, he describes four obstacles that had to be overcome by these early campaigners in the move to abolish child labour: first, the traditional assumption that it was natural for children to work and contribute to the family; second, that there was too little work for children rather than too much; third, the belief that parents had the right to do what they wished with their children and, finally, the belief in the value of free labour. In examining the early child labour movement, Fyfe (like Nardinelli) notes that the anti-child labour campaign was never broad-based, it was comprised of different actors, such as Lord Shaftesbury and Richard Oastler, and took over a century to achieve its goal.

2.1.2 Child labour in the 20th and 21st centuries

The previous section has illustrated the different types of child labour through the ages – domestic work, slavery, fighting in war and civil strife, children being used to commit crime, children working in agriculture and industry – and it is submitted that not much has changed as these are the types of child labour that have also afflicted children in the 20th and 21st centuries.⁴⁴

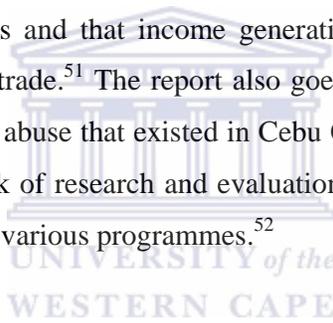
The different types of child labour in different countries and regions have been well documented over the last century.⁴⁵ The ILO, in particular, has played a key role in

⁴⁴ Humphries, p 192 – 193, note 26, concludes that countries in which child labour is common today show a greater resemblance to industrial countries at the beginnings of the industrial revolution than those same countries 50 – 100 years on. She also cautions against focusing only on public forms of employment and assuming that if children are withdrawn from the obvious sectors of employment they will also disappear from the 'darker corners' of the economy. Finally, she warns that familial or informal employment should not be seen as benign as has happened historically.

⁴⁵ For instance see: Mendelievich E, *Children at Work*, International Labour Office: Geneva, 1979; Gomango SP, *Child Labour: A Precarious Future*, Authors Press: Delhi, 2001; Kielland A and Tovo M, *Children at Work: Child Labour Practices in Africa*, Lynne Rienner Publishers: London, 2006; Isaacman A and Allman J (eds), *Invisible Hands: Child Labor and the State in Colonial Zimbabwe*,

determining the extent, nature and causes of child labour.⁴⁶ As a result there is a vast litany of stories regarding child labour.⁴⁷

One study that has relevance to the use of children in the commission of crime – a theme of this thesis – was undertaken in the Philippines relating to the use of children in the illegal drug trade, and was commissioned by the ILO.⁴⁸ This study aimed to fill the gaps relating to the use of children in the illegal drug trade and undertake a rapid assessment of children's involvement in the production and trafficking of illegal drugs in Cebu City, Philippines. The study concentrates on a situational analysis of children in the drug trade and in doing so the researchers interviewed 225 children, of whom 123 were involved in the drug trade.⁴⁹ Of these, 75 percent reported that they were encouraged by the presence of the trade in the community to become involved in the illegal drug industry.⁵⁰ The study found that most children became involved between the ages of 14 and 16 years and that income generation was the main motivating factor for entering the drug trade.⁵¹ The report also goes on to note that intervention programmes to address drug abuse that existed in Cebu City were inadequate and this was compounded by the lack of research and evaluation relating to the effectiveness of the implementation of the various programmes.⁵²



Heinneman, 2006; Bass LE, *Child Labor in Sub-Saharan Africa*, Lynne Rienner Publishers: London, 2004.

⁴⁶ See for instance the ILO 2006 Report, note 1, and the publications produced regarding the use of children in the commission of crime listed in Chapter 7.

⁴⁷ It is impossible to give effect to all the accounts and circumstances of child labour, but some works that provide accounts of the various types of child labour during this period include: Bequele A and Boyden J (eds), *Combating Child Labour*, International Labour Office: Geneva, 1988; Boyden J, Ling B and Myers W, *What Works for Working Children*, UNICEF and Save the Children Sweden, 1998; Myers W (ed), *Protecting Working Children*, Zed Books Ltd: London and New Jersey in association with UNICEF, 1991 and Weston BH (ed), *Child Labor and Human Rights: Making Children Matter*, Lynne Rienner Publishers: Boulder, 2005.

⁴⁸ Magdalena Lepiten, *Philippines Children's Involvement in the Production, Sale and Trafficking of Drugs in Cebu City: A Rapid Assessment*, ILO, Geneva, 2002.

⁴⁹ Lepiten, p 11, note 48.

⁵⁰ Lepiten, p 11, note 48

⁵¹ Lepiten, p 12, note 48.

⁵² Lepiten, p 13, note 48.

This broad historical introduction to working children and the issue of child labour and work that is detrimental and harmful to children sets the scene, so to speak, for the examination of the formation and work of the ILO and the regulatory framework on child labour and other human rights treaties dealing with economic exploitation in the early –to –mid 20th century. The following discussion aims to highlight that there was a tendency to focus more on children who work or are employed in the traditional sense, as well as children involved in informal work or work within the family. There was far less, or little, attention paid to children who were victims of economically exploitative practices such as slavery or forced labour and that conduct of this nature was regulated through general human rights treaties in the early-to-mid 20th century.

2.2 The International Labour Organisation

‘The International Labour Organisation (ILO) is devoted to advancing opportunities for women and men to obtain decent and productive work in conditions of freedom, equity, security and human dignity. Its main aims are to promote rights at work, encourage decent employment opportunities, enhance social protection and strengthen dialogue in handling work-related issues.’⁵³

An examination of the ILO is warranted on account of it being the organisation dedicated to labour issues generally, as well as child labour. It is the organisation responsible for the adoption of international labour standards on child labour that has culminated in Convention 138 and Convention 182. An examination of the significance of Convention 182 is not complete without tracing the history and activities of the ILO.

2.2.1 Background

⁵³ The introduction to the ILO accessed at http://www.ilo.org/global/About_the_ILO/lang--en/index.htm on 22 August 2007. Please note that I use the British spelling for the term ‘labour’, however, where there are references to ‘labor’ using the United States spelling, it is because it is part of an official title of an organisation, or chapter or book or used in a quote.

In 1818 a first attempt at raising the issue of labour regulation at an international level was undertaken by Robert Owen in the context, unsurprisingly, of child labour when he addressed the Congress of Aix-la-Chapelle to adopt measures to regulate the hours of children and young persons working in factories.⁵⁴ Unlike the domestic legislation discussed briefly above, for instance the Factory Act and Ten Hours Bill, this was the first attempt to get various governments to adopt regulations binding across more than one country. It should be noted that these initial ideas regarding international co-operation and regulation occurred as a parallel development to national legislation.

However, it is argued that although Owen attempted to influence the governments of Europe and that he held the view that problems of labour were not limited by national boundaries, his efforts did not amount to founding the international labour movement.⁵⁵ The reasons given are, firstly, that his arguments had little effect on subsequent labour organisations or on action by governments and, secondly, his ideas of international labour legislation were limited in that he never proposed that states should bind themselves by conventions having force of law.⁵⁶

Following Owen, a range of other individuals called for some form of international co-operation on issues of labour.⁵⁷ Jerome Blanqui, writing in 1838-39, called for international treaties between 'all industrial nations which compete in the common market' by arguing that international treaties had been concluded about war and therefore there was no reason that there should not be treaties to improve man's daily

⁵⁴ Creighton B, 'Combating Child Labour: The Role of International Labour Standards', *Comparative Labor Law Journal*, Spring 1997, p 362 – 396 at p 364.

⁵⁵ Mahaim E, 'The Historical and Social Importance of International Labor Legislation', in Shotwell JT (ed), *The Origins of the International Labor Organisation*, Columbia University Press: New York, 1934, p 3. Shotwell's work is the seminal contemporary source on the establishment of the ILO and is heavily drawn on in this chapter as it constitutes the primary source of information about this period of the ILO's history.

⁵⁶ Mahaim, p 3, note 55. He argues that although a pioneer in advocating for social legislation, his primary contribution was 'of a philanthropist who relied upon the inherent goodness of mankind to overcome the evils arising from a bad environment.'

⁵⁷ Mahaim, p 4 – 5, note 55. He points out that the call for international regulation of labour resulted from the idea that competition between manufacturers in different countries was an obstacle to the development of national legislation.

life. Likewise Daniel Legrand petitioned the French, British and Prussian governments to enact ‘an international law to protect the working classes against premature and excessive labor, which is the prime and principal cause of their physical deterioration, their moral degradation and their being deprived of the blessings of family life.’⁵⁸ Even (and according to Mahaim ‘unsurprisingly’) Karl Marx’s Worker’s International passed a resolution in favour of international legislation.

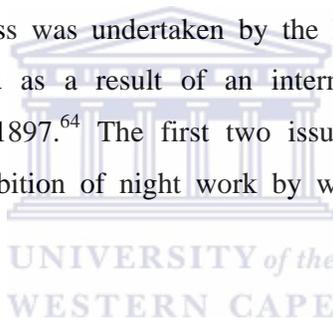
These initial attempts at forging an international set of labour standards that were legally binding were soon followed by official action. However Mahaim does not expressly state what motivated such action. He intimates that it was as a result of the individual advocacy of those mentioned above, and also stresses that the individual calls for international regulation of labour happened concomitantly with the enactment of national legislation. Delevingne, on the other hand, makes a number of suggestions as to why governments themselves began to take action.⁵⁹ Firstly, he mentions the increase in competition between countries; secondly, workers were lobbying for improved working conditions and, at the same time, a fuller understanding of the needs of workers began to emerge; thirdly, labour issues began to achieve recognition in national policies and law; and finally, international relations between countries began developing through the formation of associations and the convening of international conferences. It can be argued that all these developments contributed to national governments beginning to view labour issues as an item on the international agenda.

⁵⁸ Quoted in Mahaim, p 5, note 55. He argues that it is clear that the proposed nature of international legislation at this time did not envisage unrestricted international competition, but rather that there should be relative freedom of competition based on, inter alia, certain humanitarian considerations such as life, health and human dignity. The national legislation would include, for instance, the laws enacted by Britain mentioned by Tuttle in note 35. He implies that the national law making initiatives fed into official attempts to create an international regulatory framework.

⁵⁹ Delevingne Sir M, ‘The Pre-War History of International Labor Legislation’, in Shotwell JT (ed), *The Origins of the International Labor Organisation*, Columbia University Press: New York, 1934, p 19 – 20.

The first real steps towards international co-operation on labour issues was initiated by the Swiss National Council in 1881, when the governments of Austria, Belgium, France, Germany, Italy and Great Britain who were approached, met with no success.⁶⁰ However, the initiative was rekindled in 1887 and in 1889, the Swiss Federal Council sent various governments invitations to attend a ‘preparatory conference’ in 1890.⁶¹ The Berlin Conference was attended by delegates from 12 industrial European countries and covered almost entirely the whole field of labour legislation in force in the countries that attended the conference.⁶² Mahaim notes that no binding resolutions were made and no undertakings given and in that sense the conference failed, but nonetheless he argues that it attracted attention to the issue and indicated that if the proper preparations were put in place, an international convention was achievable.⁶³

The next step in the process was undertaken by the International Association for Labor Legislation, founded as a result of an international congress on labour legislation in Brussels in 1897.⁶⁴ The first two issues to be dealt with by the Association were the prohibition of night work by women and the regulation of



⁶⁰ Mahaim, p 6, note 55.

⁶¹ Mahaim, p 6, note 55. France, Belgium, Great Britain and the Netherlands accepted the invitation but Germany did not. However, Mahaim explains that subsequently Germany approached the governments involved and invited the conference to be held in Berlin.

⁶² The countries represented were Germany, Austria-Hungary, Belgium, Denmark, France, Great Britain, Italy, Luxembourg, the Netherlands, Portugal, Sweden, Norway, Switzerland and a representative of the Holy See.

⁶³ Mahaim, p 6-7, note 55.

⁶⁴ Mahaim, p 6-7, note 55. He explains that after being unable to reach consensus on the questions on the congress’s agenda, a committee of three members was set up to give effect to the purpose of the congress and subsequently this was achieved by establishing an international association. The statutes of the Association were adopted at another congress of labour legislation held in Paris in 1900 and the constituent assembly, which was held in Basel in 1901, established an International Labour Office in Basel, funded by member states. The Basel International Labour Office needs to be distinguished from the present one in Geneva as the latter was established by the Paris Peace Treaty and takes its mandate from the ILO Constitution. See also Delevingne, p 29-31, note 59, for a discussion on the establishment of the Association.

industries hazardous to health.⁶⁵ In 1906 the Berne Conference was held and two conventions adopted – the Convention prohibiting night work for women and the Convention prohibiting the use of white phosphorus (the Phosphorus Convention).⁶⁶

Mahaim regards the two Berne Conventions as innovative and the first successful attempt at creating an international legal framework for labour.⁶⁷ The International Association for Labor Legislation proceeded with its work after 1906 and in 1913 another preliminary conference of experts was held to discuss two new conventions that had been proposed at the General Meeting of the Association in 1910 – one to limit the hours of work for women and young persons, and the second to prohibit the night work of young persons.⁶⁸ However, before these conventions could be further

⁶⁵ Mahaim, p 8, note 55. He notes that two proposals were drafted for the various governments and the Swiss Federal Council agreed to invite the governments concerned to an international conference to draft treaties in relation to these two issues. The plan was to hold two conferences – the first in 1905 which would be a meeting of experts to do preparatory work on the two conventions and the second in 1906, where the government officials and diplomats would finalise the drafting and adoption of the conventions. He also notes a parallel development as being the conclusion of a bi-lateral treaty between France and Italy on labour.

⁶⁶ Mahaim, p 10, note 55. He notes that while the Convention prohibiting night work for women affected about one million workers across the 12 industrial European countries and contained a protective element was eventually adopted by almost all the countries, the Phosphorus Convention at first appeared to be a failure as it affected a small number of workers in specific work and a number of the countries did not ratify the Convention as it affected an exporting industry. However, in later years it began to be accepted and applied in a number of countries with the result that by 1934 it had 31 ratifications and had the widest geographical scope. See also Delevingne, p 36 – 47, note 59 for a detailed discussion of the negotiations at the 1906 Berne Conference as well as the 1905 technical conference of experts.

⁶⁷ Mahaim, p 11, note 55. See also Delevingne, p 38, note 59, who argues that the objectives that the establishment of the ILO in 1919 was intended to serve were already emerging in the work of the Berne Conference, namely, ensuring that all countries adhered to the same standards for conditions of work and making it possible for all countries, by mutual agreements, to introduce measures for the improvement of labour conditions and thereby ensuring consistent progress among such countries.

⁶⁸ Delevingne, p 48-49, note 59. He mentions that the technical meeting of experts in 1913 did not yield as positive results as expected and the proposals met with some opposition. For instance, countries were divided over the proposal that night work be prohibited for persons below 18 years of age and instead the age of 16 years was adopted rather than 18 years. On the other hand, he does note that agreement was reached that there be a general prohibition of all night work under that age, but after a

discussed and possibly adopted at a conference scheduled for 1914, the First World War began.

Mahaim regards the International Association for Labor Legislation a success for a number of reasons.⁶⁹ First, it was supported by individuals committed to its cause and the greater aim of benefiting humanity. Second, the members had extensive experience as ministers, governmental officials and politicians and also included employers and workers. Third, its chosen method of operation, i.e. selecting specific issues and researching and preparing them, yielded more positive results than trying to deal with a wide agenda of the entire scope of labour legislation. The latter approach he regards as being a key reason for the failure of the Berlin Conference.

Contrast this with the view of Delevingne who regarded the Association as having certain fundamental weaknesses.⁷⁰ First, he lists the fact that the Association was not actually representative of employer's organisations, worker's organisations nor governments. Second, although some employers and workers were members of the Association, generally they took little interest in its work. Third, he argues that the Association did not have capacity for research and that the information on which the Association based its recommendations for the conventions was necessarily incomplete and reports were one-sided, drafted by the technical experts for a specific audience, namely, the Association. Finally, and differing notably from Mahaim, he

long struggle in the face of opposition by Austria and Belgium. At this stage it is interesting to note the participation of the United States of America in the Association. Delevingne relates how representatives from the US were active in the work and meetings of the Association and how the work on white phosphorus was transported across the Atlantic and resulted in the enactment of the Federal Act of 1912 by the United States Congress.

⁶⁹ Mahaim, p 7 – 9, note 55.

⁷⁰ Delevingne, p 49 – 50, note 59. See Thomas A, 'The International Labour Organisation. Its origins, development and future', *International Labour Review*, Vol. 1, No. 1, 1921, reprinted in *International Labour Review*, Vol. 135, No. 3-4, 1996, p 261-276, who also confirms certain limitations to the Association, namely, that the Association was not comprised of accredited employer or employee organisations or even governments and that the adoption of propositions could only be secured through diplomatic channels not the Association itself.

argues that the Association tended to divide its attention between a wide range of labour issues and, in that manner, had too broad a scope.⁷¹

2.2.2 The establishment of the ILO

The advent of the First World War brought about the demise of the International Association for Labour Legislation, especially in light of a movement, emanating from Britain and other countries, aimed at establishing a new organisation for international co-operation on labour once the War was over.⁷²

Delevingne provides a succinct overview of the prevailing conditions and circumstances that favoured the formation of the ILO.⁷³ First, he alludes to the fact that the labours of the workers in the War effort led to the growing recognition of their claims for better conditions and a higher standard of life; second, there was a call for common action by the Allies to counter the ‘enemies’ general position regarding labour at the end of the War; third, is the fact that the War brought both employers’ and workers’ organisations into a closer relationship with government, inter alia, on account of the production of munitions and provision of essential services and fourth, the War brought the Allied governments closer together and necessitated mutual consultation and joint action. Finally, Delevingne refers to the realisation that a new international order was required, as well as a new international organ which would give effect to the social and political ideals of the time. This ultimately resulted in one of the objectives of the League of Nations being the provision of fair and humane

⁷¹ To substantiate this claim he refers to resolutions adopted at the 1912 General Meeting of the Association which dealt with a plethora of issues including the administration of labour laws, child labour, hours of work, protection of railway workers, protection of dock workers, the hygienic working day and so forth.

⁷² Delevingne, p 52 – 53, note 59. He also ascribes the breakdown of the Association to how the War affected labour generally, with governments under great pressure to ensure production of military requirements and civilian necessities. In order to ensure maximum efficiency, they paid close attention to industrial conditions in order to prevent excessive fatigue and health problems in the worker population. See also Riegelman C, ‘War-time Trade- Union and Socialist Proposals’, in Shotwell JT (ed), *The Origins of the International Labor Organisation*, Columbia University Press: New York, 1934, p 55 – 56.

⁷³ Delevingne, p 52 – 53, note 59.

conditions of labour and the establishment of an international organisation for this purpose (article 23 of the Covenant of the League).

The influence of labour and worker's organisations in the establishment of the ILO was considerable.⁷⁴ In particular, according to Riegelman, the work and proposals of the American Federation of Labor,⁷⁵ the International Federation of Trade Unions⁷⁶ and the Socialist International Bureau⁷⁷ was key in motivating the heads of State of the participating nations to include labour negotiations as part of the Paris Peace Conference at the end of the War.

⁷⁴ Riegelman, in her chapter, note 72, provides a detailed and comprehensive documentary account of the history of labour's involvement in the establishment of the ILO. It is particularly enlightening on account of the inclusion of lengthy quotes from correspondence between leading labour advocates of the time.

⁷⁵ A significant contribution of the American Federation of Trade Unions (AFTU) was a resolution adopted at its Philadelphia Convention in 1914 calling for a world labour congress at the same time and place as the Peace Conference at the end of the War. Riegelman, note 72, argues that although this was the starting point for the movement to call a world congress at the same time as the Peace Conference, the AFTU did not envisage direct participation in the Peace Conference.

⁷⁶ Riegelman, note 72, recognises the critical influence of the International Federation of Trade Unions in the establishment of the ILO, especially on account of the outcomes of its 1916 Leeds Conference and 1917 Berne Conference. The Leeds Conference called for specific recognition in the peace treaty of the right to work, the regulation of migration, social insurance, a maximum ten-hour working day, legislation for provisions of hygiene and safety and governmental control of the implementation of these provisions. It also called for the appointment of an international commission to ensure effect was given to these provisions, and the creation of an international labour office to, inter alia, study the development of labour legislation. She argues that the Leeds Conference registered a fundamental change in the attitude of the labour movement towards international labour legislation as it brought the ideas of labour into line with those later included in Part XIII of the Treaty of Peace. The Berne Conference of 1917 went even further than the Leeds Conference and recommended that the International Labour Office at Basel (see note 64 above) have the power to 'convoke the international congresses for the promotion of labour protection and social reform legislation, which shall be arranged periodically and officially represented', which Riegelman views as a recommendation for the creation of a super-national legislative body.

⁷⁷ Riegelman explains that the socialist conferences of 1917 and 1918 emphasised the policy of labour concerning the political outcome of the War and although they probably influenced the Allies to give labour a role in the workings of the Peace Conference, they had little influence on international labour legislation issues.

However, in addition to the efforts of the labour and socialist movements, official approbation by the Allied governments for the inclusion of labour issues in the Peace Conference was evident.⁷⁸

What resulted was a resolution adopted at the Paris Peace Conference⁷⁹ to establish a commission 'to enquire into the conditions of employment from the international aspect, and to consider the international means necessary to secure common action on matters affecting conditions of employment, and to recommend the form of a permanent agency to continue such enquiry in co-operation with and under the direction of the League of Nations.'⁸⁰

The work of the Commission on Labour Legislation of the Peace Conference can be seen as divided into two parts – first the British proposal was read and considered, a recess was taken and then on resumption of its work, the Commission considered various amendments to the British proposal put forward by the delegates (which also included a proposed Labour Charter).⁸¹ Once the Commission finished its work, a

⁷⁸ See generally Picquenard C, 'The Preliminaries of the Peace Conference', in Shotwell JT (ed), *The Origins of the International Labor Organisation*, Columbia University Press: New York, 1934, p 83 - 126. He notes that both France and Great Britain had participated and taken interest in international labour legislation prior to the War as explained briefly earlier in this chapter. He goes on to explain that the various proposals for the inclusion of protections for workers in the Treaty of Peace met with acceptance from the French and British governments. Both governments set up official channels through which labour issues could be investigated and studied and eventually the British and French drafted proposals for an international organisation on labour legislation for the Peace Conference. Importantly, although a suggestion was made that there should be three separate representative bodies in the proposed organisation – one for government representatives, another for employer's representatives and a third for worker's representatives – this was never part of the final proposal and although not part of the ILO's constitution, Picquenard nevertheless sees it as a forecast of the system that has informally developed in the Organisation.

⁷⁹ This was a preliminary conference which took place before the official Versailles Peace Conference which the Germans attended. See Phelan EJ, 'The Commission on International Labour Legislation', in Shotwell JT (ed), *The Origins of the International Labor Organisation*, Columbia University Press: New York, 1934, p 127.

⁸⁰ Picquenard, p 126, note 78.

⁸¹ Phelan, p 130, note 79. In his chapter, Phelan takes the reader through the in-depth debates held regarding each Article of the ultimate ILO Constitution.

report was drafted and preparations made to present the report. However, difficulties arose regarding, amongst others, opposition from the British delegation; calls from delegates such as Japan for further amendments; resistance to the Labour Charter and, finally, the difficulty of actually convening a plenary session of the Peace Conference to consider the report of the Commission.⁸²

These difficulties overcome, on 11 April 1919 the report was presented to the plenary session of heads of state and the Commission moved for the following resolution:

‘That the Conference approves the Draft Convention creating a permanent organisation for the promotion of international regulation of labour conditions which has been submitted by the Labour Commission, with the amendments proposed by the British delegation; instructs the Secretariat to request the governments concerned to nominate forthwith their representatives on the Organising Committee for the October Conference, and authorises that the committee to proceed at once with its work’.⁸³

The Plenary Session of the Peace Conference unanimously adopted the resolution and the International Labour Organisation (ILO) came into being.

2.2.3 The work of the ILO

The first efforts of the ILO concentrated on the convening of the first International Labour Conference. Part of the negotiations of the Commission on Labour Legislation of the Peace Conference in drafting the Constitution for the ILO involved provisions relating to labour conferences to be held under the auspices of the ILO. In addition it was contemplated at the outset that the first International Labour Conference be held

⁸² Phelan, p 199 – 207, note 79.

⁸³ Phelan, p 209 – 210, note 79. Although the Constitution of the ILO had to be incorporated into the Treaty of Peace, once this resolution was adopted, the ILO came into being because of the existence of the ‘Transitory Provisions’ of Articles 39-41, which would allow the ILO to operate before the Constitution was ratified.

as soon as possible.⁸⁴ In 1919 the first ILO International Labour Conference was held and the issues up for discussion centred on the application of the 8 hour working day or 48 hour working week; the question of preventing or providing against unemployment; women's employment; the employment of children and the extension and application of the Berne Conventions of 1906. The subject matter relating to children's employment concerned the minimum age of employment, night work for children and work involving 'unhealthy processes' – issues that concern the regulation of employment and its conditions and which were eventually regulated by Convention 138 (discussed in section 3.1 of Chapter 3).

In examining the work of the first Conference, Butler praises its achievements and the manner in which it dealt expeditiously with all the issues before it.⁸⁵ Before the Conference could even begin to tackle issues of substance it had to resolve constitutional and political issues such as the election of the Governing Body of the International Labour office and finalisation of the Conference procedure and rules. Nonetheless, having successfully dispensed with these issues, the Conference proceeded to draft six conventions dealing with hours of work in industry, night work of women, night work of young persons, the age of admission of children to industrial employment and the employment of women before and after childbirth.⁸⁶

Apart from ironing out the procedures and methodologies of International Labour Conferences, this Conference set the trend for many future gatherings including those

⁸⁴ Delevingne Sir M, 'The Organising Committee', in Shotwell JT (ed), *The Origins of the International Labor Organisation*, Columbia University Press: New York, 1934, p 285. The Commission finalised the constitution of the Organising Committee of the International Labour Conference as well as its Agenda as part of its work. Article 424 of the Peace Treaty and its Annex stipulates that first conference would be held in Washington and convened by the United States of America and sets out the issues for the Agenda. The work of the Organising Committee included preparing reports on the Agenda items for discussion at the Conference; making arrangements for the election of the Governing Body of the International labour Office, now situated in Geneva, making proposals regarding rules for the discussion of issues and other preparatory work.

⁸⁵ Butler HB, 'The Washington Conference', in Shotwell JT (ed), *The Origins of the International Labor Organisation*, Columbia University Press: New York, 1934, p 326 -327.

⁸⁶ Butler, p 326 -327, note 86, notes that in addition the Conference adopted six recommendations and eight resolutions on aspects contained in the Agenda but not dealt with in Conventions.

which produced Conventions 138 and 182, perhaps the most well-known child labour treaties in child rights and child labour discourse today.⁸⁷

Mahaim, writing in 1921, describes the International Labour Conference as an ‘organisation of unprecedented kind’.⁸⁸ He argues that three factors make the Conference important from the point of view of international labour law: firstly, its universal character as it aims at securing certain minimum rights to all working men (or women and children); secondly, its periodical repetition allows members to be permanently in touch with one another and thus the work of the Conference is continuous; and finally, its make-up increases its effective power through the granting of equal rights to governments, employer representatives and employee representatives, particularly as collaboration between them gives weight to decisions made.⁸⁹

The preamble to the ILO Constitution states ‘universal and lasting peace can be established if only it is based on social justice... also the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries’ and it has been said that this remains true even in today’s age of globalisation and that it still provides the ideological basis for the ILO.⁹⁰

In 1944 at the International Labour Conference in Philadelphia, the members of the ILO adopted the *Declaration concerning the aims and purposes of the International Labour Organisation* (known as the Philadelphia Declaration) which is set out as an

⁸⁷ However, Thomas notes teething difficulties following the first Conference. He details a backlash against the spirit of Versailles and the first Conference based, inter alia, on fear: fear of diminished production, of the effects of excessive leisure and social indiscipline. Ultimately he concludes that there was no reason to despair or to doubt because the ILO is a necessity and ‘[w]hatever obstacle it meets, whatever resistance opposes it, it will live’, Thomas, p 268-276, note 70.

⁸⁸ Mahaim E, ‘International labour law’, *International Labour Review*, Vol. 1, No. 3, 1921, reprinted in *International Labour Review*, Vol. 135, No. 3-4, 1996, p 287-290.

⁸⁹ Mahaim, p 289, note 88.

⁹⁰ *The International Labour Organisation: What it is. What it does*, ILO, undated, accessed at http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---webdev/documents/publication/wcms_082364.pdf on 23 August 2007.

Annex to the ILO Constitution and essentially redefined the aims and purposes of the Organisation. The Declaration states, for instance:

‘labour is not a commodity; freedom of expression and of association are essential to sustained progress; poverty anywhere constitutes a danger to prosperity everywhere; the war against want requires to be carried on with unrelenting vigor within each nation, and by continuous and concerted international effort in which the representatives of workers and employers, enjoying equal status with those of governments, join with them in free discussion and democratic decision with a view to the promotion of the common welfare.’

Today, the ILO’s different activities are grouped under 4 strategic objectives:⁹¹ to promote and realise standards and fundamental principles and rights at work; to create greater opportunities for women and men to secure decent employment and income; to enhance the coverage and effectiveness of social protection for all; and to strengthen tri-partism and social dialogue. These strategic objectives are achieved through a wide range of work on different themes such as decent work, which involves opportunities for work that are productive and deliver a fair income, security in the workplace and social protection for families; setting labour standards, which define and guarantee labour rights and improve conditions for working people by building a system of international labour standards expressed in the form of Conventions, Recommendations and Codes of Practice; forced labour, which takes different forms, including debt bondage, trafficking and other forms of modern slavery; child labour, which the ILO terms a pressing social, economic and human rights issue; employment and income, which forms the core of the ILO’s mandate and includes conditions of work, and finally, social protection, to which the ILO is committed by assisting countries to extend social protection to all members of society and by improving conditions of work and safety at work.⁹²

⁹¹ Accessed at http://www.ilo.org/global/About_the_ILO/Mission_and_objectives/lang--en/index.htm on 22 August 2007.

⁹² *The ILO at a glance*, the International Labour Office Geneva, undated, accessed at http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---webdev/documents/publication/wcms_082367.pdf on 23 August 2007.

Today the approach of the ILO to child labour has been described as threefold.⁹³ Firstly it seeks to document the nature, extent and causes of child labour; secondly, based on research, it adopts conventions for member states to sign and ratify and thirdly, it attempts to formulate and implement practical policies and programmes to combat child labour. One such programme relates to the substantive content of this thesis, and is discussed in Chapter 7.

2.3. The international regulatory framework on child labour prior to Convention 138

2.3.1 ILO instruments on child labour

The move to adopt international treaties and conventions within an international regulatory organisation such as the ILO has been said to be remarkable.⁹⁴ The reason given is that labour issues are primarily problems of domestic concern and should reflect the conditions of each particular society. The scope of international labour legislation, on the other hand, deals with issues and problems that different countries have in common and in that respect it sets general norms and standards that should be applicable to all states. However, it should be emphasised that international labour laws are not a substitute for domestic laws but rather build upon them, making them more effective by raising the common standards and conditions of work.⁹⁵

The ILO regards the Minimum Age Convention 1973 (Convention 138) and the Worst Forms of Child Labour Convention 1999 (Convention 182) and their related Recommendations⁹⁶ as the fundamental international conventions on child labour.

⁹³ Giampetro-Meyer A, Brown L, Kubasek N, 'The Exploitation of Child Labor: An Intractable International Problem', *Loyola of Los Angeles International and Comparative Law Journal*, June 1994, p 657 – 674 at p 667 – 668.

⁹⁴ Shotwell JT (ed), *The Origins of the International Labor Organisation*, Columbia University Press: New York, 1934, p xix.

⁹⁵ Shotwell, p xix, note 94.

⁹⁶ Minimum Age Recommendation, 1973 (No. 146) and Worst Forms of Child Labour Recommendation, 1999 (No. 190).

However, prior to the adoption of Convention 138, the ILO adopted several other dedicated instruments on child labour that concerned the protection of children and young persons.⁹⁷

At a cursory glance, it is obvious why Convention 138 and Convention 182 are regarded as the fundamental conventions regarding child labour. All the international legal instruments previously dealing with child labour were ultimately sectoral in nature, applying either to different industries (e.g. underground work or family undertakings) or to different conditions of work (e.g. night work or work requiring medical fitness). Likewise, where they set a minimum age of admission to employment they did so within the context of a particular industry or sector, whereas Convention 138 is of general application and sets standards equally applicable to all

⁹⁷ See the following web-site: http://www.ilo.org/global/About_the_ILO/Mainpillars/Theightsatwork/Labour_Standards/lang-en/index.htm, accessed on 4 September 2007 for a list of the instruments regarded by the ILO as relating to child labour issues (notably there are others in respect of children working at sea but they are not referred to on the website). The instruments include: Medical Examination of Young Persons (Industry) Convention, 1946 (No. 77); Medical Examination of Young Persons (Non-Industrial Occupations) Convention, 1946 (No. 78); Medical Examination of Young Persons (Underground Work) Convention, 1965 (No. 124); Medical Examination of Young Persons Recommendation, 1946 (No. 79) and Conditions of Employment of Young Persons (Underground Work) Recommendation, 1965 (No. 125); Minimum Age (Non-Industrial Employment) Recommendation, 1932 (No. 41) and Minimum Age (Family Undertakings) Recommendation, 1937 (No. 52); Night Work of Young Persons (Industry) Convention, 1919 (No. 6); Night Work of Young Persons (Non-Industrial Occupations) Convention, 1946 (No. 79); Night Work of Young Persons (Non-Industrial Occupations) Recommendation, 1946 (No. 80); Night Work of Young Persons (Industry) Convention (Revised), 1948 (No. 90) and Night Work of Children and Young Persons (Agriculture) Recommendation, 1921 (No. 14); Minimum Age (Industry) Convention, 1919 (No. 5); Minimum Age (Agriculture) Convention, 1921 (No. 10); Minimum Age (Non-Industrial Employment) Convention, 1932 (No. 33); Minimum Age (Industry) Convention (Revised), 1937 (No. 59), Minimum Age (Underground Work) Convention, 1965 (No. 123) and Minimum Age (Underground Work) Recommendation, 1965 (No. 124); Minimum Age (Trimmers and Stokers) Convention, 1921 (No. 15) and the Minimum Age (Non – Industrial Employment) Convention (Revised), 1937 (No. 60) and the Minimum Age (Coal Mines) Recommendation, 1953 (No. 96). Of these one has been withdrawn, two shelved, five in need of revision and six which are outdated.

working children. In addition, all of the Conventions address the regulation of employment, as opposed to child labour regarded as intolerable on account of the fact that it violates certain fundamental human rights, as eventually recognised in Convention 182. The latter is not surprising as it was only with the adoption of the UNCRC that children were afforded full protection of their rights in a binding international instrument.

However, what is surprising is the actual level of protection afforded to children in some of the Conventions predating Convention 138. The provisions of the Conventions were adopted sporadically and applied different standards to different industries or types of work in certain circumstances. The following discussion in relation to certain select Conventions will attempt to illustrate this point.

The Minimum Age (Industry)⁹⁸ Convention No. 5 of 1919 and the Night Work of Young Persons (Industry)⁹⁹ Convention No. 6 of 1919, while being the first international laws under the ILO that regulated child labour, can most certainly be regarded as only a first attempt at providing protection for children. For instance, article 2 of Convention No. 5 provided that '[c]hildren under the age of fourteen years shall not be employed or work in any public or private industrial undertaking, or in any branch thereof, other than an undertaking in which only members of the same family are employed'. By limiting the Convention to industrial undertakings, this meant that there was no minimum age for children working in agriculture and non-industrial undertakings. In addition, even though article 4 of the Convention provided

⁹⁸ Article 1 defines the term 'industrial undertaking' as: '(a) mines, quarries and other works for the extraction of minerals from the earth; (b) industries in which Articles are manufactured, altered, cleaned, repaired, ornamented, finished, adapted for sale, broken up or demolished, or in which materials are transformed; including shipbuilding, and the generation, transformation, and transmission of electricity and motive power of any kind; (c) construction, reconstruction, maintenance, repair, alteration, or demolition of any building, railway, tramway, harbour, dock, pier, canal, inland waterway, road, tunnel, bridge, viaduct, sewer, drain, well, telegraphic or telephonic installation, electrical undertaking, gas work, water work, or other work of construction, as well as the preparation for or laying the foundations of any such work or structure; (d) transport of passengers or goods by road or rail or inland waterway, including the handling of goods at docks, quays, wharves, and warehouses, but excluding transport by land'.

⁹⁹ In this Convention 'industrial undertaking' is given the same definition as in Convention No. 5.

that every employer in an industrial undertaking must keep a register of all persons under the age of 16 years employed by him, the conditions of work for children older than 14 years were not prescribed.

Likewise, the protections contained in Convention No. 6 were rather meagre. For instance, Article 2(1) provided that persons under 18 years of age were prohibited from being employed during the night in any public or private industrial undertaking except one in which only members of the same family are employed, subject to certain exceptions, and it is rather obvious that those exceptions detract from the weight of the Convention. Article 2(2) provided that children over the age of 16 but under 18 years may be employed during the night in certain industrial undertakings in work which, by its nature, is carried on continuously day and night.¹⁰⁰ In addition, the provisions of Article 4, which also provided for an exception to the general prohibition, were somewhat confusing: '[t]he provisions of Articles 2 and 3 shall not apply to the night work of young persons between the ages of 16 and 18 years in case of emergencies which could not have been controlled or foreseen, which are not of a periodical character, and which interfere with the normal working of the industrial undertaking'. The problem is that the provision did not specify whether it applies to Article 2(1) or 2(2). If it applied to the former, then children between 16 and 18 years could be used for night work in the case of emergencies. If it applied to Article 2(2) then they could not, but this would not really make sense.¹⁰¹ These exceptions, taken together with the absence of a requirement that the child's schooling is not

¹⁰⁰ The Convention lists this work as: '(a) manufacture of iron and steel; processes in which reverberatory or regenerative furnaces are used, and galvanising of sheet metal or wire (except the pickling process); (b) glass works; (c) manufacture of paper; (d) manufacture of raw sugar; (e) gold mining reduction work'.

¹⁰¹ However, it appears from a reading of one of the individual observations of the Committee of Experts on the Application of Conventions and Recommendations (appointed by the Governing Body of the International Labour Office to examine the information and reports submitted under Articles 19, 22 and 35 of the Constitution by states members of the ILO) that Article 4 applies to Article 2(1) as night work for children should be prohibited for children under 18 years except in cases of force majeure, when it can be lowered to 16 years. See CEACR: Individual Observation concerning Night Work of Young Persons (Industry) Convention, 1919 (No. 6) Burkina Faso (ratification: 1960) Published: 2007, accessed from www.ilo.org/ilolex/ on 6 September 2007.

interrupted, did not afford comprehensive protections for children aged between 16 and 18 years, especially in the industries mentioned in Article 2(2).

Obviously it is easy, in hindsight, to be critical of the substantive provisions of the Conventions, but this should not detract from the fact that these two Conventions laid the basis for the range of international laws on child labour that were to follow throughout the 20th century.

Convention No. 5 was followed by other minimum age Conventions for different sectors, as well a revised Convention for industrial undertakings in 1937. These instruments, unlike the initial Conventions, illustrated a greater insight into the need for equal protection for children. For instance, Article 1 of the Minimum Age (Agriculture) Convention No. 10 of 1921 provides that children under the age of 14 years may not be employed or work in any public or private agricultural undertaking except after school hours and if they are employed after school hours then such employment must not prejudice their attendance at school. So, for the first time there was a provision adopted seeking to ensure that children's education is not interfered with by work.

However, the Convention does not provide a blanket prohibition on the employment of children under 14 years in the agricultural sector and this, ostensibly, could result in a six year old working in the agriculture sector after school hours provided his or her schooling is not adversely affected, for example, by homework not being completed.

The International Labour Office, following a request for assistance from The Netherlands on the scope of application of Article 1, has interpreted the provision in an even less protective manner.¹⁰² It stated that the provision does not prohibit the employment in agriculture of all children under 14 years of age during the hours fixed

¹⁰² For more detail see: *ILC: Interpretation of a decision concerning Convention No. 10, Minimum Age (Agriculture), 1921 The Netherlands; Published: 1927; Interpretation of Conventions and Recommendations Vol. XII, 1927, No. 2; document no. (ilolex) 241927010 – accessed at www.ilo.org/ilolex/ on 6 September 2007*

for school attendance, but that it only aims at prohibiting the employment of those children who are *obliged* (my emphasis) to attend school, not those under the compulsory age of schooling.

However, the International Labour Office did not stop there. It went on in the same discussion to state:

‘[d]espite its relative ambiguity, this clause can only be plausibly interpreted if it is understood to refer to the hours of school attendance fixed for children under 14 years. When children under the age of 14 years are not subjected to compulsory school attendance, it is difficult to see why it should be necessary to make their hours of work depend upon the hours fixed for the school attendance of others and not of themselves. This interpretation is confirmed by the concluding words of Article 1 which provide that the work performed by children outside the hours of school attendance shall not prejudice this attendance, and it is clear that this cannot mean the attendance at school of children who are exempt from compulsory school attendance, in whose case the words would be meaningless’.

This clearly illustrates that, once again, the envisaged protections for children were not of equal application as they narrowed the scope of the application of the Convention to children subject to compulsory school attendance.

In 1932 the Minimum Age (Non-Industrial Employment)¹⁰³ Convention No.33 was adopted. It purported to provide more protections for child workers in that it provided

¹⁰³ Article 1 of the Convention states that it does not apply to employment dealt with in the previous minimum age conventions for, amongst others, industrial work, agriculture and employment at sea and its application is also excluded from employment in sea-fishing and work done in technical and professional schools. It also provides that states can exempt the application of the Convention from employment in establishments in which only members of the employer's family are employed, except employment which is harmful, prejudicial or dangerous and domestic work in the family performed by members of that family. This last-mentioned provision is another example of the shortcomings of the earlier conventions in that the qualifier attached to employment in establishments in which only members of the employer's family are employed, namely that such employment must not be harmful, prejudicial or dangerous, is absent from domestic work in the family performed by members of the family, thereby leaving a gap for the potential abuse of children doing family domestic work.

that children under 14 years of age, or children over 14 years who are required by law to attend primary school, shall not be employed in non-industrial employment with certain exceptions (Article 2); children over 12 years and under 14 years may be employed in light work;¹⁰⁴ children under 14 years may be employed in public entertainment or as actors provided it is not dangerous, performed after midnight and strict safeguards are prescribed for the health, physical development and morals of the children (Article 4); states must set a higher minimum age than 14 years for work which is ‘dangerous to the life, health or morals of the persons employed in it’ and children working as street traders (Articles 5 and 6), and states must provide for a ‘system of public inspection and supervision’ to ensure the enforcement of the Convention (Article 7). The ILO also adopted a Recommendation (No. 41) to give further guidance to this Convention, which recommended that states adopt specific rules and procedures regarding light work, employment in public entertainment and dangerous work.¹⁰⁵

Interestingly, Part 4, Paragraph 7, of this Recommendation deals with the prohibition of employment of children by certain persons and provides that ‘[w]ith a view to safeguarding the moral interests of children persons who have been condemned for certain serious offences or who are notorious drunkards should be prohibited from employing children other than their own, even if such children live in the same household with these persons’. It is argued that this is a somewhat progressive clause for 1932, given that South Africa, for example, has only recently enacted similar (though obviously more advanced) provisions prohibiting certain persons from working with children in its Children’s Act 38 of 2005. Unfortunately, the clause does

¹⁰⁴ Defined in Article 2 as work ‘(a) which is not harmful to their health or normal development; (b) which is not such as to prejudice their attendance at school or their capacity to benefit from the instruction there given; and (c) the duration of which does not exceed two hours per day on either school days or holidays, the total number of hours spent at school and on light work in no case to exceed seven per day’.

¹⁰⁵ Minimum Age (Non-Industrial Employment) Recommendation No. 41 of 1932.

not stop such persons from employing their own children, perhaps an indication of the inequalities inherent in the parent-child relationship that still existed at the time.¹⁰⁶

Yet, Convention No. 33 still only applied to children who working in non-industrial employment and children working in the agricultural, sea and industrial sectors were excluded from the protections afforded children in the non-industrial sector on account of the ILO adopting separate Conventions for each sector. Despite this, it has been noted that from the time of the adoption of Convention No. 33, the ILO standards on child labour were more or less established and they remained substantially unchanged until Convention 182 in 1999.¹⁰⁷

What also emerges from a perusal of the early Conventions, is the move towards prohibiting employment of children and setting higher ages of admission to employment, a trend that would culminate in the adoption of Convention 138 and its aim of abolishing child labour altogether.¹⁰⁸ This approach fails to give cognisance to a child who chooses to work, or the prevailing conditions in certain countries that require children to become economically active. A prohibition on all child work would result in a failure to regulate the conditions of children who do in fact work, thereby placing them squarely in harms way. The criticism of the abolition approach by various commentators, such as Myers, is discussed in more detail in section 3.1.1 of Chapter 3 of this thesis.

Perhaps because of the gaps between the Conventions, in 1937 the Minimum Age Convention (Industry)¹⁰⁹ was revised, the Minimum Age Convention (Non-Industrial Employment)¹¹⁰ was revised and a Minimum Age Recommendation (Family

¹⁰⁶ For a detailed discussion of the parent -child relationship see Bonniface A, *Evolutionary Changes to the Parent – Child Relationship in South Africa with specific reference to Guardianship, Care and Contact*, unpublished LLD Thesis, University of Pretoria, 2007.

¹⁰⁷ Cullen H, 'Child Labor Standards: From Treaties to Labels', in Weston BH (ed), *Child Labor and Human Rights: Making Children Matter*, Lynne Rienner Publishers: Boulder, 2005, p 87 – 115 (p 90).

¹⁰⁸ Article 1 requires states to 'pursue a national policy designed to ensure the effective abolition of child labour and to progressively raise the minimum age for admission to employment or work.'

¹⁰⁹ Minimum Age (Industry) Convention (Revised) No. 59 of 1937.

¹¹⁰ Minimum Age (Non-Industrial Employment) Convention (Revised) No. 60 of 1937.

Undertakings)¹¹¹ was introduced. Conventions No. 59 and 60 raised the minimum age to 15 years, but again with some notable exceptions. Convention 59 allowed states to permit children under 15 years of age to work in family undertakings provided the work is not ‘dangerous to the life, health or morals of the child’ (article 2), while Convention 60, on the other hand, permitted children over 13 years and under 15 years to perform light work which was not harmful to their health or normal development and which did not prejudice their schooling, subject to certain exceptions (article 3). The Family Undertaking Recommendation merely recommended that members of the ILO ‘should make every effort to apply their legislation relating to the minimum age of admission to all industrial undertakings, including family undertakings’, ostensibly to cover the gap that existed in the Convention. Despite these developments, the Minimum Age Convention (Agriculture) and its shortcomings were not revised. Likewise, it was only in 1965 that specific instruments on the minimum age for underground work were introduced.¹¹²

Aside from the difficulties in the ambit of protection the different Minimum Age Conventions provided children, it has also been noted that their textual inflexibility has been a key reason why, even after being ratified, they have been plagued by compliance problems.¹¹³ These compliance problems are evidenced by the plethora of Individual Observations and Individual Direct Requests made by the Committee of Experts on the Application of Conventions and Recommendations, appointed by the Governing Body of the International Labour Office to examine the information and reports submitted under Articles 19, 22 and 35 of the ILO Constitution by states members on their action taken with regard to conventions and recommendations.¹¹⁴

¹¹¹ Minimum Age (Family Undertakings) Recommendation No. 52 of 1937.

¹¹² The Minimum Age (Underground Work) Convention No. 123 of 1965 and the Minimum Age (Underground Work) Recommendation No. 124 of 1965.

¹¹³ Cullen, p 90, note 107. Contrast this with the view of Fyfe who is of the opinion that the ILO Conventions were usually flexible, allowing for gradual implementation and the possibility for states to grant exceptions, particularly in the case of family undertakings: Fyfe, p 132, note 43.

¹¹⁴ See generally www.ilo.org/ilolex/ where an advanced search per convention and recommendation will provide a list of such communications by the Committee of Experts.

Similar difficulties regarding the scope of protection afforded children can be found in the international instruments regulating medical examinations of child workers. The Medical Examination of Young Persons (Industry)¹¹⁵ Convention No. 77 of 1946 and the Medical Examination of Young Persons (Non-Industrial Occupations)¹¹⁶ Convention No. 78 of 1946 provide in Article 2 of both Conventions that ‘children and young persons under eighteen years of age shall not be admitted to employment ... unless they have been found fit for the work in which they are to be employed by a thorough medical examination’. Article 3 of the Conventions also provide that a child’s fitness for employment shall be subject to medical supervision until he has attained the age of 18 years and Article 4 provides that in occupations which involve high health risks, medical examination

¹¹⁵ Article 1 defines ‘industrial undertaking’ as ‘(a) mines, quarries, and other works for the extraction of minerals from the earth; (b) undertakings in which Articles are manufactured, altered, cleaned, repaired, ornamented, finished, adapted for sale, broken up or demolished, or in which materials are transformed, including undertakings engaged in shipbuilding or in the generation, transformation or transmission of electricity or motive power of any kind; (c) undertakings engaged in building and civil engineering work, including constructional, repair, maintenance, alteration and demolition work; (d) undertakings engaged in the transport of passengers or goods by road, rail, inland waterway or air, including the handling of goods at docks, quays, wharves, warehouses or airports.’

¹¹⁶ Article 1 of the Convention defines the term ‘non-industrial occupations’ as including all occupations other than those recognised by the state concerned as industrial, agricultural and maritime occupations. However, this is given further definition by Paragraph 1 of the Medical Examination of Young Persons Recommendation 79 of 1946, which states that the Convention should be applied to the following, whether public or private: ‘(a) commercial establishments, including delivery services; (b) postal and telecommunication services, including delivery services; (c) establishments and administrative services in which the persons employed are mainly engaged in clerical work; (d) newspaper undertakings (editing, distribution, delivery services and the sale of newspapers in the streets or in places to which the public have access); (e) hotels, boarding-houses, restaurants, clubs, cafés and other refreshment houses, and domestic service for wages in private households; (f) establishments for the treatment and care of the sick, infirm, or destitute and of orphans; (g) theatres and places of public entertainment; (h) itinerant trading, the hawking of objects of all kinds, and any other occupation or service carried on in the streets or in places to which the public have access; (i) all other jobs, occupations or services which are neither industrial nor agricultural nor maritime’.

and re-examinations for fitness for employment shall be required until at least the age of 21 years.

However, Article 8 of the Conventions allow for exceptions to their application for member states whose territory 'includes large areas where, by reason of the sparseness of the population or the stage of development of the area, the competent authority considers it impracticable to enforce the provisions' of the Conventions, thereby forsaking the protection of children's health in cases of countries who seemingly require children to work in industrial or non-industrial undertakings irrespective of their fitness to work. In addition, the Conventions talk of 'fitness for employment' and 'state of health', but do not specify further as to what this actually constitutes.

The Medical Examination of Young Persons Recommendation No. 79 of 1946 supplements these two Conventions and tries to provide some guidance to states beyond the regulating provisions of the Conventions that pertain to medical examinations.¹¹⁷ However, based on the use of terms and phrases such as 'clinical, radiological and laboratory tests useful for discovering fitness or unfitness for the employment' (Paragraph 4) and 'in order to ensure the full efficacy of the medical examination of young workers, measures should be taken to train a body of examining doctors who are qualified in industrial hygiene' (Paragraph 11), as well as the absence of references to mental and psychological health, it is argued that the Recommendation does also not seem to require further protections for child workers' health beyond physical fitness and is very first world in tone.¹¹⁸

¹¹⁷ In this respect the Recommendation provides that, for instance, that it is desirable that all children should undergo, preferably before the end of their compulsory school attendance, a general medical examination, the results of which can be used by the vocational guidance services (Paragraph 3); and that the findings of the medical examination should be entered in full on an index-card to be kept in the files of the medical services responsible for carrying out the examinations and only the information necessary to indicate the limitations of fitness for employment noted in the examination (and the precautions which should, as a result, be taken regarding employment conditions) should be communicated to the employer, not any other confidential medical information (Paragraph 6).

¹¹⁸ The International Labour Office has had occasion to pronounce on Convention 77, but only in relation to Article 9. Essentially the interpretation dealt with the cases where states make a declaration accompanying their ratification of the Convention in order to substitute an age lower than 18 years, but not lower than 16 years, in relation to Articles 2 and 3 and an age lower than 21 years, but not lower

This cursory examination of certain ILO Conventions and Recommendations pertaining to child labour clearly illustrate the ad hoc nature in which they were adopted and the unequal application of the Conventions across different sectors. Yet, it has been argued that this sectoral approach proved viable as it allowed countries to ratify Conventions applicable to their own particular circumstances based on the fact that many countries were not and may still not be able to set and implement a minimum age for employment or work in all sectors of the economy.¹¹⁹ Despite the fragmented nature of the instruments, however, these Conventions and Recommendations illustrate the development of a collection of international laws for the protection of working children. Yet, once again, I would suggest that the idea that children are vulnerable to certain intolerable human rights violations in the form of economic exploitation was not yet fully developed. The focus, instead, was on regulation and the employment sector, which, as will be seen in Chapter 4, are not really characteristic of Convention 182.

What follows is a discussion on the emerging international human rights legal discourse that, it is argued, laid the foundation for the eventual recognition of certain intolerable forms of economic exploitation of children, which were identified and addressed in the UNCRC and ILO Convention 182.

2.3.2 International instruments focused on children

Prior to the adoption of the seminal UNCRC in 1989, two previous international instruments had attempted to set out norms and standards to give effect to the particularities of childhood and ensure the protection of children. However, they did

than 19 years in relation to Article 4. For a more detailed description see: *ILC: Interpretation of a decision concerning Convention No. 77, Medical Examination of Young Persons (Industry), 1946, Northern Committee for Social Policy. Published: 1962; Interpretation of Conventions and Recommendations Vol. XLV, 1962, No. 3; document no. (ilolex): 241962077 – available on www.ilo.org/ilolex/ accessed on 6 September 2007.*

¹¹⁹ Swebston L ‘Child Labour: Its regulation by ILO standards and national legislation’, *International Labour Review*, Volume 121, No. 5, International Labour Office, 1982, p 577 – 593 (p 580).

not have convention status and were not binding in international law.¹²⁰ Nonetheless they represented certain stages in the development of the ideas about child labour and economic exploitation.

The first of these was the Geneva Declaration on the Rights of the Child (1924), which was said to mark 'social work for childhood' becoming an official object of international relations.¹²¹ Van Bueren also points out that: '[d]espite the historical diplomatic invisibility of children, this instrument was the first human rights Declaration adopted by any inter-governmental organisation, and preceded the Universal Declaration on Human Rights by twenty-four years'.¹²²

The Declaration only listed five basic needs of children, including the fact that children should be given the material and spiritual means necessary for their normal development, and that they should receive the necessary care to ensure their survival and development (including food and shelter).¹²³ The Declaration also recognised the vulnerability of children and the need for them to be granted priority 'in times of distress.' This provision is directly linked to the fate of children affected by war and illustrates the close link between the Declaration and the experience of the recent

¹²⁰ In fact, commenting on the 1924 Geneva Declaration on the Rights of the Child, Van Bueren notes that the preamble's exhortation to provide the child with 'the best it has to give' was aimed at adults as it was assumed that children could and should rely on adults to ensure that their rights as defined in the Declaration were protected. Therefore children were regarded as objects and not subjects of international law: Van Bueren G, *The International Law on the Rights of the Child*, Martinus Nijhoff Publishers: Dordrecht, The Netherlands, 1995, p 7-8.

¹²¹ Marshall D, 'The construction of children as an object of international relations: The declaration of Children's Rights and the Child Welfare Committee of League of Nations, 1900 – 1924', *The International Journal of Children's Rights*, Volume 7, 1999, p 103 -104. She goes on to note, however, that this new status for childhood was hotly contested and provides a comprehensive and detailed account of how child welfare became a component of the work of the League of Nations.

¹²² Van Bueren, p 6, note 120.

¹²³ Van Bueren notes that the Declaration is 'also evidence that the early development of international human rights law was not exclusively concerned with the development of civil and political rights, as the Declaration highlights the economic and social entitlements of children': Van Bueren, p 8, note 120.

World War,¹²⁴ though has also been said to go further than this and also represent the principle that children should always have priority.¹²⁵

Importantly, the Declaration provided that ‘the child must be put in a position to earn a livelihood, and must be protected against every form of exploitation’ (Paragraph 4). This illustrates not only the recognition of the child’s right to work and be educated, but also the child’s right not to be exploited in relation to such work. Veerman, reflecting on this provision, refers to Edward Fuller’s commentary on the Declaration, which noted that although attempts to make children under 14 years work in Britain had become quite rare, it was still common for the ‘very gifted’ child to stop school and start helping their parents earn a living as soon as he or she had completed his or her compulsory education.¹²⁶

What is also noteworthy is the broad nature of Paragraph 4. It refers to ‘every form of exploitation’ and can thus be interpreted to extend beyond the obvious workplace violations such as long hours and very young child workers previously addressed by the ILO. Given that in only two years time the League of Nations would adopt the Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention of 1926, it could be argued that the move to recognise human rights violations in the context of child labour was already emerging. In fact, White notes that the Geneva Declaration initiated a new dimension to the child labour discourse, namely the differentiation between the ‘abolitionist’ (minimum age prohibition) and ‘protectionist’ approaches to the problem of child work.¹²⁷ In other words, two schools of thought were emerging, one that was aimed at abolishing child labour in general, and another that was aimed at providing protections to working children,

¹²⁴ Marshall, p 133, note 121.

¹²⁵ Veerman P, *The rights of the child and the changing image of childhood*, Dordrecht: Martinus Nijhoff Publishers, 1992, p 158.

¹²⁶ Fuller E, ‘Great Britain and the Declaration of Geneva’, *The World’s Children*, Vol. V, October 1924, p 27-29, referred to by Veerman, p 158, note 125.

¹²⁷ White B, ‘Shifting Positions on Child Labor: The Views and Practice of Intergovernmental Organisations’, in Weston BH (ed), *Child Labor and Human Rights: Making Children Matter*, Lynne Rienner Publishers: Boulder, 2005, p 327.

while at the same time acknowledging their choice to work. A fuller discussion on this debate is contained in section 3.3 of Chapter 3 of the thesis.

In 1959 the United Nations Declaration of the Rights of the Child was adopted and Veerman provides a detailed account of the process of its adoption.¹²⁸ In 1946 the members of the Economic and Social Council of the United Nations (ECOSOC) were lobbied to have the Geneva Declaration of the Rights of the Child amended and confirmed by the United Nations as the prevailing view was that the 1924 Declaration was somewhat outdated especially in light of changes that had taken place in the field of health care and child welfare. In 1950, a Concept Declaration of the Rights of the Child was proposed by the Social Commission to ECOSOC in Geneva and discussed by its Social Committee, but certain objections to a new instrument were noted and ultimately a proposal made to merely consider a Declaration; only in 1957 was the issue raised again and it was in 1959 that the Commission on Human Rights discussed the Concept Declaration. A second Concept Declaration was drafted by the Commission on Human Rights and on 30 July 1959 ECOSOC recommended presenting the second draft to the General Assembly of the United Nations, which in turn delegated the issue to its Third Committee. It appeared that some delegates would have preferred a convention to a declaration, but the United States was opposed to the former and after 23 meetings by the Third Committee to discuss the issue, the United Nations Declaration on Rights of the Child was unanimously adopted on 20 November 1959.

Of general significance is the fact that it contained a provision, in Principle 2, which stated '[i]n the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration'. This marks the emergence, in the field of international law, of the best interest of the child principle, which is regarded as one of the 'four pillars' of the UNCRC.¹²⁹

¹²⁸ Veerman, p 159 – 166, note 125. See also Van Bueren, p 9-10, note 120, for a summarised version of the history of the development of the 1959 Declaration.

¹²⁹ See Van Bueren for a discussion of the 'four pillars': Van Bueren G, 'The United Nations Convention on the Rights of the Child: An Evolutionary Revolution', in Davel CJ (ed), *An Introduction to Child Law in South Africa*, Juta: Lansdowne, 2000, p 202.

Of relevance to the issue of child labour presently under discussion, Principle 9 states:

‘The child shall be protected against all forms of neglect, cruelty and exploitation. He shall not be the subject of traffic, in any form.

The child shall not be admitted to employment before an appropriate minimum age; he shall in no case be caused or permitted to engage in any occupation or employment which would prejudice his health or education, or interfere with his physical, mental or moral development’.

This Principle has various components to it. Firstly, it deals with the right of children not to be subject to neglect and cruelty, violations which fall within the ambit of both the criminal law and welfare and protection law sectors.

It then requires protection from exploitation, in particular ‘all forms of exploitation’. As commented on above, the inclusion of this provision clearly shows a growing recognition that the economic exploitation of children may incorporate something conceptually different, a situation that goes beyond exploitation only relating to conditions of work. In other words, economic exploitation is not limited to exploitative working conditions, but extends to other conduct. In this regard the Principle specifically refers to the trafficking of children, perhaps not surprisingly considering that the 1950s saw the adoption of a number of international instruments that sought to deal with that phenomenon and the purposes for which persons are trafficked.¹³⁰ The proposal to include the trafficking of children originated from the representative of Romania, and, while there were no objections to this particular proposal, some of the delegates were of the opinion that the issue was already covered under the term ‘exploitation’.¹³¹

¹³⁰ For instance, Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others 1949, the Protocol amending the Slavery Convention 1953, the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery 1957 and the Abolition of Forced Labour Convention 1957, discussed in the following section.

¹³¹ Veerman, p 178 – 179, note 125. He notes that the Rumanian representative made a further proposal to include the words ‘nor shall he be bought or sold’ after the provision relating to trafficking. However, this was strongly opposed on the grounds that it implied that a contract to buy or sell a child could potentially be entered into – essentially admitting the possibility of an act which had no legal

The Principle also deals more specifically with conditions of work for children, emphasising the need for a minimum age of employment and protection from hazardous work and work that interferes with child's development. Veerman describes the process through which this principle was finalised.¹³² In 1950 there had been no agreement reached at the Social Commission whether to link the minimum age of employment with the school leaving age and the discussion on this issue continued. In 1959 the Human Rights Commission discussed the matter and a Soviet proposal was adopted which read '[t]o these end, the States shall enact legislation prohibiting the employment of minors below a certain age limit to be established by law, and also the employment of minors for unhealthy or hazardous work'. In the deliberations of the Third Committee, the Venezuelan representative argued for a minimum age of 14 years in order to be consistent with the ILO Conventions but this was opposed and ultimately the wording 'appropriate minimum age' was adopted.

Veerman also notes that during the drafting process the determination of a minimum age for employment found much resistance.¹³³ One of the possible reasons for this is the difficulties experienced by states in complying with their obligations under the ILO Minimum Age Conventions as discussed earlier in this chapter in section 2.3.1.¹³⁴ Further discussion on the general disquiet regarding the setting of minimum age standards can be found in section 3.1.1 of Chapter 3 of this thesis.

It can be argued that this Principle, also drawing on the content of the 4th principle in the Geneva Declaration, specifically links the issue of other forms of exploitation, for instance trafficking in children on the one hand, and the regulation of child work, such as hazardous work on the other, under the context of exploitation in general. This is a link also made in Convention 182, which provides that hazardous work constitutes a worst form of child labour as does, for instance, slavery, forced labour and trafficking of children. This link brings exploitation in

validity in the domestic laws of the member states of the United Nations. As a result these words were deleted from his proposal and only the prohibition on trafficking children remained.

¹³² Veerman, p 178 – 179, note 125.

¹³³ Veerman, p 178 – 179, note 125.

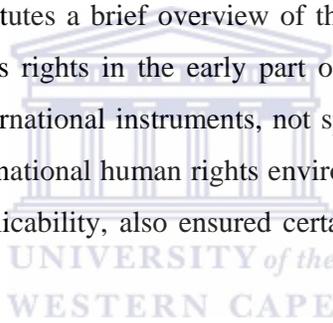
¹³⁴ See note 113 above.

the workplace together with exploitation that constitutes criminal conduct and human rights violations under one umbrella concept: exploitation.

Overall, Van Bueren notes that the 1959 Declaration represented great progress in the conceptual thinking of children's rights.¹³⁵ She argues: '[a]lthough it is a non-binding resolution of the General Assembly, the fact that it was adopted unanimously accords it a greater weight than other General Assembly resolutions'.¹³⁶ In addition, she observes that by the time that the 1959 Declaration was adopted, children were beginning to emerge 'no longer as passive recipients but as subjects of international law recognised as being able to 'enjoy the benefits of 'specific rights and freedoms'.¹³⁷

2.3.3 Other international instruments

The above discussion constitutes a brief overview of the legal instruments affecting child workers and children's rights in the early part of the 20th century. However, there were certain other international instruments, not specifically aimed at children, which also typified the international human rights environment of the time and, in so far as they had general applicability, also ensured certain rights and protections for children.



2.3.3.1 The Universal Declaration of Human Rights 1948

It has been noted that the UN Charter, despite proposals to the contrary, stopped just short of incorporating a bill of rights; rather, in 1946, the Economic and Social Council of the UN established the UN Commission on Human Rights, which was ultimately responsible for choosing to adopt the draft Declaration on Human Rights adopted by the UN General Assembly in 1948 as the Universal Declaration of Human Rights (UDHR).¹³⁸

¹³⁵ Van Bueren, p 12, note 120.

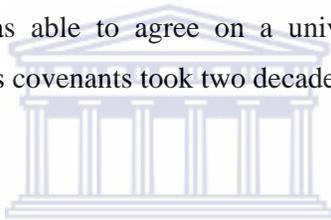
¹³⁶ Van Bueren, p 12, note 120.

¹³⁷ Van Bueren, p 12, note 120.

¹³⁸ Steiner HJ and Alston P, *International Human Rights in Context: Law Politics Morals*, Clarendon Press: Oxford, 1996, p 119. See also Steiner HJ, Alston P and Goodman R, *International Human Rights in Context*, 3rd Edition, Oxford University Press: Oxford, 2008.

As it is only a declaration, the UNHR is not legally binding and can only exert moral and political influence on states.¹³⁹ However, it has been said to represent ‘an authoritative interpretation of the term “human rights” in the UN Charter’.¹⁴⁰

In addition, it has been understood that the UDHR was intended to act as a ‘springboard’ for new human rights treaties, but in reality, this vision was only realised in 1966 with the adoption of the two principal human rights covenants, namely, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR) and the international community had to wait another decade until 1976 for these international instruments to achieve the requisite number of ratifications for them to enter force.¹⁴¹ Nowak points out that it was remarkable that in the course of two years, the international community was able to agree on a universal declaration, while the adoption of two human rights covenants took two decades.¹⁴²



¹³⁹ Steiner and Alston, p 120, note 138. Van Bueren, however, describes different approaches taken regarding the Declaration’s status: firstly, the minimalist approach is the one that regards the Declaration as non-binding, secondly, the middle ground approach argues that the Declaration represents an authoritative interpretation by the UN General Assembly of the human rights provisions of the UN Charter, thirdly, the high ground approach emphasises the use of the Declaration by the UN Commission on Human Rights in determining gross human rights violations and to the amount of use of the Declaration by states in statements, participation in human rights treaties and incorporation of the Declaration’s provisions in domestic legislation as evidence that the rights contained in the Declaration are binding; finally, there is the view that the Declaration is *jus cogens*, it possesses peremptory norms from which there can be no derogation, though Van Bueren is of the opinion that this position is difficult to motivate. See Van Bueren, p 18, note 120.

¹⁴⁰ Nowak M, *Introduction to the International Human Rights Regime*, Martinus Nijhoff Publishers: Leiden/ Boston, 2003, p 76.

¹⁴¹ Steiner and Alston, p 120, note 138. The authors note that it was not until these two covenants became effective that treaties achieved as broad coverage of human rights topics as the UDHR.

¹⁴² Nowak, p 75, note 140. He attributes this success to two factors: firstly, the personal commitment of individual delegates in the Human Rights Commission such as Eleanor Roosevelt from the United States of America and Rene Cassin from France; and secondly, the fact that the international community in the 1940’s was relatively small, and rigid ideological differences had yet to surface.

As far as the general application of the UDHR is concerned, Nowak considers it remarkable that while the UDHR primarily reflects first generation or civil and political rights, the second generation or social, economic and cultural rights were accepted on more or less equal footing as first generation human rights.¹⁴³

Despite having only 2 articles that refer specifically to children,¹⁴⁴ the UDHR applies to ‘all human beings’, therefore also children. In this regard it contains two articles in particular that deal with economic exploitation, which are relevant to children as well as adults. Both are indicative of the developing notion that economic exploitation includes different forms of human rights violations and abuse.

The first of these, Article 4, states as follows: ‘No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms’. This provision gives recognition to provisions of the Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention of 1926, while anticipating the Protocol amending the Slavery Convention (1953), the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery 1957 and the Abolition of Forced Labour Convention 1957.

The second, Article 23, states as follows:

- ‘1. Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
2. Everyone, without any discrimination, has the right to equal pay for equal work.

¹⁴³ Nowak, p 76, note 140. See also Joseph S, Schultz J and Castan M, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, 2nd Edition, Oxford University Press, New York, 2004, p 7.

¹⁴⁴ Article 25(2) provides that the status of childhood confers special care and protection and Article 26(3) states that parents have the right to choose the kind of education that shall be given to their children.

3. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.

4. Everyone has the right to form and to join trade unions for the protection of his interests.'

Both articles provide protection against intolerable forms of work, which in today's terminology would be considered crimes against humanity, and intolerable conditions of employment. In relation to the latter issue, the provisions of Article 23 constitute not only protection, but also incorporate the right to non-discrimination and equal treatment of workers.

Overall, the following quote perhaps signifies the role played by the UDHR in the field of human rights:

'To this day it retains its symbolism, rhetorical force and significance in the human rights movement. It is the parent document, the initial burst of idealism and enthusiasm, terser, more general and grander than the treaties, in some sense the constitution of the entire movement.'¹⁴⁵

2.3.3.2 The International Covenant on Civil and Political Rights (ICCPR)

Nowak explains that the ICCPR contains essential civil and political rights, including the rights of self-determination (Article 1) and the rights to equality and non-discrimination (Article 26), and is monitored by the Human Rights Committee which, issues General Comments, being interpretative views of the Covenant's provisions.¹⁴⁶

Article 24 deals specifically with children and reads:

'1. Every child shall have, without any discrimination as to race, colour sex, language, religion, national or social origin, property or birth, the right to such

¹⁴⁵ Steiner and Alston, p 120, note 138.

¹⁴⁶ Nowak, p 80, note 140.

measures of protection as are required by his status as a minor, on the part of his family, society and the State.

2. Every child shall be registered immediately after birth and shall have a name.

3. Every child has the right to acquire a nationality.'

Paragraph 2 of General Comment No. 17 of the Human Rights Committee states that the rights provided for in Article 24 are not the only ones that the Covenant recognises for children and that, as individuals, children benefit from all of the civil rights contained in the Covenant.¹⁴⁷ Joseph, Schultz and Castan point out that use of the term 'civil rights' suggests that children cannot enjoy political rights and that in fact they are excluded from the application of Article 25 on the right to vote.¹⁴⁸

As far as the economic exploitation of children is concerned, Joseph, Schultz and Castan confirm that Article 24's ambit extends to protecting children from such exploitation, noting that while economic exploitation is only condemned implicitly in General Comment No. 17, the Human Rights Committee has criticised countries for inaction on the issue of child labour.¹⁴⁹ Nowak also argues that the UNCRC contains a comprehensive list of civil and political rights, which by way of a dynamic interpretation, may also be taken into consideration for the interpretation of Article 24 and, therefore, the rights on economic exploitation and child labour in the UNCRC seem to be of particular importance for the interpretation of the general right to protection under Article 24(1).¹⁵⁰ Writing in the context of economic exploitation, Detrick also points to General Comment No. 17, noting that the special measures of protection contained in Article 24(1) have been interpreted by the Human Rights

¹⁴⁷ General Comment 17, 35th Session (1989), UN doc. A/44/40.

¹⁴⁸ Joseph, Schultz and Castan, p 625, note 143.

¹⁴⁹ Joseph, Schultz and Castan, p 641, note 143. They cite the examples of the Human Rights Committee's Concluding Observations on India (1997) and Ecuador (1998).

¹⁵⁰ Nowak M, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, 2nd revised edition, N.P. Engel Publishers: Germany, 2005, p 548.

Committee as possibly also including social, economic and cultural rights despite being intended to primarily ensure the other rights enunciated in the ICCPR.¹⁵¹

2.3.3.3 The International Covenant on Economic, Social and Cultural Rights (ICESCR)

Nowak states that the ICESCR constitutes the most important international treaty for the codification of the 'second generation' of human rights and includes the main economic rights such as the rights to work and fair and favourable working conditions.¹⁵²

Van Bueren notes that the ICESCR applies to all 'men and women' and therefore by implication children, yet she warns that just because an international instrument is capable of being applied to children, does not mean that it incorporates a 'coherent child-centred approach setting out all the rights necessary to ensure the basic dignity of children'.¹⁵³ This observation can also be applied to the more general human rights instruments discussed elsewhere in this section, and points to the fact that despite the availability of these treaties, the ILO still saw fit to adopt Convention 138 and Convention 182, possibly because a coherent child-centred approach was necessary on those issues, despite the fact (at least as far as Convention 182 is concerned) that the UNCRC addressed all forms of economic exploitation (these provisions of the UNCRC will be dealt with in Chapter 3).

The Covenant deals with the rights to work and conditions of work generally in articles 6 and 7, and therefore children would also enjoy the provisions relating to,

¹⁵¹ Detrick S, *A Commentary on the United Nations Convention on the Rights of the Child*, Kluwer Law International: The Hague, 1999, p 600.

¹⁵² Nowak, p 81, note 140. See also generally, Eide A, Krause C and Rosas A, *Economic, Social and Cultural Rights: A Textbook*, 2nd Revised Edition, Martinus Nijhoff Publishers, Dordrecht /Boston /London, 2001. On the ICESCR and states obligations generally, see also Alston P and Quinn G, 'The Nature and Scope of State Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights', *Human Rights Quarterly*, Vol. 9, No. 2, 1987, p 156-229.

¹⁵³ Van Bueren, p 19, note 120.

amongst others, fair wages, safe and healthy working conditions and rest, leisure and the reasonable limitation of working hours.

Article 10 (3) specifically deals with children and it has been said that the provision contains a broad ambit of protection:¹⁵⁴

‘Article 10

The States Parties to the present Covenant recognise that:

.....

3. Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.’

By the time of the adoption of the Covenant in 1966, terms such as ‘work harmful to their morals or health’ and ‘likely to hamper their normal development’ were familiar in the context of child labour. Article 10(3) covers four themes: children must not be discriminated against in the provision of special measures of protection and assistance; children must be protected from economic and social exploitation; there must be a prohibition on their employment in harmful or hazardous work and there should be a minimum age of admission to employment set by law. However, although the protection is very broad, it could be argued that it is so broad that it is not particularly constructive on account of, for example, the failure to define or give guidance on what constitutes economic or social exploitation.¹⁵⁵

¹⁵⁴ Van Bueren, p 19, note 120.

¹⁵⁵ See also Hammerberg T, ‘Children’, in Eide A, Krause C and Rosas A, *Economic, Social and Cultural Rights: A Textbook*, 2nd Revised Edition, Martinus Nijhoff Publishers: Dordrecht /Boston /London, 2001.

Detrick notes that in the section on Article 10 of its (revised) guidelines regarding the form and contents of reports to be submitted by states under Articles 16 and 17 of the ICESCR, the UN Committee on Economic, Social and Cultural rights refers to this particular provision and specifically requests states to indicate if they are a party to Convention 138 or Convention 182 on the protection of children in relation to employment and work.¹⁵⁶

Obviously at the time, the protections afforded children in both the ICCPR and the ICESCR were significant because these were the first binding international instruments to contain specific clauses that ensured rights for children. Today, however, I would argue that their worth has been superseded by the UNCRC and its Optional Protocols. Nevertheless, the value of the Covenants in the human rights discourse generally, still adds credence to the children's rights clauses contained therein, and their monitoring committees' Concluding Observations to reporting states can also supplement international children's rights jurisprudence.

2.3.3.4 The Slavery, Forced Labour and Trafficking Conventions

The early – to – mid 20th century also saw the adoption of a number of human rights instruments that prohibited and addressed conduct which, in Convention 182, came to be regarded as worst forms of child labour. These Conventions, however, were not specifically applicable to children but concerned adults and children equally. The Slavery and Forced Labour Conventions, although adopted many decades ago, still constitute the fundamental international treaties on these issues today. In this sense, it is fit to undertake a brief examination of their contents as they have shaped the understanding of what Convention 182 seeks to address.

The first of these was the Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention of 1926, which was adopted by the League of Nations. Article 1 of the Convention defined slavery as 'the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised' and the slave trade as including 'all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the

¹⁵⁶ Detrick, p 560, note 151.

acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves’.

Interestingly, Article 2, in dealing with states’ obligations to prohibit slavery, introduced terminology that still finds echoes in international instruments today. The Article requires the member states to ‘prevent and suppress the slave trade [and]...to bring about, progressively and as soon as possible, the complete abolition of slavery in all its forms’.¹⁵⁷

Notably, Article 5 links the issue of slavery to that of forced labour and requires states to ‘recognise that recourse to compulsory or forced labour may have grave consequences andto take all necessary measures to prevent compulsory or forced labour from developing into conditions analogous to slavery’.¹⁵⁸

Hanson and Vandaele, while noting that the 1926 Convention did not address child slavery per se, state that the phenomenon in its classic form was occasionally dealt with, for instance, by the 1930 Committee of Experts of the League of Nations appointed to study the effects of the Slavery Convention.¹⁵⁹

¹⁵⁷ Similar wording such as ‘prevent’, ‘combat’, ‘eliminate’ can be found in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organised Crime (2000) and ILO Convention 182.

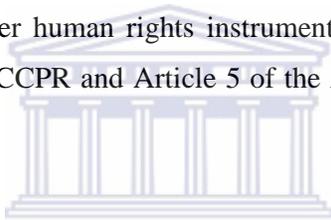
¹⁵⁸ Article 5 allows for certain exceptions to forced labour, namely, compulsory or forced labour may only be exacted for public purposes. However, it provides that where compulsory or forced labour for purposes other than public purposes still exists, the states shall ‘endeavour progressively and as soon as possible to put an end to the practice. So long as such forced or compulsory labour exists, this labour shall invariably be of an exceptional character, shall always receive adequate remuneration, and shall not involve the removal of the labourers from their usual place of residence’.

¹⁵⁹ Hanson K and Vandaele A, ‘Working children and international labour law: A critical analysis’, *The International Journal of Children’s Rights*, Vol. 11, 2003, p 73 – 146 at p 103. They provide an account of how the Committee investigated alleged slave conditions in Liberia and discovered the ‘pawning’ of children – whereby a child was given, for money, by a relative to a third party in servitude for an indefinite period and was held without rights and in practice, could never ‘repay’ the ‘pawn’ debt to free himself. See in general Gutteridge J, ‘Supplementary Slavery Convention, 1956’,

As a result of the League of Nations ceasing to be, and the formation of the United Nations, the Protocol amending the Slavery Convention (1953) was adopted in order to substitute the outdated terms and organisations with the current ones.

Finally, in 1957, the United Nations adopted the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery. This instrument was far more comprehensive and detailed in its content than its predecessor. In particular, in Article 1, it broke down the concept of slavery into specific acts and provided definitions for these.¹⁶⁰

Drzewickie notes that the gradual demise of classic slavery practices did not prevent the international community from including these absolute and immediate prohibitions in several further human rights instruments such as Article 4 of the UDHR, Article 8(1) of the ICCPR and Article 5 of the African Charter on Human



The International and Comparative Law Quarterly, Vol. 6, No. 3, 1957, p 449-471 for an account of the drafting and adoption of the Convention.

¹⁶⁰ For example, debt bondage was defined as, 'the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined'. Likewise serfdom was defined as 'the condition or status of a tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is not free to change his status'. Article 7 provides further definitions of slavery and the slave trade: '(a) "Slavery" means, as defined in the Slavery Convention of 1926, the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, and "slave" means a person in such condition or status; (b) "A person of servile status" means a person in the condition or status resulting from any of the institutions or practices mentioned in Article 1 of this Convention; (c) "Slave trade" means and includes all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a person acquired with a view to being sold or exchanged; and, in general, every act of trade or transport in slaves by whatever means of conveyance'.

and People's Rights.¹⁶¹ So too, was a prohibition contained in Convention 182. Drzewickie observes that the proliferation of international instruments and the reiteration of the prohibitions on slavery practices contained therein should also be seen from an implementation perspective as the early Conventions on slavery contained weak supervisory mechanisms.¹⁶² He argues that this is not so much the case with other international instruments, such as the ICCPR.

It has also been asserted that slavery and the slave trade are forbidden by international law, both as a matter of customary law and as general principles common to major legal systems.¹⁶³ Van Bueren refers to the fact that it has been said that international norms prohibiting slavery constitute *jus cogens*.¹⁶⁴ She suggests that if the prohibition on slavery indeed amounts to *jus cogens*, then the argument that prohibitions on institutions and practices similar to slavery also amount to *jus cogens* is correct.¹⁶⁵ She also notes that this is a view supported by the UN Working Group on Contemporary Forms of Slavery.

The Convention has particular relevance to child labour: firstly, Article 3(a) of Convention 182 refers to both debt bondage and serfdom, and as these terms are not defined, the Supplementary Slavery Convention provides guidance in this regard. Secondly, Article 1 (d) has specific reference to children who are trafficked into slavery to exploit the child or his or her labour.

Three years after the adoption of the first Slavery Convention, in 1926, the ILO adopted the Forced Labour Convention of 1930. It has been noted that the 1930 Convention was adopted by the ILO in response to the deficiencies of the anti-slavery treaties in dealing with forced labour.¹⁶⁶

¹⁶¹ Drzewickie K, 'The Right to Work and rights in Work', in Eide A, Krause C and Rosas A, *Economic, Social and Cultural Rights: A Textbook*, 2nd Revised Edition, Martinus Nijhoff Publishers, Dordrecht /Boston /London, 2001, p 223-243 at p 228-229.

¹⁶² Drzewickie, p 229, note 161.

¹⁶³ Harris D J, *Cases and Materials on International Law*, Sweet and Maxwell: London, 1991 p 698.

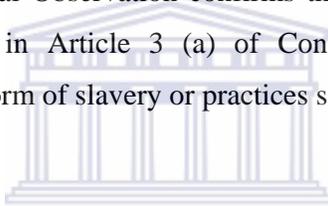
¹⁶⁴ Van Bueren, p 278, note 120.

¹⁶⁵ Van Bueren, p 278, note 120.

¹⁶⁶ Drzewickie, p 230, note 161.

As with the Slavery Convention, the Forced Labour Convention sought to ‘suppress the use of forced or compulsory labour in all its forms within the shortest possible period’.¹⁶⁷ Article 2 of the Convention defines the term forced or compulsory labour as ‘all work or service, which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily’.

The difficulties experienced by states in applying the provisions of the Convention have been referred to in a General Observation of the Committee of Experts on the Application of Conventions and Recommendations.¹⁶⁸ The Committee of Experts, in dealing with Convention 29, has also called on member states to provide certain information in their reports to the Committee, for instance, information on measures taken or contemplated to prevent, suppress and punish trafficking in persons for the purpose of exploitation in light of national laws prohibiting forced or compulsory labour.¹⁶⁹ This latter General Observation confirms the link between forced labour and trafficking, evidenced in Article 3 (a) of Convention 182, which regards trafficking of children as a form of slavery or practices similar to slavery (discussed in section 4.4 of Chapter 4).



Article 1 of the 1930 Forced Labour Convention referred to a transitional period of five years during which time steps should be taken to ‘suppress’ all forms of forced labour without a further transition period. Yet it was only in 1957 that the ILO adopted the Abolition of Forced Labour Convention. Referring to the Forced Labour Convention of 1930 as well as the Slavery Conventions (discussed above), this

¹⁶⁷ Article 1, which also allowed for countries to have a period of transition of 5 years, during which steps are taken to prohibit forced labour. During the transitional period only forced labour for public purposes and as an exceptional measure was allowed.

¹⁶⁸ CEACR: General Observation concerning Convention No. 29. Published 1987, document no. (ilolex): 051987029, published 1987, available on www.ilo.org/ilolex/, accessed on 7 September 2007. Other Committee of Experts General Observations include ones addressing the use of forced labour by persons convicted of criminal offences and in private prisons (CEACR: General Observation concerning Convention No. 29, document no. (ilolex): 051999029, published: 1999 and CEACR: General observation concerning Convention No. 29, document no. (ilolex): 052002029, published: 2002).

¹⁶⁹ CEACR: General Observation concerning Convention No. 29, document no. (ilolex): 052001029, Published: 2001, available at www.ilo.org/ilolex/, accessed on 7 September 2007.

instrument, in Articles 1 and 2, requires ratifying states to take effective measures to secure the immediate and complete abolition of forced or compulsory labour for various purposes.

Drzewickie argues that both the 1930 and 1957 Conventions together bring about an extensive definition of the circumstances of forced labour which are prohibited and that the details of these prohibitions have served as a model for most general human rights treaties, which, I would argue includes Convention 182.¹⁷⁰ He also notes that the jurisprudence on freedom from forced labour emanating from the ILO's Committee of Experts as well as the European Committee of Social Rights under the European Social Charter have identified individual cases of violations and large-scale and structural cases.¹⁷¹ He concludes by noting that reports of the UN and ILO and other international organisations show an unacceptable extent to which forced labour practices are still used, and their apparent link with undemocratic structures and other structural causes of gross human rights violations such as debt bondage, sale of children, child prostitution and the kidnapping of children for labour exploitation.¹⁷²

The international concern with trafficking arose in the context of the trafficking of 'white slaves' in the early 1900's. In 1910 the International Convention for the Suppression of the White Slave Traffic was adopted, but only entered force in 1949. This Convention, not situated under the auspices of any international organisation, was signed in Paris following two international conferences (in 1902 and 1910) and a 1904 agreement on trafficking. While calling for the 'punishment' of those engaged in trafficking, the Convention was problematic in a number of respects: it only applied to trafficking for immoral purposes by means of procurement, enticement or 'leading away' to women or 'girls under age' (Article 1) and it only applied to trafficking for immoral purposes by means of fraud, violence, threats or abuse of authority to women or 'girls over age' (Article 2).

¹⁷⁰ Drzewickie, p 230, note 161. He mentions Article 8(3) of the ICCPR as an example.

¹⁷¹ Drzewickie, p 231, note 161.

¹⁷² Drzewickie p, p 232, note 161.

However, the Convention was supplemented by a Protocol agreed to at the same time as the Convention, which gave some guidance on the applicability of Articles 1 and 2.¹⁷³

In 1921, a further international instrument was adopted dealing with the issue of trafficking. This was the International Convention for the Suppression of the Traffic in Women and Children, which entered force in 1922 and was aimed at again supplementing the 1910 Convention. Instead of merely referring to the state obligation to ‘punish’ as contained in the 1910 Convention, Article 2 of the 1921 Convention required states to ‘take all measures to discover and prosecute’ offenders. Article 2 also does away with the discriminatory provisions of the 1919 Convention that did not extend the protection of the Convention to male children (however does not go so far as to extend the protections to all persons).

In 1949 the United Nations adopted the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, which came into force in 1951. The purpose of the Convention, as stated in the Preamble, is to consolidate previous trafficking Conventions,¹⁷⁴ and to give effect to a draft Convention prepared by the League of Nations in 1937 and make necessary amendments thereto. Articles 1 and 2 of the Convention requires states to punish persons who, in order to ‘gratify the passions of another’: procures, entices or leads away, for purposes of prostitution, another person, even with the consent of that person; exploits the prostitution of another person, even with the consent of that person; keeps or manages, or knowingly

¹⁷³ This Protocol was amended in 1948 in order to make provision for the fact that the Convention and Protocol now fell under the auspices of the United Nations. It is known as the Protocol Amending the International Agreement for the Suppression of the White Slave Traffic, 1949.

¹⁷⁴ Namely, the International Agreement of 18 May 1904 for the Suppression of the White Slave Traffic, as amended by the Protocol approved by the General Assembly of the United Nations on 3 December 1948; the International Convention of 4 May 1910 for the Suppression of the White Slave Traffic, as amended by the Protocol approved by the General Assembly of the United Nations on 3 December 1948; the International Convention of 30 September 1921 for the Suppression of the Traffic in Women and Children, as amended by the Protocol approved by the General Assembly of the United Nations on 20 October 1947 and the International Convention of 11 October 1933 for the Suppression of the Traffic in Women of Full Age, as amended by the Protocol approved by the General Assembly of the United Nations on 20 October 1947.

finances or takes part in the financing of a brothel; knowingly lets or rents a building or other place or any part thereof for the purpose of the prostitution of others.¹⁷⁵

Van Bueren notes that the phrase ‘even with the consent of that person’ has important implications for the protection of children as it recognises that many children are induced to give their consent in order, for example, to be able to contribute to household income.¹⁷⁶

Unfortunately, the concept of trafficking in persons for the purpose of forms of exploitation other than sexual exploitation had, at the time, not yet found a place in international law. However, the Convention laid a sound basis for procedural mechanisms to combat trafficking. For instance the Convention provides for extradition where applicable (Articles 8 - 10); requests between states (article 13), and for states to establish or maintain a service to co-ordinate and centralise the results of investigations of offences under the Convention (Article 14).¹⁷⁷

Van Bueren has argued that prior to the adoption of the UNCRC, the only all-embracing prohibition on trafficking was contained in the 1959 Declaration on the Rights of the Child.¹⁷⁸ Nevertheless, the 1949 Convention represented an example of the international community’s desire to address the issue of trafficking both substantively and procedurally. However, certain shortcomings are evident, in particular the failure to provide a comprehensive definition of trafficking, as well as the limiting of the application of the Convention to trafficking for the purposes of prostitution. The Convention’s enforcement mechanisms have also been described as extremely weak and the Convention as a whole having very limited value.¹⁷⁹ It was

¹⁷⁵ The scope of the Convention extends to cross-border trafficking as evidenced by the provisions of Article 4, which states: ‘[t]o the extent permitted by domestic law, international participation in the acts referred to in Articles I and 2 above shall also be punishable’.

¹⁷⁶ Van Bueren, p 278, note 120.

¹⁷⁷ Article 14 also provides that states should compile all information necessary to prevent and ‘punish’ the offences under the Convention, as well as keep in contact with the similar services in other states. This provision illustrates the drafters’ insight into the value of data collection.

¹⁷⁸ Van Bueren, p 280, note 120.

¹⁷⁹ Defeis E F, ‘Protocol to Prevent, Suppress and Punish Trafficking in Persons – A New Approach’, *ILSA Journal of International and Comparative Law*, Vol. 10, 2004, p 485 – 491 at p 485-486.

only with the adoption of the Palermo Protocol in 2000, that a comprehensive trafficking treaty came into being.¹⁸⁰

2.4 Conclusion

This chapter has attempted to provide a brief overview of the emergence of concern regarding child labour emerged during the industrial revolution as well as the resultant move to regulate it and labour more generally in international law. The Chapter also discussed the formation of the ILO and the resultant international regulatory framework on child labour and economic exploitative practices constituting gross human rights violations in the early- to- mid 20th century.

The overall impression that emerges in relation to child labour is that there has been a strong focus on regulating the conditions of work or employment for children and the age at which they should be admitted to employment. Concerns regarding their use in economic exploitative practices such as slavery, forced labour and trafficking were not as well articulated. It was left to general international instruments to protect the interests of children and adults alike, and while some of these instruments are still regarded as setting the tone for action today, such as the 1957 Slavery Convention and the 1957 Forced Labour Convention, they did not incorporate a child-centred approach. In addition, treaties such as the ICCPR and ICESCR, although recognising the vulnerabilities of children and their need for special protection, did not go far enough and commentators now interpret their provisions against the all-encompassing provisions of the UNCRC.

In sum, I would argue that this historical account shows that concern with child labour has been a defining feature of the child rights movement. This analysis tends to suggest that addressing the plight of working children was central to the overall development of what became a broader child rights movement. It is the issue of child labour - not juvenile justice, child victims of war, or the sexually abused, to name but three groups of children in especially vulnerable situations – which founded the recognition the need for increased protections for children. Hence, child labour can be

¹⁸⁰ The Palermo Protocol is discussed in more detail in section 4.6.2 of Chapter 4.

seen as the catalyst for the development of international and national protections for other children in especially difficult circumstances. Nevertheless, although ongoing progress occurred in the sphere of regulating the working conditions and employment of children throughout the 19th and early 20th Centuries, an overarching international legal framework for protecting children against economic exploitation constituting gross human rights violations was not developed until the adoption of the UNCRC towards the end of the 20th Century.



Chapter 3

The international legal framework and other developments on child labour and child rights preceding the adoption of Convention 182

The preceding chapter examined the historical developments regarding child labour, the early work of the ILO and the adoption of more general international instruments dealing with human rights violations that would later be termed worst forms of child labour under Convention 182.

The thesis will now undertake an examination of legal and other developments regarding child labour and the exploitation of children preceding the adoption of Convention 182 in order to contextualise it in the developing international child labour and child rights legal framework. It is contended that this will facilitate the eventual evaluation of its significance.

This chapter will seek to determine the influence of Convention 138 as a child labour legal standard, explore the manner in which the UNCRC incorporated provisions that deal with the exploitation of children, and trace other developments within the ILO and the child rights sector regarding child labour and the exploitation of children.

3.1 ILO Minimum Age Convention No. 138 of 1973 and Recommendation 146

The discussion in section 2.3.1 of Chapter 2 illustrated the wide range of efforts by the ILO to regulate child labour especially by means of setting a minimum age for admission to employment. However, these efforts were fragmented, seemingly ad hoc and spread across different sectors, at times setting different standards for different industries. This state of affairs changed with the adoption of the Convention concerning Minimum Age for Admission to Employment 1973, Convention No. 138 and its accompanying Recommendation No. 146. Van Bueren notes that this Convention was an effort by the ILO to establish a general instrument applicable to all

forms of work and employment on minimum age and to replace the existing applicable ILO treaties which were limited to specific economic sectors.¹

3.1.1 The use of a minimum age to protect children

As a precursor to the discussion on Convention 138, Boyden, Ling and Myers provide an interesting insight into the application and implementation of minimum age standards.² They begin by noting that the minimum age standard represents the ideal of childhood as being a time of privilege, dedicated solely to education and play, a time in which children are dependant and protected from having to engage in economic activity. They proceed to explain that where this model of childhood exists, it seems natural and is assumed to represent the universal norm of how children should be raised, yet there is no evidence that this type of childhood produced children who are happier and more adjusted for adult life than other models. In truth, they point to the fact that there is evidence that children thrive in a variety of childhood situations, including those in which they become economically active at an earlier age. Accordingly, they argue that the minimum age standard in Convention 138 is such that it restricts the freedom or choice of children to work below a certain age for any reason.

Expanding this argument, Bourdillon, Myers and White contend that a universalised standard of excluding children below a particular age from employment or work as set in Article 2 of Convention 138 is unjustified.³ The reasons they give are that insufficient attempts have been made to determine the impact of setting a minimum age for admission to employment or work on children; there is existing evidence that the policy often harms the children it claims to protect and the effort of enforcing

¹ Van Bueren G, *The International law on the Rights of the Child*, Martinus Nijhoff Publishers: Dordrecht, The Netherlands, 1995, p 265.

² Boyden J, Ling B and Myers W, *What Works for Working Children*, UNICEF and Save the Children Sweden, 1998 p 195 – 198.

³ Bourdillon M, Myers W and White B, 'Re-assessing Minimum Age Standards for Children's Work', forthcoming in *The International Journal of Sociology and Social Policy*, special issue on children and work, 2008, p 1-2 (copy on file with the author cited with the permission of William Myers).

'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.

I believe that these observations are correct, and from an African perspective, acknowledge the varied approaches to child work (which is not harmful or exploitative) generally seen as necessary as part of a child's development and young people's passage through childhood into adulthood. It is, therefore, appropriate to highlight these reservations about Convention 138 and the minimum age for admission to employment at the outset of the discussion on the Convention.

3.1.2 Convention 138

The proposal for a minimum age convention was placed on the agenda of the 57th International Labour Conference in 1972 and it was justified by the statement that 'as they now stand, the basic Conventions on minimum age for admission to employment can no longer be an effective instrument of concerted international action to promote the well-being of children'.⁴

Right at the outset, Article 1 of the Convention requires states to 'pursue a national policy designed to ensure the effective abolition of child labour and to raise progressively the minimum age for admission to employment or work to a level consistent with the fullest physical and mental development of young persons'. This not only places the goal of eliminating child labour at the vanguard, but also intimates that despite the Convention setting a minimum age, it is just that: a minimum. States are required to progressively raise the minimum age 'to the fullest physical and mental development of young persons.' This is what Boyden, Ling and Myers are referring to in their argument that the Convention (or rather minimum age standards)

⁴ Quoted in Swepston L 'Child Labour: Its regulation by ILO standards and national legislation', *International Labour Review*, Volume 121, No. 5, International Labour Office, 1982, p 577 – 593, p 580. However, he also notes that this statement does not mean that the previous ILO instruments on minimum age are no longer valid – '[c]ountries which cannot ratify a general instrument on minimum age for employment or work will still find it valuable to ratify and apply the earlier instruments on the subject.... Convention No. 138 is intended to replace the earlier instruments gradually, not all at once'.

do not allow freedom of choice to children to allow them to decide to become economically active.⁵

Commenting on Article 1, Kooijmans asserts that because of the objective of Convention 138 being the effective abolition of child labour, the fixing of a minimum age is by itself not sufficient to achieve the objective, and so the Convention requires the pursuit of a 'national policy' as well.⁶ He notes that the Convention does not make any specific demands on the shape and content of such a policy, leaving it essentially to the states themselves to determine the policy – taking into account national and local circumstances.⁷

Creighton notes that reference to a 'national policy' in Article 1 is reminiscent of some of the 'promotional' ILO Conventions which have been adopted since the late 1950s, such as the Discrimination (Employment and Opportunity) Convention No. 111 of 1958, and seems to indicate an intention to adopt a less rigid approach to the child labour issue, by requiring the adoption of a policy aimed at a particular outcome (the abolition of child labour) rather than the imposition of an immediate obligation to that effect.⁸ He proceeds to argue that the content of Article 1 is weak, quoting the preparatory work to the Convention which stated that 'Article 1 does not impose an obligation to take any specific measures beyond those described in the subsequent provisions'. Therefore compliance can be achieved simply by adhering to the substantive requirements of the Convention, even though this would not necessarily secure 'the effective abolition of child labour' as envisaged by Article 1.

However, like commentators such as Myers and White, I would suggest that Convention 138 has in fact been the flagship standard of the ILO in respect of child

⁵ Note 2 above.

⁶ Kooijmans J, 'The Struggle against Child Labour: A winnable fight', in Alen A, Bosly M, De Bie M, Vande Lanotte J, Ang F, Delens-Ravier I, Delplace M, Herman C, Reynaert D, Staelens V, Steel R and Verheyde M (eds), *The UN Children's Rights Convention: theory meets practice*, intersentia: Antwerpen-Oxford, 2007, p 267 – 287 at p 272.

⁷ Kooijmans, p 272, note 6.

⁸ Creighton B, 'Combating Child Labour: 'The Role of International Labour Standards'', *Comparative Labor Law Journal*, Volume 18, Spring 1997, p 362 – 396 (p 371).

labour precisely on account of the fact that it has set the over-arching objective of the ILO with regard to child labour, namely, abolition.

Boyden, Ling and Myers assert that Article 1 makes certain assumptions, including that raising the minimum age of admission to employment is such a powerful weapon that it should be the focal point of national action against the economic exploitation of children and that the mental and physical development of children will be enhanced by excluding them from all work until, at least, midway through adolescence.⁹ They submit that these assumptions are open to question in light of the ‘enormous diversity between and within countries’ and that the minimum age strategy has proved weak in non-industrial and developing countries where the vast majority of child work and exploitation is found.¹⁰

Article 2 of the Convention sets the minimum age of admission to employment. Article 2(3) states:

‘The minimum age specified in pursuance of paragraph 1 of this Article shall not be less than the age of completion of compulsory schooling and, in any case, shall not be less than 15 years’.

Van Bueren explains that the Convention, by providing that the minimum age for admission to employment or work should not be lower than the age of completion of compulsory schooling, has removed the possibility of children being in legal employment whilst, at the same time, under a legal obligation to attend school.¹¹

However, Article 2(4) accords recognition to the fact that the ‘economy and educational facilities’ of certain states may be insufficiently developed and thus these states may, after consultation with the organisations of employers and workers concerned, initially specify a minimum age of 14 years.¹² The word ‘initially’ links

⁹ Boyden, Ling and Myers, p 188, note 2.

¹⁰ Boyden, Ling and Myers, p 188, note 2.

¹¹ Van Bueren, p 265 note 1. She adds that if schooling were to end before children were legally entitled to work there might be ‘an enforced period of idleness’ especially in countries where for some children only the minimum amount of education is available.

¹² In addition, Article 2 (5) requires that if a state has set 14 years as a minimum age, it shall include in its reports on the application of this Convention a statement to the effect ‘(a) that its reason for doing so

back to Article 1, which requires the progressive raising of the minimum age of admission to employment. Therefore states that have set 14 as a minimum age cannot merely retain it, they must strive to ensure that it is raised over time. Van Bueren notes that Article 2(4) was only intended as a transitional measure to enable developing states to accede to the Convention and to work towards adopting the higher minimum age.¹³

Having set the minimum age for admission to employment, Article 3 (1) deals with the issue of hazardous work:

‘The minimum age for admission to any type of employment or work which by its nature or the circumstances in which it is carried out is likely to jeopardise the health, safety or morals of young persons shall not be less than 18 years’.

While the wording of this Article purports to set a minimum age for admission to work which ‘by its nature or the circumstances in which it is carried out is likely to jeopardise the health, safety or morals of young persons’, effectively it is prohibiting work which is not permissible for children between 15 years and 18 years or work which can be otherwise termed ‘child labour’.¹⁴ However, Article 3(3) allows for a derogation from this prohibition by allowing ‘employment or work as from the age of 16 years on condition that the health, safety and morals of the young persons concerned are fully protected and that the young persons have received adequate specific instruction or vocational training in the relevant branch of activity’.

Article 4 (1), allows for a further general derogation from the application of the Convention in relation to ‘limited categories of employment or work in respect of which special and substantial problems of application arise’.¹⁵ Therefore a state can

subsists; or (b) that it renounces its right to avail itself of the provisions in question as from a stated date’.

¹³ Van Bueren, p 265, note 1.

¹⁴ Article 3(2) requires states to determine what work shall be hazardous for its territory in consultation with organisations of workers and employers.

¹⁵ However, in terms of Article 4(3) such derogation is not permitted in relation to the provisions of Article 3, namely, hazardous work.

exclude the application of the minimum age standard for certain industries. However, if a state does exclude any categories of employment from the application of the Convention, it must list in its first report to the International Labour Office the categories which have been excluded, it must give the reasons for such exclusion, and must also state in subsequent reports the position of its law and practice in respect of the excluded categories and the progress, if any, in giving effect to the provisions of the Convention in relation to those categories. It has been noted that this provision was intended to allow countries to exclude the application of the Convention from particular categories to which application is not feasible for reasons such as legal difficulties or difficulties of enforcement.¹⁶

In discussing the possibility of states excluding limited categories of employment or work in which 'special and substantial problems of application arise', Van Bueren notes that the General Survey by the Committee of Experts on the Minimum Age Convention found that the most common exclusion by states is work in family undertakings, followed by domestic service.¹⁷ She argues that, although there are understandable reasons for excluding these categories, it is not co-incidental that in both of these sectors children are subject to economic exploitation.¹⁸ Boyden, Ling

¹⁶ Swepston, p 582, note 4.

¹⁷ Van Bueren, p 266, note 1. For example, a South African study found that most children who engage in economic activity do so unpaid in family enterprises, mostly in agriculture and retail, which are likely to be mostly micro enterprises. Of the children doing three hours or more work per week, 59% worked in agriculture and 32% in trade. Of those in agriculture, many were working in subsistence agriculture, on family farms, rather than as paid employees. So, for example, only 12% of children working in agriculture were in commercial farming areas while 77% were in other rural areas. Similarly, in retail many were working in family businesses rather than as paid employees, see Statistics South Africa, Survey of Activities of Young People in South Africa: Country report on children's work-related activities, Department of Labour, 2001 accessed at <http://www.labour.gov.za/download/9499/Research%20report%20-%20Survey%20of%20Activities%20of%20Young%20People%20in%20South%20Africa%201999%20-%20Country%20Report.pdf> on 5 October 2007.

¹⁸ This is evidenced by a study on domestic work in the Western Cape in South Africa, Koen K and Van Vuuren B, *Children in domestic service: A case of the Western Cape*, terre des hommes schweiz (tdh-ch), 2002. In addition, a recent study which was aimed at undertaking a situational analysis of trafficking in Swaziland also confirms this assertion. The study interviewed children employed as domestic workers, herders, farm workers, vendors and gardeners. The findings showed that initial

and Myers agree: they note that the practical effect of the provision is that the sectors and occupations in which children ordinarily work (agriculture, informal sector and domestic service) will tend not be covered by national laws and that the law will usually apply to industrial undertakings in which only a small percentage of children are employed.¹⁹

Another derogation is permitted in Article 5 (1), which provides that a state 'whose economy and administrative facilities are insufficiently developed' may (by means of a declaration in terms of Article 5 (2)), after consultation with the organisations of employers and workers concerned, initially limit the scope of application of the Convention. However, Article 5(3) does not allow for derogation from the provisions of the Convention in the following types of employment: mining and quarrying; manufacturing; construction; electricity, gas and water; sanitary services; transport, storage and communication; and plantations and other agricultural undertakings mainly producing for commercial purposes, but excluding family and small-scale holdings producing for local consumption and not regularly employing hired workers.

However, unlike the provisions of Article 4, the derogation contained in Article 5 is not excluded from the provisions of Article 3, namely, in relation to hazardous work. Perhaps this is on account of the limitation already contained in Article 5(3), preventing any application of the Article to certain listed industries and types of work. However, states who wish to make use of the derogation, in terms of Article 5(4) must indicate in their reports to the International Labour Office the general position as regards the employment or work of young persons and children in the branches of

contacts leading to their employment in distant places were usually made at the children's homes, and often involved family or relatives. Potential employers promised employment, cash payment, and/or care and upkeep. While most of the promises were kept, others were not. Working conditions of the children were often characterised by long hours of hard work, without rest, almost throughout the week. This state of affairs left them without time to play, relax, and interact with others, still less to do schoolwork. See Keregero JB and Keregero MM, *A rapid assessment of child trafficking and other migration-related child labour in Swaziland*, ILO, 2007 (unpublished draft on file with the author). For further discussion on children in domestic service in South Africa see Bray R, *Who does the Housework? An Examination of South African Children's Working Roles*, Centre for Social Science Research Working Paper No. 45, 2003 and Budlender D and Bosch D, *South Africa Child Domestic Workers: A National Report*, ILO, 2002.

¹⁹ Boyden, Ling and Myers, p 189, note 2.

activity which are excluded from the scope of application of this Convention and any progress which may have been made towards wider application of the provisions of the Convention.

Van Bueren notes that the rationale behind the general exclusions contained in Articles 4 and 5 of the Convention in particular, is based on the fact that Convention 138 was intended to replace earlier Conventions only applicable to specific sectors of the economy and it was believed that the only way the Convention would be ratified by a large number of states, including developing nations, was to allow states to exclude specific sectors of the economy from its scope of application.²⁰ However, she critically points out that the aim was not achieved as the Convention has ‘gaping holes in its net of protection’.²¹

Article 6 excludes the application of the Convention to work done by children and young persons in schools for general, vocational or technical education or in other training institutions, or to work done by children of at least 14 years of age, which is an integral part of a course of education or training for which a school or training institution is primarily responsible; a programme of training which has been approved by a competent authority in the state; or a programme of guidance or orientation designed to facilitate the choice of an occupation or of a line of training. Likewise, Article 8 allows for states to grant exceptions to the minimum age requirements set out in Article 2 in relation to artistic performances. However, if such exceptions are granted, permits must be issued which limit the hours of work for artistic performances and prescribe the working conditions.²²

²⁰ Van Bueren, p 267, note 1.

²¹ Van Bueren, p 267, note 1. At the time of writing, in 1995, she also comments on the irony that this intention was not realised as the Convention had only been ratified by a few states.

²² A legislative example of this can be found in the South African Basic Conditions of Employment Act 75 of 1997 and the subsequent Sectoral Determination 10: Children in the Performance of Advertising, Artistic and Cultural Activities issued by the South African Department of Labour, which addresses all the provisions of Article 8 of the ILO Minimum Age Convention - amongst other things, the Determination sets minimum wages, working hours and termination rules for children engaged in artistic performances, discussed in section 5.3.2 of Chapter 5.

Article 7 deals with the issue of light work by children. Article 7(1) allows for children aged between 13 to 15 years to perform light work provided it is '(a) not likely to be harmful to their health or development; and (b) not such as to prejudice their attendance at school, their participation in vocational orientation or training programmes approved by the competent authority or their capacity to benefit from the instruction received.' Article 7(2) also allows children who are 15 years, but who have not yet finished compulsory schooling, to perform light work. A state needs to determine what constitutes 'light work' within its territory and must also prescribe the number of hours of work which can be spent on light work as well as the relevant working conditions.

Article 7(4) allows for an exception to Article 7(1), in that states which have set a minimum age of admission to employment of 14 years in terms of Article 2(4) may allow children between the ages of 12 and 14 years to perform light work. This means that where the 'economy and educational facilities' of certain states may be insufficiently developed, those states can set a lower minimum age for light work. Unfortunately Convention 138 does not define 'light work' and neither does Recommendation 146 on Minimum Age. However Van Bueren describes two categories of light work: the assistance of children in the family economy and the engagement of children outside of school hours in order for them to earn money or gain experience – she argues that the former is more common in developing states and the latter in industrialized states.²³ However, one must also not lose sight of the fact that, as Van Bueren has noted earlier,²⁴ often children engaged in family undertakings are economically exploited and in instances where the light work is harmful to children's health or development or prejudices their schooling, such work is not permissible for children below the minimum age of work.

There is general consensus that Convention 138 contains flexible provisions and savings clauses.²⁵ Likewise, Van Bueren notes that it was not intended as a static

²³ Van Bueren, p 267, note 1.

²⁴ Note 17.

²⁵ Fyfe A, *Child Labour*, Polity Press: Cambridge, 1989, p 133. See also Bequle A 'Emerging Perspectives in the Struggle against Child Labour', in Myers W (ed), *Protecting Working Children*, Zed Books Ltd: London and New Jersey in association with UNICEF, 1991, p 69 – 86 (p 71);

instrument establishing a fixed minimum standard, but a ‘dynamic treaty encouraging progressive improvement’.²⁶ Ultimately the provisions seek to ensure a global standard for the minimum age of child work, while at the same time giving recognition to developing countries’ economies. Whilst this is a true reflection of the nature of the Convention, I must refer back to section 3.1.1 and the grave reservations that have been expressed regarding the use of setting a minimum age standard for child labour. Likewise, I would also agree with Myers who expresses extreme disquiet with the overall goal set by Convention 138, namely the total abolition of child labour, as such an objective fails to recognise, on the one hand, the wishes of children who want to work, and on the other, that not all work is harmful.²⁷

3.1.3 Recommendation 146

Convention 138 was supplemented by ILO Recommendation 146 concerning Minimum Age for Admission to Employment of 1973. The Recommendation covers five themes: national policy, minimum age, hazardous employment or work, conditions of employment and enforcement and it has been said that the Recommendation especially ‘advocates the expansion of employment, education and welfare facilities so that the economic participation of children will be neither necessary nor attractive’.²⁸

In relation to national policy the instrument recommends that states should prioritise planning for, and meeting the needs of, children and youth in national development policies and programmes and to the progressive extension of the inter-related measures necessary to provide the best possible conditions of physical and mental growth for children and young persons.²⁹ This would include the progressive extension of other economic and social measures to alleviate poverty wherever it

Swepton L, p 580 – 582, note 4 above; Lansky M, ‘Perspectives: Child Labour: How the challenge is being met’, *International Labour Review*, Vol. 136, No. 2, 1997, p 233 – 257 (p 235 – 236).

²⁶ Van Bueren, p 265, note 1.

²⁷ Myers W, ‘Considering Child Labour: Changing terms, issues and actors at the international level’, *Childhood: A global journal of child research*, Volume 6, No. 1, 1999, p 13 – 26 at p 17.

²⁸ Boyden, Ling and Myers, p 190, note 2.

²⁹ Paragraph 1.

exists.³⁰ A national policy should also ensure family living standards and income, which are such as to make it unnecessary to have recourse to the economic activity of children and the development and progressive extension, without any discrimination, of social security and family welfare measures aimed at ensuring child maintenance.³¹ The recommendation also singles out the needs of children and young persons who do not have families or do not live with their own families and of migrant children and young persons who live and travel with their families for particular attention.³²

As far as minimum age is concerned, the Recommendation requires that the minimum age should be fixed at the same level for all sectors of economic activity and that states should set a goal for the progressive raising to 16 years of the minimum age for admission to employment or work specified in pursuance of Article 2 of the Minimum Age Convention, 1973.³³

In dealing with hazardous employment or work the Recommendation provides that where the minimum age for admission to types of employment or work, which are likely to jeopardise the health, safety or morals of young persons, is still below 18 years, immediate steps should be taken to raise it to that level.³⁴

In relation to Article 5 of the Convention, which allows for derogations to the minimum age for hazardous work, the Recommendation provides that where, a minimum age is not immediately fixed for certain branches of economic activity or types of undertakings, appropriate minimum age provisions should be made applicable to types of employment or work presenting hazards for young persons.³⁵

Regarding conditions of employment, it is recommended that measures should be taken to ensure that the conditions in which children and young persons under the age

³⁰ Paragraph 2 (b).

³¹ Paragraph 2 (c).

³² Paragraph 3.

³³ Paragraph 7. The Recommendation proceeds to provide that where it is not immediately feasible to fix a minimum age for all employment in agriculture and in related activities in rural areas, a minimum age should be fixed at least for employment on plantations and in the other agricultural undertakings referred to in Article 5 of Convention 138.

³⁴ Paragraph 9.

³⁵ Paragraph 11.

of 18 years are employed or work, reach and are maintained at a satisfactory standard and that the conditions be closely supervised.³⁶ The Recommendation lists, in Paragraph 13, which particular conditions of work should receive attention, namely, fair remuneration, strict limitation of working hours and the prohibition of overtime, rest time, annual holidays, the provision of social security schemes such as unemployment insurance and workman's compensation insurance, the maintenance of satisfactory standards of safety and health, and supervision.

Finally, in relation to enforcement, the Recommendation provides that, in order to ensure the effective application of Convention 138 and the Recommendation, states should, amongst others, strengthen labour inspection services; include the provision of information and advice in the responsibilities of labour inspectors and take measures to facilitate the verification of ages.³⁷ In particular, the Recommendation provides that special attention should be paid to the enforcement of provisions concerning employment in hazardous types of employment or work.³⁸

Bequele argues that Convention 138 and the Recommendation provides general as well as specific guidelines in order to pursue the effective abolition of child labour through the regulation of the minimum age for employment being viewed as an integral part of a comprehensive set of national policies.³⁹ This should be contrasted with the writings of Boyden, Myers and White, to name a few commentators who profess doubts regarding the efficacy of minimum age standards and goal of the abolition of child labour, discussed in section 3.1.1 above.

Van Bueren also argues that the fact that the majority of the detailed and positive provisions of the Recommendation were not accepted by states as necessary for inclusion in a binding treaty illustrates the prevailing lack of political will at the time for protecting children from economic exploitation.⁴⁰

³⁶ Paragraph 12.

³⁷ Paragraphs 14 and 16.

³⁸ Paragraph 15.

³⁹ Bequele, p 70, note 25.

⁴⁰ Van Bueren, p 268, note 1.

Convention 138 has been marked by a slow ratification rate. Fyfe notes that by 1979 only 13 countries had ratified it and by 1988 the figure had only risen to 36,⁴¹ while Lansky notes that by 1997 only 53 states had ratified it.⁴² At the time of writing, 150 countries had ratified the Convention, almost twice the number that had ratified it a decade ago.⁴³

Lansky, writing in 1997 when Convention 138 had only been ratified by 53 states (juxtaposed against the 187 ratifications of the UNCRC at the same time),⁴⁴ argued that the gap between the two reflected the difficulty of translating international consensus on basic ethical and moral principles into effective action when economic and socio-cultural issues are at stake.⁴⁵ Other reasons that have been given for the slow uptake rate included the fact that some societies which traditionally incorporated children into family undertakings were uncomfortable with the broad scope of 'all employment or work' set by the Convention and yet other countries struggling with poverty and unable to implement the Convention may have simply wanted to avoid the criticism attendant upon non-compliance with the Convention's provisions.⁴⁶

⁴¹ Fyfe, p 133, note 25. At the first UN Seminar on Child Labour held in Geneva between 28 October and 8 November 1985, Fyfe notes that the UK delegate raised the issue of the poor ratification of the Convention and posed the question as to what the point of ratifying conventions was if states could not implement them; on the other hand The Netherlands representative asserted that ratification of international instruments is an indication of the political will to comply broadly with their provisions and it was necessary to show support for the Principles that they embody. See also Van Bueren, p 268, note 1, and Bequele, p 71, note 25, who give the same figures for ratification of Convention 138 in 1988.

⁴² Lansky, p 239, note 25.

⁴³ <http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C138> accessed on 17 September 2007.

⁴⁴ Boyden, Ling and Myers, p 190, note 2, writing at the same time, however, note that the states that had ratified Convention 138 up to 1997 were not among the countries that were of concern regarding child labour practices.

⁴⁵ Lansky, p 239, note 25.

⁴⁶ Boyden, Ling and Myers, p 191, note 2. However, as Swepston points out, the Committee of Experts has made it clear that not every kind of work should be prohibited and, for example, work within the family should not be considered undesirable. What is prohibited, however, is work which is physically and mentally harmful to children and which interferes with their schooling. See Swepston, p 578, note 4. If this interpretation is given to 'all employment or work' then the argument that the Convention has not been ratified because its scope is too broad and covers family undertakings does not hold water.

Simultaneously, the reasons for the significant rise in number of ratifications to today's figures are not clear but could legitimately be argued to be linked to the adoption of the UNCRC and Convention 182, both of which have contributed to the development of a global children's rights culture not limited to civil and political rights but inclusive of socio-economic rights as well. One possible reason for the marked rise in ratifications relates to an initiative launched by the Director General of the ILO in 1995/6, which saw the Director-General call on each member state to ratify the fundamental Conventions of the ILO, which included the Forced Labour Convention and Convention 138.⁴⁷

Writing in relation to Convention 138, Bequele lists the importance of the ratification and incorporation of international labour standards into domestic law relating specifically to minimum age for admission to employment, the prohibition of child employment in certain activities and the regulation of lawful child work.⁴⁸ First, it helps establish labour norms and standards to which society can aspire and which can be used as a framework for policy; second, it constitutes a benchmark against which performance and progress can be measured and finally, it is one way of moving towards a common set of universal standards and ensuring that certain 'absolutes' enshrined in international law regarding the rights of children are observed and respected.

Giampetro-Meyer, Brown and Kuasek expand on this view and submit that while the adoption of Conventions and Recommendations is important for the eradication of child labour, the enactment of legislation alone is insufficient to reduce the problem of poverty-related harmful behaviour as the laws must be accompanied by their adequate

⁴⁷ See General Report of the Conference Committee on the Application of Conventions and Recommendations, 1996, document no. (ilolex): 111996 accessed at www.ilo.org/ilolex on 6 September 2007; General Report of the Conference Committee on the Application of Conventions and Recommendations, 1997, document no. (ilolex): 111997 accessed at www.ilo.org/ilolex on 6 September 2007; and General Report of the Committee of Experts on the Application of Conventions and Recommendations, 2001, document no. (ilolex): 042001 accessed at www.ilo.org/ilolex on 6 September 2007.

⁴⁸ Bequele, p 71, note 25.

enforcement, a government dedicated to the eradication of child labour, and programmes to reduce the need for child labour.⁴⁹

Confirmation of this contention, namely that more is needed than just legislation, can also be found in Bequele's writing, which highlights certain innovative policies and programmes that attempt to meet children's developmental needs through a range of packages including nutrition, education and health as well as recognising the reality and persistence of child labour and the critical role children sometimes play in assisting with family survival.⁵⁰

Contrast these arguments with the view of Boyden, Ling and Myers.⁵¹ They argue that the goal that Convention 138 is designed to realise is one of social and economic justice – a free and democratic society in which all work-seeking adults can find employment without exploitation, a vision closely linked to the historical aims of trade unions. Seen through this lens, child employment is regarded as a threat to adult employment and fair wages and perpetuates poverty and injustice. Accordingly, one of the aims of Convention 138 was to neutralise this threat and therefore it is meant to be more about the health and development of society than the health and development of children. This argument is reminiscent of the one invoked by Nardinelli regarding the Factory Movement in the industrial revolution: that by advocating for the regulation of child labour, this would lead to the regulation of adult labour, which was the Movement's ultimate goal.⁵² However, I would posit that while historically the regulation of child labour may have been seen by some as a means to the end of improving adult labour, when discussing an international treaty adopted in 1973, in the midst of the increasing scope and reach of international human rights law, such a view is cynical and perhaps deliberately controversial.

⁴⁹ Giampetro-Meyer A, Brown T and Kubasek N, 'The Exploitation of Child Labor: An Intractable International Problem?', *Loyola of Los Angeles International and Comparative Law Journal*, Volume 16, June 1994, p 657 -674 (p 672).

⁵⁰ Bequele, p 76 – 77, note 25.

⁵¹ Boyden, Ling and Myers, p 190, note 2.

⁵² Chapter 2, section 2.1.1.

What remains is an undeniable truth: that the setting of minimum age standards has persisted throughout the 20th century, from the initial work of the ILO (discussed in section 2.3.1 of Chapter 2) to the UN Convention on the Rights of the Child (discussed in section 3.3.1 below). This illustrates an ongoing international agenda, supported by the individual states party to the adoption of such treaties, to address the minimum age of admission to employment as the principal means of eliminating child labour. Contrast this with the slow uptake rate of Convention 138, which perhaps pointed to less national support for minimum age standards than was evident at the international level. However, the recent upsurge in ratifications runs contrary to the arguments that states, for a number of reasons alluded to above, are reluctant to adopt minimum age norms and standards.

I would argue that the significance of Convention 138 is that for the first time, the ILO adopted a universally binding standard regarding child labour, which, though somewhat misguidedly, set the overarching objective of the ILO that is still found today in the 1998 ILO Declaration on Fundamental Principles and Rights at Work⁵³ and Convention 182, namely the abolition of all child labour.

Convention 138, being the first universal, international treaty with subject matter dedicated to children, ushered in a period of great activity surrounding children's rights and the development of universally binding legal instruments to ensure such rights.

3.2 An overview of developments in child labour and the international legal framework between Convention 138 and Convention 182

This section of the chapter examines the various international developments relating to child labour between 1973 and 1999, including but not limited to the adoption of the UNCRC, the Special Rapporteur on the Exploitation of Child Labour and Debt Bondage, and various campaigns to address the plight of working and exploited children. These developments all contributed to the eventual call for a further treaty on child labour to address the worst forms of economic exploitation against children.

⁵³ See Chapter 4, note 1.

3.2.1 The Convention on the Rights of the Child

The Convention on the Rights of the Child was developed at the initiative of the government of Poland (which also proposed the 1924 Geneva Declaration on the Rights of the Child and the founding of UNICEF). In 1978 (on the eve of the International Year of the Child), Poland proposed that the UN General Assembly adopt an international convention on the rights of the child based on the principles and provisions of the 1959 Declaration on the Rights of the Child.⁵⁴ It took 10 years of drafting by the UN Working Group, established by the UN Commission on Human Rights, to produce a draft text of the Convention, which was adopted on 20 November 1989 and came into force on 2 September 1990; to date it is the most widely ratified human rights treaty in the world.⁵⁵

Archard views the importance of the UNCRC as representing children to be the moral and legal subjects of fundamental entitlements and rights: they are acknowledged as having agency and as having a voice that must be listened to.⁵⁶ Detrick notes that while many of the rights contained in the UNCRC are also contained in other international instruments such as the ICESCR and ICCPR, many more states have ratified the UNCRC than those Covenants and have therefore assumed responsibility for the first time to ensure these rights in relation to children.⁵⁷ In addition, she argues

⁵⁴ Fyfe, p 163, note 25. For an overview of the adoption of the Convention see Detrick S, *A Commentary on the United Nations Convention on the Rights of the Child*, Kluwer Law International: The Hague, 1999, p 1 – 18 and Van Bueren, p 13 – 16, note 1.

⁵⁵ Detrick and Van Bueren, note 54 above.

⁵⁶ Archard D, *Children: Rights and childhood*, 2nd Edition, Routledge: London and New York, 2004, p 58 – 59.

⁵⁷ Detrick, p 2 and 4, note 54. See also Doek J, 'The UN Convention on the Rights of the Child: Some observations on the monitoring and the social context of its implementation', *University of Florida Journal of Law and Public Policy*, Vol. 14, Spring 2003, p 125 – 136 at p 127, where he states that '[t]he [UN]CRC is a most comprehensive human rights treaty because it contains classic, civil, political, economic, social and cultural rights. Many of these rights can also be found in existing human rights treaties....[b]ut these rights are much more specific and elaborate in the [UN]CRC, which also contains quite a number of provisions that cannot be found in other treaties.'

that the UNCRC contains new and innovative rights that do not feature in other Conventions.

Van Bueren adds to the list of reasons for the Convention's significance: it incorporates rights in a global treaty which had previously only been acknowledged or refined in case law under regional human rights treaties, for example, the child's right to be heard in judicial and administrative proceedings and have those views taken into account; it creates binding standards in areas which, prior to the adoption of the Convention, were only governed by non-binding recommendations; and finally the Convention imposes new obligations in relation to the provision and protection of children.⁵⁸ In sum, she states:

'[t]he Convention is a powerful yet peaceful agent of social change. It has legitimised what was once considered radical and defined what once was in search of definition'.⁵⁹

However, Hanson takes this statement a step further. He states that the human rights discourse may provide children with a powerful tool for social change in view of their emancipation as social actors deficient in power, but, he argues:

'[h]uman rights, however, do not act by definition as a tool for social change. The social world is not solely shaped by high ideals of empowerment, but is also taking form as a consequence of pragmatic policies, that might even make use of human rights discourses, not to alter but to sustain extant power relations'.⁶⁰

⁵⁸ Van Bueren, p 16, note 1.

⁵⁹ Van Bueren G, 'The United Nations Convention on the Rights of the Child: An Evolutionary Revolution', in Davel CJ (ed), *Introduction to Child Law in South Africa*, Juta Law: Lansdowne, 2000, p 202-213 at p 202.

⁶⁰ Hanson K, 'Does Practice also Work in Theory?', in Alen A, Bosly M, De Bie M, Vande Lanotte J, Ang F, Delens-Ravier I, Delplace M, Herman C, Reynaert D, Staelens V, Steel R and Verheyde M (eds), *The UN Children's Rights Convention: theory meets practice*, intersentia: Antwerpen-Oxford, 2007, p 633 – 646 at p 642.

International legal instruments are not enough, change is only effected through comprehensive action that implements the standards in a practical, effective and sustainable manner. It is the implementation of Convention 182 in relation to the use of children in the commission of crime that will be examined in Chapter 7 in order to examine the significance of Convention 182 in shaping action to address the instrumental use of children to commit crime as a worst form of child labour.

3.2.1.1 The UNCRC and the economic exploitation of children

In the final text of the Convention, Article 32 states:

‘1. States Parties 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.

2. States Parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present Article. To this end, and having regard to the relevant provisions of other international instruments, States Parties shall in particular:

- (a) provide for a minimum age or minimum ages for admission to employment;
- (b) provide for appropriate regulation of the hours and conditions of employment;
- (c) provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present Article.’

Fyfe notes that following a meeting, in 1985, of the UN Working Group, established by the UN Commission on Human Rights to produce a draft text of the Convention, Poland revised its original proposal for the Article by deleting reference to protection from all forms of discrimination, social exploitation or degradation of dignity and also deleting any reference to trafficking in children.⁶¹ He points out that the text of

⁶¹ Fyfe, p 163 -164, note 25.

Article 18 (the original version of Article 32 just prior to the adoption of the final Convention), which did not undergo any substantive changes, was seemingly acceptable to the ILO and notes a very positive inclusion to Article 32 being the reference to ‘any work’ in sub-paragraph (1), which is broader than the terms ‘employment’ or ‘occupation’. It therefore covers any activity, in whatever context, in which the child engages or is engaged in work, whether for remuneration or other reward. In addition, he states that the reference to other international instruments in sub-paragraph (2) means that the provisions of this Article are not exclusive.

Detrick points out that the UNCRC’s *travaux preparatoires* reveal that Poland’s original proposal for Article 32 followed the wording of Article 2 of Convention 138, which required states to set the minimum age for admission to employment at 15 years, but this was not adopted.⁶²

Detrick also notes that the use of the word ‘and’ between the term ‘economic exploitation’ and the words ‘from performing any work’ in Article 32(1) indicates that the CRC’s drafters did not regard all work performed by children as economic exploitation.⁶³ Van Bueren argues that this approach illustrates the fundamental difference between the right to work and being obliged to work: economic exploitation amounts to work at the expense of development and child labour is exploitative when it threatens the physical, mental, emotional or social development of the child.⁶⁴

⁶² Detrick, p 569, note 54.

⁶³ Detrick, p 563, note 54.

⁶⁴ Van Bueren, p 264, note 1. The author explains further: ‘There is exploitation of children at work where the financial remuneration or the services in kind are less than that which would be paid to adults. Work or employment also amounts to exploitation where it is undertaken at too young an age and is detrimental to the well-being of the child who as a consequence of working too young is deprived of educational entitlements, vocational training and self-progress for the future. It is not work per se which is the focus of international law but its abuse’. She also lists the essential elements of exploitation identified by UNICEF, namely, beginning full-time work at too early an age; working too long; inadequate remuneration, work which causes excessive physical, psychological and social strain; work and life on the streets; excessive responsibility at too early an age, work which hampers the psychological and social development of the child and work which inhibits the child’s self esteem. To this list she adds the situation where children are working in breach of international standards.

This obviously accords with the provisions of Convention 138, which allows children to perform work above the minimum age of employment (as well as certain light work, again above a minimum age for such work), provided such work, by its nature or the circumstances in which it is carried out, is not likely to jeopardise the health, safety or morals of young persons.⁶⁵ Likewise the UNCRC, while recognising that not all work amounts to exploitation and that children can perform work, also sets out in Article 32(1) what work is not permissible and should be prohibited, namely, work which is hazardous, interferes with the child's education and is harmful to the child's health or physical, mental, spiritual, moral or social development.

As far as the issue of minimum age of admission to employment is concerned (and apparently favouring Convention 138's approach to the progressive raising of the minimum age), Van Bueren points out that it could be said that by not raising the minimum age of admission to employment from 15 years, as contained in Convention 138, the UNCRC missed an opportunity, but she counters this by noting that if higher limits were set states may have been less willing to ratify the UNCRC and able to enforce them.⁶⁶ Nonetheless, she goes on to note that the provisions in Article 32 on minimum ages and economic exploitation are not restricted by the provisions of Convention 138 and actually have broader application: firstly, by requiring states to take 'legislative, administrative, social and educational measures to ensure the implementation of the present Article' it is not sufficient for states just to raise the minimum age, but they must ensure that social conditions in the country do not make children below the minimum age vulnerable to exploitation; and secondly the term 'any work' does not necessarily exclude any sector and so if a state has excluded a particular economic sector from Convention 138, then Article 32(2)(c) still provides

⁶⁵ Article 3.

⁶⁶ Van Bueren, p 269, note 1. This is certainly a valid observation given the fact that previous ILO Conventions were seen to have compliance problems due to inflexibility (see Cullen H, 'Child Labor Standards: From Treaties to Labels', in Weston BH (ed), *Child Labor and Human Rights: Making Children Matter*, Lynne Rienner Publishers: Boulder, 2005, p 90) by the fact that by 1988 Convention 138 had only been ratified by 36 states, and that at the 1985 UN Seminar on Child Labour the issue of inability to implement Convention 138 was discussed (Fyfe, note 61).

protection against economic exploitation by providing for appropriate sanctions against transgressors.

However, the implications of the UNCRC for the arguments contained in this thesis do not stop at Article 32, which is closely followed by provisions relating to forms of exploitation of children that would eventually be termed ‘worst forms of child labour’ by ILO Convention 182. Article 33 deals with the protection of children from the illicit use of narcotic drugs and psychotropic substances and the prevention of their use in the production and trafficking of such drugs and substances; Article 34 deals with the protection of children from all forms of sexual exploitation and sexual abuse;⁶⁷ Article 35 deals with the protection of children from being abducted, sold or trafficked; and Article 36 constitutes a ‘catch-all’ provision protecting children from ‘all other forms of exploitation prejudicial to any aspects of the child's welfare’.

In international legal standards, Article 33 is the precursor to Article 3(c) of Convention 182 which identifies the instrumental use of children in criminal activities, especially the production and trafficking of drugs, as a worst form of child labour.⁶⁸ Detrick provides a discussion on the drafting history of Article 33 and notes that its inclusion was initiated by a proposal by China (originally located in Article 24 concerning the child's right to the highest attainable standard of health) which was amended to constitute a separate article to prevent and prohibit children from taking drugs; requiring states to investigate cases of drug abuse and provide timely medical treatment; and to prevent and prohibit trafficking in drugs by a child.⁶⁹ However, after discussion and input from, amongst others, The Netherlands, UNICEF and the World Health Organisation, the text of the present Article 33 was agreed upon.

⁶⁷ The Article specifically provides that states should take measures to prevent the following forms of sexual exploitation and abuse: the inducement or coercion of a child to engage in any unlawful sexual activity; the exploitative use of children in prostitution or other unlawful sexual practices and the exploitative use of children in pornographic performances and materials.

⁶⁸ For a discussion of the range of UN General Assembly Resolutions that preceded the adoption of Article 33 see section 6.1.1 in Chapter 6.

⁶⁹ Detrick, p 583, note 54.

Although limited to crimes involving drugs, Article 33 represented the recognition, for the first time in an international legal instrument, of the need to protect children from being used to commit crime and that this is a form of exploitation and abuse. It marked the beginnings of the idea that children who are involved in the commission of crime themselves may also be victims of exploitation. This development will be expanded upon in more depth in Chapter 6 of this thesis.

Detrick notes that early proposals relating to Article 34 dealt with both sexual exploitation and the sale and trafficking of children; however, it was decided to place the issue of the sale and trafficking of children in a separate Article as the latter problem was wider in scope than sexual exploitation, and included economic exploitation and commercial adoption.⁷⁰ This was the recognition missing in the Trafficking Convention of 1949, which limited its scope to sexual exploitation. Both Detrick and Van Bueren note that sexual exploitation can be distinguished from sexual abuse as the term ‘exploitation’ conveys a commercial connotation.⁷¹

Article 34 does not define sexual exploitation, but the first Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography, Vitit Muntarbhorn, has pointed out that it can be defined as:

‘[the] use of children (under 18 years of age) for the sexual satisfaction of adults. The basis of the exploitation is the unequal power and economic relationship between the child and the adult. The child is exploited for his/her youth and sexuality. Frequently, although not always, this exploitation is organised by a third party for profit’.

He defines child prostitution as ‘the sexual exploitation of a child for remuneration in cash or in kind, usually, but not always organised by an intermediary (parent, family member, procurer, teacher, etc.)’ and child pornography as ‘the video or audio

⁷⁰ Detrick, p 589, note 54. See also Vitit Muntarbhorn ‘Article 34: Sexual Exploitation and Sexual Abuse of Children’ in Alen A, Vande Lanotte J, Verhellen E, Ang F, Berghmans E and Verheyde M (eds), *A Commentary on the United Nations Convention on the Rights of the Child*, Martinus Nijhoff Publishers: Leiden, 2007, p 2-3.

⁷¹ Detrick, p 593, note 54, and Van Bueren, p 275, note 1.

depiction of a child for the sexual gratification of the user, [involving] the production, distribution and /or use of such material'.⁷²

Van Bueren describes as 'unsatisfactory' the reference to the 'exploitative' use of children in prostitution and their 'exploitative' use in pornographic performance and materials.⁷³ She argues, quite correctly, that the use of children in prostitution or pornography could not be anything other than exploitative. It may be that the drafters of the UNCRC simply wanted to emphasise the exploitative nature of child prostitution and child pornography, but it is unfortunate that tautologous turns of phrase were used.

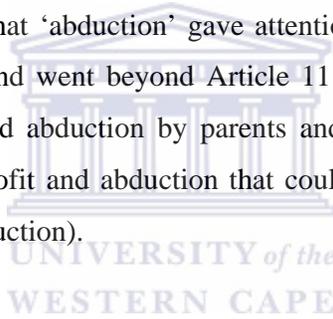
The next provision in the UNCRC to deal with forms of economic exploitation of children is Article 35, which seeks to prevent and prohibit the abduction, sale and

⁷² All three definitions quoted in Detrick, p 593, note 54. At the time of her writing, the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography 2000 (which entered into force in 2002) had not yet been adopted. The Optional Protocol now also provides definitions in Article 2, namely: '(a) Sale of children means any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration; (b) Child prostitution means the use of a child in sexual activities for remuneration or any other form of consideration; (c) Child pornography means any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes' (for further discussion on the Optional Protocol see section 4.6.1 of Chapter 4). In addition, the Stockholm Declaration issued at the First World Congress against Commercial Sexual Exploitation of Children defined the commercial sexual exploitation of children as comprising 'sexual abuse by the adult and remuneration in cash or in kind to the child or a third person or persons. The child is treated as a sexual object and as a commercial object. The commercial sexual exploitation of children constitutes a form of coercion and violence against children, and amounts to forced labour and a contemporary form of slavery.' (See Paragraph 5 of the Declaration accessed at http://www.ecpat.net/eng/A4A02-03_online/ENG_A4A/Appendices_1_Stockholm.pdf on 25 November 2007.) Muntarhorn refers to the Stockholm Declaration and Agenda for Action of the First World Congress against Commercial Sexual Exploitation of Children as 'the most influential instrument globally on the issue of sexual exploitation and sexual abuse in the commercial field'. He notes that they have been referred to on numerous occasions by the Committee on the Rights of the Child and constitute a comprehensive plan for inter-disciplinary measures to prevent and overcome the phenomenon of sexual exploitation and sexual abuse, See Muntarhorn note 70.

⁷³ Van Bueren, p 277, note 1.

traffic of children. This provision squarely places the issue of trafficking of children within a global children's rights treaty, and the effect of the almost universal ratification of the Convention has been that most countries in the world are now obligated to take 'appropriate national, bilateral and multilateral measures' to address the issue of all forms of trafficking, and not only trafficking for the purposes of slavery or sexual exploitation as provided for in the 1926 and 1949 Trafficking Conventions.

As far as Article 35 is concerned, Detrick notes that the UNCRC does not define the terms 'abduction, 'sale' or 'traffic'.⁷⁴ In order to provide some clarity about abduction, she goes on to provide a description of the debates surrounding the incorporation of 'abduction' in the Article: one view was that 'abduction' was too broad and also covered controversial issues such as parental child abduction while the other prevailing view was that 'abduction' gave attention to the phenomenon of the disappearance of children and went beyond Article 11 of the UNCRC, which only dealt with international child abduction by parents and not child abduction in any form for the purposes of profit and abduction that could occur within a country (as opposed to cross-border abduction).



⁷⁴ Detrick, p 604, note 54. In fact it was not until the adoption of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Against Transnational Organised Crime (2000) (Palermo Protocol) that an internationally acceptable definition of trafficking was developed. Article 3 of the Protocol states: ' (a) "Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs; (b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this Article shall be irrelevant where any of the means set forth in subparagraph (a) have been used; (c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered "trafficking in persons" even if this does not involve any of the means set forth in subparagraph (a) of this Article; (d) "Child" shall mean any person under eighteen years of age.' For further discussion of the Palermo Protocol see section 4.6.2 in Chapter 4.

Van Bueren highlights two of the benefits of Article 35 as being that it closed the ‘yawning gaps’ in international legislation which sought to prevent the trafficking in children for the purposes of adoption and it required states to take measures to prevent trafficking, and not merely to prohibit it and punish offenders.⁷⁵ However, it is submitted that although the Article purported to provide a very broad framework for the potential control of trafficking and the sale of children, its weakness is the lack of definition of sale of children and trafficking of children – a shortcoming now filled by the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography in relation to sale of children (but not trafficking). On the other hand, while the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Against Transnational Organized Crime does provide a definition of trafficking, it does not provide a definition of the sale of a child. So while Article 35 married the two issues, later international instruments inexplicably divorced them.

Finally, Article 36 represents a blanket provision for all other forms of exploitation ‘prejudicial to any aspects of the child’s welfare’ not contained in previous Articles. Van Bueren notes that it is a ‘sad comment on international society that such a broad and general Article was necessary to ensure that all present and future forms of child exploitation should be caught by the Convention’.⁷⁶ Both she and Detrick look to Article 10(3) of the ICESCR to give Article 36 its content, in that it referred to ‘economic and social exploitation’, thereby providing some clearer content.⁷⁷ An earlier draft of Article 36 referred to ‘social exploitation’ but this was not adopted because it was thought by the drafters to possibly be susceptible to too restrictive an interpretation.⁷⁸ Van Bueren argues that, while the failure to include the phrase was not detrimental, the inclusion of the phrase would have more easily focused attention on the problems suffered by abandoned children and street children.⁷⁹

⁷⁵ Van Bueren, p 280-281, note 1.

⁷⁶ Van Bueren, p 280, note 1.

⁷⁷ Van Bueren, p 284 – 285, note 1, and Detrick, p 610 – 614, note 54.

⁷⁸ Van Bueren, p 284 – 285, note 1, and Detrick, p 610 – 614, note 54.

⁷⁹ Van Bueren, p 284, note 1.

I agree with Detrick and Van Bueren when they lament the need for such a broad, blanket provision for all other forms of exploitation, and I feel that it was necessary, given the ever-evolving forms of evils that mankind perpetrates, to make it so all-encompassing and yet vague. The content to this provision can adequately be provided by, for instance, the jurisprudence of the Committee on the Rights of the Child through its Concluding Observations (the Committee is discussed in section 3.2.3.2.3 of this chapter) and other sources like the ICESCR as suggested by Detrick and Van Bueren.

It is undisputed that the Convention on the Rights of the Child constitutes the legal backbone of children's rights and symbolises supreme international commitment to the realisation of those rights. However, Archard argues there are two reasons for the limited practical and legal impact of the UNCRC.⁸⁰ First, he alludes to the fact that world-wide systematic abuse of children continues, and in this regard he specifically mentions the wide incidence of worst forms of child labour such as bonded labour, commercial sexual exploitation and child soldiers. Second, he argues that the UNCRC has not yet had any significant impact on domestic legislation, or it has not had an impact commensurate with its significance as a codification of children's rights.

While translating legal rights into practice that results in effective implementation is a critical issue for human rights scholars and activists alike, I wish to provide some counter-balance to Archard's contentions. First and foremost, I would note that there is a wealth of new child laws that have been and are being enacted in an attempt to comply with the provisions of the UNCRC. One merely has to look to examples of countries such as New Zealand, Uganda, Kenya, Malawi and Norway to see efforts to domesticate the rights contained in the UNCRC in national law. In addition, there is an ever-increasing number of Country Reports submitted to the UN Committee on the Rights of the Child by states to indicate their compliance with the UNCRC and their attempts to implement its provisions. There is a commensurate number of Concluding Observations on those Reports by the Committee, which (although speaking to the fact that states are not fully complying with the provisions of the Convention) have compiled a wealth of child rights jurisprudence that gives further content to the

⁸⁰ Archard, p 59, note 56.

UNCRC and practically informs its implementation.⁸¹ In addition, the Committee on the Rights of the Child has, since 2001, issued 10 General Comments to guide implementation of the Convention.⁸² Whilst this is a standard feature of Committee work on treaties, it is also indicative of the need identified by the Committee to provide further content to states on how to ensure compliance with the UNCRC. These General Comments provide valuable and practical information on implementation issues, research and monitoring. Finally, specifically in relation to child justice, the former Chairperson of the Committee on the Rights of the Child has stated that many States Parties do take legislative measures to bring their laws (on child justice) in compliance with the UNCRC, although he does note that the implementation of these measures often does not follow and therefore the top priority in the future is implementation.⁸³

A debate regarding the significance or impact of the UNCRC could go on in perpetuity and is not the focus of this thesis. Hanson provides a balanced assessment: he states that one can always find examples of where the CRC has had some impact, where there is no impact or where the situation has worsened.⁸⁴ He asserts that to 'empirically verify the totality of both positive and negative impacts of the [UN]CRC seems fairly unrealistic'.⁸⁵

⁸¹ For a general overview of the Committee on the Rights of the Child's General Comments and Concluding Observations see *General Comments of the Committee on the Rights of the Child: Including CD with Concluding Observations*, UNICEF Innocenti Research Centre, 2006. Also see Hodgkin, R and Newell, P, *Implementation Handbook for the Convention on the Rights of the Child: Fully revised version*, UNICEF: New York, 2002, where the authors concisely set out key Concluding Observations of the Committee on the Rights of the Child in relation to each Article of the UNCRC.

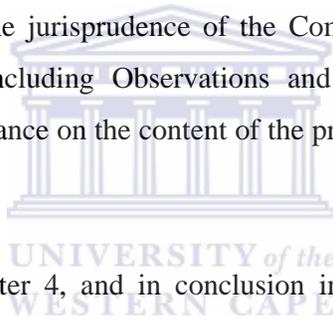
⁸² To view all of the Committee on the Rights of the Child's General Comments see <http://www.ohchr.org/english/bodies/crc/comments.htm> accessed on 13 September 2007.

⁸³ Doek J, 'Child Justice trends and concerns with a reflection on South Africa' in Gallinetti J, Kassan D and Ehlers L (eds), *Child Justice in South Africa: Children's Rights under Construction Conference Report*, Open Society Foundation for South Africa and the Child Justice Alliance, 2006, p 11-16 at p 12 (available at www.communitylawcentre.org.za). Shortly after making this statement the Committee on the Rights of the Child released a General Comment on Children's Rights in Juvenile Justice (discussed in section 6.3.1.1 of Chapter 6).

⁸⁴ Hanson, p 640, note 60.

⁸⁵ Hanson, p 641, note 60.

The above discussion on the UNCRC is important as it highlights certain issues which will become relevant when an examination of Convention 182 is undertaken in Chapter 4. First, the UNCRC deals with all forms of economic exploitation of children, also termed worst forms of child labour in Convention 182. The exception is the use of children to commit crime, as the UNCRC limits its application to the use of children in producing and trafficking drugs and psychotropic substances, though it could be argued that the broader concept is covered by the blanket provision in Article 36. Second, the UNCRC exhorts states to 'protect' children from the forms of economic exploitation dealt with and also 'prevent' this conduct. The goal set is therefore prevention and protection. Finally, the means through which the prevention and protection of children is to be achieved is 'legislative, administrative, social and educational measures', the nature of which is arguably broad and vague. However, the obligations on states in relation to these forms of economic exploitation of children are greatly enhanced through the jurisprudence of the Committee on the Rights of the Child, especially their Concluding Observations and General Comments, which provide comprehensive guidance on the content of the provisions and what is required for their implementation.



As will be argued in Chapter 4, and in conclusion in Chapter 8, the UNCRC is perhaps the most suitable international standard in relation to addressing conduct termed by Convention 182 the 'worst forms of child labour'. Given its objectives, reach, universal ratification, nature of obligations, supplementary Optional Protocols and Committee on the Rights of the Child jurisprudence, I will argue that it was perhaps not necessary for the ILO to adopt a new international standard regarding the economic exploitation of children.

3.2.2 The African Charter on the Rights and Welfare of the Child (ACRWC)

The ACRWC was adopted by the former Organisation of African Unity (OAU), now the African Union (AU) in July 1990, but only entered into force on 29 November 1999 – 10 days after Convention 182 was adopted. The ACRWC has been described

as the first binding regional instrument that identifies the child as a possessor of certain rights.⁸⁶

The need for a specific regional instrument protecting the rights of children in Africa, notwithstanding the existence of the UNCRC, is articulated in the preamble to the ACRWC. This makes particular reference to the fact that the situation of most African children remains critical owing to unique factors in their socio-economic, cultural, traditional and developmental circumstances. These include exposure to natural disasters, armed conflicts, exploitation and starvation. Olowu in his critique of the ACRWC notes that the Charter was not developed in opposition to the UNCRC, but rather in tandem. The two treaties are complementary: both contribute to a framework in terms of which the rights of children in Africa can be discussed.⁸⁷ Lloyd argues that one of the reasons for Africa adopting its own treaty on children's rights was that African involvement in the drafting process of the UNCRC was limited; resulting in perceptions of a Western bias; and the ACRWC puts children's rights legally and culturally into perspective in Africa.⁸⁸

The ACRWC deals with child labour in Article 15, but makes no reference to worst forms of child labour. This is not surprising given that it was adopted prior to the introduction of Convention 182. Article 15 of the ACRWC seems to be based on the wording of Article 32 of the UNCRC, with some exceptions. On a positive note,

⁸⁶ Kassan D, *Children's right to be heard in divorce proceedings*, LLM dissertation, unpublished, UWC, 2004, p 19. See generally Viljoen F, 'Supra-national human rights instruments for the protection of children in Africa: the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child', *Comparative and International Law Journal of Southern Africa*, Vol. 31, 1998, p 199 - 212; Viljoen F, 'The African Charter on the rights and Welfare of the Child', in Davel CJ (ed), *Introduction to Child Law in South Africa*, Juta and Co. Ltd: Kenwyn, 2000, p 214 – 231; and Chirwa D, 'The merits and demerits of the African Charter on the Rights and Welfare of the Child', *The International Journal of Children's Rights*, Vol. 10, No. 2, 2002, p 157 -177.

⁸⁷ Olowu D, 'Protecting children's Rights in Africa: A critique of the African Charter on the Rights and Welfare of the Child', *The International Journal of Children's Rights* 10, Kluwer Law International, 2002, p 127 – 136.

⁸⁸ Lloyd, A 'The African Charter on the Rights and Welfare of Children and the Reality for Africa's Children: An Evaluation of the ACRWC through a Cultural Perspective', unpublished LLM dissertation, University of the West of England, Bristol, 2001, p 36.

Article 15 seems to broaden the scope of the UNCRC's protections by referring to "all forms of exploitation" as opposed to 'exploitation' alone.⁸⁹ However, the ACRWC, in Article 15, omits reference to work that is prone to 'interfere with the child's education' and 'or to be harmful to' the child's health etc. The result of this appears to be a much narrower protection being afforded to African children. Gose argues that these are accidental omissions.⁹⁰ However, it could be argued that the inclination to underline African practices and identities, as well as the duties of children to the family and state, has played a role in the drafting of this provision.

Nonetheless, Article 15 introduces a provision that is designed to ensure more effective and widespread implementation of the Charter, namely, the obligation on States to disseminate information on the dangers of child labour.⁹¹ In doing so, the ACRWC goes further than Article 32 and creates a precursor to the supplementing Recommendation (No. 190) to Convention 182, which expressly calls for wide social mobilisation.

3.2.3 Developments in child labour

Just as Chapter 2 discussed some of the efforts to address child labour during the industrial revolution that preceded the establishment of the ILO and the international instruments addressing various forms of child labour, it is useful to briefly examine the various movements, campaigns and efforts around the issue of child labour that preceded the adoption of Convention 182. The reason for this is that some of these developments played a part in the adoption of Convention 182, such as the Global March against Child Labour, and others, for example the formation and work of IPEC, have played a critical role in the implementation of Convention 182.

White notes that the historical developments relating to child labour may be seen as 'successive waves or layers of strategising that have not replaced each other but accumulated: first, abolitionism (as reflected in minimum age legislation and ILO

⁸⁹ Gose, M, *The African Charter on the Rights and Welfare of the Child*, Community Law Centre, 2002, p 61.

⁹⁰ Gose, p 62-63, note 89.

⁹¹ Gose, p 64, note 89.

discourse); next, from the 1980's onward, the emergence of protectionism (see section 3.3 of this chapter) as the efficacy of abolitionist approaches was questioned and hotly debated; thereafter in the 1990's the evolution of child labour as both an international trade and human (child) rights issue'.⁹²

3.2.3.1 The International Labour Organisation

Fyfe points out that the ILO was not particularly vigilant in following up on Convention 138, and that the International Year of the Child in 1979 really marked the first opportunity for the ILO and other agencies to focus world attention on the issue of child labour.⁹³ He points out that the ILO's attention was not re-directed to the issue until the ILO Director General's 1983 report included a special feature on child labour. Fyfe argues that the reality behind the poor response has been the fact that the ILO had not been able to obtain major donor support for its child labour activities.

A vital development occurred in 1991 with the establishment of the Infocus Programme on the Elimination of Child Labour (IPEC), which became fully operational in 1992 and has been described as the 'ILO's operational arm in the fight against child labour'.⁹⁴

The overall strategy of IPEC is the progressive elimination of child labour, which is to be achieved through strengthening the capacity of countries to deal with the problem and promoting a worldwide movement to combat child labour.⁹⁵ This strategy is

⁹² White B, 'Shifting Positions on Child Labor: The Views and Practice of Intergovernmental Organisations', in Weston BH (ed), *Child Labor and Human Rights: Making Children Matter*, Lynne Rienner Publishers: Boulder, 2005, p 327.

⁹³ Fyfe, p 134, note 25.

⁹⁴ Lansky, p 249, note 25. He notes that IPEC was established with initial funding from Germany, but this was soon followed with contributions from, amongst others, Australia, Denmark, Italy, the European Commission and the United States. The ILO website notes that IPEC currently has operations in 88 countries, with an annual expenditure on technical cooperation projects that reached over US\$74 million in 2006: <http://www.ilo.org/ipec/programme/lang--en/index.htm> accessed on 14 September 2007.

⁹⁵ IPEC homepage, note 94.

achieved through a phased, multi-sectoral approach that includes a situational analysis of the nature and magnitude of child labour in a given country; assistance in policy design; institution building; awareness raising; development of and implementation of protective legislation and support for direct action.⁹⁶ An example of an IPEC initiated intervention forms the basis of the discussion in Chapter 7 in relation to the instrumental use of children in the commission of crime as a worst form of child labour, hence the background to IPEC has been included in this chapter.

On account of the immeasurable task of combating child labour, and arguably informing the approach to child labour taken by Convention 182, IPEC has prioritised its work. This prioritisation of activities has evolved since 1997 when IPEC was concentrating on addressing intolerable forms of child labour, such as children working under forced labour conditions and in bondage, children working in hazardous occupations, very young children (under 12 years) and working girls in 1997.⁹⁷ Today, IPEC addresses the worst forms of child labour as specified in Article 3 of Convention 182, namely all forms of slavery or practices similar to slavery; debt bondage and serfdom or compulsory labour; the instrumental use of children in illicit activities and hazardous work.⁹⁸

One of IPEC's initiatives has been to ensure the collection of data on child labour. To this end, IPEC formed the Statistical Information and Monitoring Programme on Child labour (SIMPOC) in 1997 with the aim of improving the accuracy of information on the scale, distribution and characteristics of child labour and on related socio-economic factors.⁹⁹ It is this Programme that was responsible for providing the data that has allowed the ILO to claim that between 2000 and 2004 there was a global

⁹⁶ Lansky, p 249, note 25.

⁹⁷ Lansky, p 249, note 25.

⁹⁸ IPEC homepage, note 94. White referring to Bequele and Myers, terms this the 'first things first' approach to child labour (namely the arguments to give priority to the worst forms of child labour as specified in Convention 182), White, p 327, note 92. However, it should be noted that Bequele and Myers were, at the time, just writing on hazardous work in the context of child labour, see Bequele A and Myers W, *First things first in child labour: Eliminating work detrimental to children*, UNICEF and ILO, 1995.

⁹⁹ Lansky, p 253, note 25.

reduction in the numbers of economically active children, child labourers and children involved in hazardous work.¹⁰⁰

Between January 1998 and December 2003, IPEC was evaluated to determine the relevance and effectiveness of its strategies and design in the context of a results-based framework, and the efficiency of organisational arrangements for achieving programme outcomes.¹⁰¹ The evaluation deals with the programme strategies and approach, governance and management issues. Of relevance to this discussion is the summary of conclusions and recommendations in relation to programme strategies and approach. These conclusions and recommendations illustrate that, on a positive note, IPEC has continued to evolve and respond effectively to new challenges of the complex child labour environment; the Programme is internationally recognised for generating new knowledge and practical tools for the elimination of child labour; tripartite action between governments, employer organisations and employee organisations has been a major factor in realising international and national strategies; and that IPEC's multilevel approach to programming at national level (small action programmes, multi-component integrated projects and support for Time-Bound Programmes) has been effective.¹⁰² However, the evaluation has highlighted certain issues for future action. One recommendation is that IPEC reassess its advocacy strategy to take into account new programme directions and evaluate its dissemination strategy and use of materials. In addition, IPEC should provide evidence of linkages and appropriate indicators to ILO units and external partners for mainstreaming child labour into the Millennium Development Goals process. Finally, and in collaboration with constituents and donors, IPEC should develop improved means to deliver technical co-operation modalities in a programme.¹⁰³

¹⁰⁰ *The end of child labour: Within Reach. Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work*, ILO, Geneva, 2006, p 5 -6.

¹⁰¹ *Evaluation of the Infocus Programme on the Elimination of Child Labour (IPEC)*, International Labour Office Governing Body, Document No. GB. 291/PFA/11, November 2004 (hereafter IPEC Evaluation Report).

¹⁰² IPEC Evaluation Report, p 1-2, note 101.

¹⁰³ IPEC Evaluation Report, p 3-4, note 101.

Overall, the evaluation concluded that IPEC, while operating in a complex environment of high risk, uncertainty and continuous change, has delivered an innovative, solid programme that has international credibility and illustrates the comparative advantage of the ILO in generating and applying standards-related knowledge and action.¹⁰⁴

A practical example of the critical value of IPEC in assisting, shaping and implementing national child labour policies will be provided in Chapter 7, when the use of children in the commission of crime as a worst form of child labour is discussed.

Another development within the ILO regarding child labour occurred just before the adoption of Convention 182. In 1998 the ILO adopted the ILO Declaration on Fundamental Principles and Rights at Work. Article 2 of the Declaration states that there are certain fundamental principles, which member states, even if they haven't ratified the ILO Conventions in question, have an obligation to promote and realise given their membership in the ILO. These fundamental principles are: (a) freedom of association and the effective recognition of the right to collective bargaining;(b) the elimination of all forms of forced or compulsory labour;(c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation.

This was confirmation, 25 years after the adoption of Convention 138, that the ILO still regarded abolition as its overall objective regarding child labour.

3.2.3.2 The United Nations

Lansky observes that, apart from the ILO (although, as Fyfe points out above, the ILO was not particularly active in child labour following Convention 138), relatively few international organisations were active in the field of child labour prior to the 1980's

¹⁰⁴ IPEC Evaluation Report, p 33, note 101. However, it also notes that while providing a strong endorsement of the Programme, there are areas for improvement, particularly in relation to its management and business practices.

and that it was only from then on that the ILO's efforts to combat child labour began to elicit broader international support.¹⁰⁵ White agrees. He argues that most of the Cold War period was characterised by relative inactivity in the field of child labour, whether by the ILO or other international governmental organisations. He regards this inaction as being attributed to wealthy countries viewing their child labour problems as having been solved, while developing countries were prioritising other problems.¹⁰⁶

It was only after the International Year of the Child in 1979 that developments began within the United Nations structure. Progress specific to the subject matter of this thesis relate to the use of working groups or special rapporteurs. The UN Commission on Human Rights and the Economic and Social Council have established a number of extra-conventional procedures and mechanisms which have been entrusted either to working groups composed of experts acting in their individual capacity or to independent individuals variously designated as special rapporteurs, representatives or experts. The mandates given to them were either to examine, monitor and publicly report on human rights situations in specific countries or territories or on major phenomena of human rights violations worldwide.¹⁰⁷

3.2.3.2.1 Working Group on Slavery

The Sub-Commission on Prevention of Discrimination and Protection of Minorities of the UN Commission on Human Rights, by resolution XXVII of 21 August 1974 established the UN Working Group on Slavery to examine developments on slavery and the slave trade. The mandate of the Working Group on Slavery has been progressively interpreted to cover a growing number of issues. The Working Group asserts that there is not only evidence that slavery and the slave trade continues to exist in their various forms, but that new forms of practices analogous to slavery are

¹⁰⁵ Lansky, p 236 – 237, note 25.

¹⁰⁶ White, p 327, note 92.

¹⁰⁷ <http://www.unhchr.ch/html/menu2/xtraconv.htm> accessed on 14 September 2007. For instance the Special Rapporteur on violence against women, its causes and consequences (see <http://www.ohchr.org/english/issues/women/rapporteur/> accessed on 25 November 2007) and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (see <http://www.ohchr.org/english/issues/torture/rapporteur/> accessed on 25 November 2007).

being discovered or devised. Therefore, in 1998, their name was changed to Working Group on Contemporary Forms of Slavery.¹⁰⁸ Detrick notes that in recent years the Working Group has reviewed developments relating to children such as sale and trafficking, the exploitation of child labour, debt bondage or bonded labour and sexual exploitation.¹⁰⁹

Its work has resulted in a number of resolutions being adopted by the UN Commission on Human Rights,¹¹⁰ such as the appointment of a Special Rapporteur to consider matters relating to the sale of children, child prostitution and child pornography,¹¹¹ the Programme of Action for the Prevention of the Sale of Children, Child Prostitution and Child Pornography¹¹² and the establishment of a working group to investigate a possible draft optional protocol to the UNCRC on the sale of children, child prostitution and child pornography.¹¹³

Other, more recent, work has included investigations into the exploitation of children, particularly in the context of prostitution and domestic servitude¹¹⁴ and a 1999 resolution on the traffic of women and girls.¹¹⁵ This latter resolution addressed a variety of issues. These included encouraging governments to take appropriate measures to address the root factors, including external factors, that encourage trafficking in women and girls for prostitution and other forms of commercialized sex, forced marriages and forced labour; to criminalize trafficking in women and girls in all its forms and to conclude bilateral, sub-regional, regional and international agreements to address the problem of trafficking in women and girls. It also urged

¹⁰⁸ Detrick, p 561, note 54.

¹⁰⁹ Detrick, p 561, note 54. She also mentions that, following recommendations made by the Working Group, the UN Commission on Human Rights adopted the Programme of Action for the Elimination of Child Labour by passing Resolution 1993/79.

¹¹⁰ Detrick, p 591, note 54.

¹¹¹ Resolution 1990/68.

¹¹² Resolution 1992/74.

¹¹³ Resolution 1994/90.

¹¹⁴ *Exploitation of children, particularly in the context of prostitution and domestic servitude*, E/CN.4/Sub.2/AC.2/2002/4.

¹¹⁵ UN Commission on Human Rights Resolution 1999/40, *Traffic in women and girls*, E/CN.4/RES/1999/40.

relevant United Nations bodies and organizations to assist government in training initiatives and awareness raising on trafficking.

The Office of the High Commissioner on Human Rights has also issued a fact sheet on Contemporary Forms of Slavery, which also deals with child labour and explains the conditions of hazardous work and worst forms of child labour, but is very brief and superficial. At most it can be said that the fact sheet is significant because of the fact that it includes child labour, but the content does not take the issue much further.¹¹⁶

3.2.3.2.2 Special Rapporteurs

Most of the Special Rapporteurs research and study issues of concern, carry out country visits, receive and consider complaints from victims of human rights violations, and intervene with governments on their behalf.¹¹⁷ In some cases, the experts also recommend programmes of technical cooperation. All of the Special Rapporteurs report to intergovernmental bodies, such as the UN Commission on Human Rights or the United Nations General Assembly on their findings, conclusions and recommendations.¹¹⁸

In terms of the mandate granted by Resolution 1990/68 of the UN Commission for Human Rights, the Special Rapporteur on the sale of children, child prostitution and child pornography is required to investigate the sale of children and the sexual exploitation of children around the world, to submit reports to the Commission on Human Rights, and to make recommendations for the protection of children. The first Special Rapporteur was Vitit Muntarhorn, followed by Ofelia Calcetas-Santos (1994-2001) and the mandate is now held by Juan Miguel Petit, who was appointed Special Rapporteur in July 2001.¹¹⁹

¹¹⁶ UN Fact Sheet No. 14, <http://www.unhcr.ch/html/menu6/2/fs14.htm> accessed on 14 September 2007.

¹¹⁷ UN Fact Sheet No. 27, <http://www.unhcr.ch/pdf/factsheet27.pdf> accessed on 14 September 2007.

¹¹⁸ Fact Sheet No. 27, note 117.

¹¹⁹ <http://www.againstsexualexploitation.org/en/instruments/sale-report.html> accessed on 13 September 2007.

The UN Special Rapporteur on the Exploitation of Child Labour and Debt Bondage, Abdelwahab Boudhiba, investigated the exploitation of child labour. In his 1981 report to the Sub-Commission on Prevention of Discrimination and Protection of Minorities he demonstrated that work done by children is often traumatic, and perverts the notions of work as a liberating force or as a means of development towards maturity.¹²⁰ Importantly for the subject matter of this thesis, an analysis of the types of exploitation of child labour was undertaken by the Special Rapporteur. While he singled out domestic work; non-domestic, unremunerated work; bonded labour; wage labour, including apprenticeship; and marginal economic activities as the types of exploitation to pursue under his mandate he made some notable observations.¹²¹ Discussing theft, pick-pocketing, drug trafficking and the recruitment of ‘young prostitutes’ he states: ‘the dividing line between small tasks, dubious practices and near-delinquency is truly a fine one’.¹²² Although there is a difference in the seriousness of each activity, all nonetheless constitute the use of children in the commission of crime. However, I must point out that it is somewhat easier to view a child used for pick-pocketing as a victim of a worst form of child labour, than it is to view a child who has been recruited to commit a murder. This point is illustrated through a practical example in section 7.7 of Chapter 7. Of significance, given the prioritisation of certain forms of economic exploitation in Convention 182 is the following observation by the Special Rapporteur:

‘the definition of specified types of situations makes it easier to find appropriate solutions and to determine the measures to be adopted. The measures needed cannot be universal and generally applicable. The types of exploitation listed in this section are not reducible to a common denominator; they are not all equally serious and they are quite different in significance’.¹²³

¹²⁰ *Exploitation of Child Labour*, Final report submitted by Abdelwahab Bouhdiba, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, United Nations, New York, 1982 (hereinafter Special Rapporteur on Child Labour report). See also Fact Sheet No. 14, note 116.

¹²¹ Special Rapporteur on Child Labour report, p 15, note 120.

¹²² Special Rapporteur on Child Labour report, p 19, note 120

¹²³ Special Rapporteur on Child Labour report, p 21, note 120

This statement succinctly sums up the difficulty of setting common standards for very different situations. As I will argue in Chapter 7 and 8 regarding the use of children in the commission of offences as a worst form of child labour, despite it being a form of economic exploitation, it does not sit well with the other worst forms of child labour that are classic forms of victimisation and exploitation.

Despite a decision by the Sub-Commission on Prevention of Discrimination and Protection of Minorities to appoint a Special Rapporteur to update the report of Mr. Abdelwahab Boudhiba on the exploitation of child labour, it does not appear that this has been done.¹²⁴

3.2.3.2.3 The United Nations Committee on the Rights of the Child

The UN Committee on the Rights of the Child was established in terms of Article 43 of the UNCRC and in terms of Article 44 and 45 of the Convention may, amongst others, review reports made by states parties on the measures adopted to realise the rights under the UNCRC and progress made on the enjoyment of the rights; recommend to the UN General Assembly that the Secretary General undertake studies on specific issues relating to the rights of the child and make suggestions and general recommendations based on information received pursuant to Article 44 and 45.

On 4 October 1993 a day of general discussion on 'Protection of the child against economic exploitation' was held by the Committee on the Rights of the Child. In the discussion, Committee members placed emphasis on the need for the child to be put at the centre of all policies, whether they are adopted by international financial institutions, development agencies or governments and identified the need for a comprehensive and concerted action for prevention, protection and rehabilitation.¹²⁵ The Committee also issued a statement wherein it expressed its concern over the fact that more than 100 million children were forced into jobs harmful to their health or

¹²⁴ Resolution 1993/5 of 20 August 1993.

¹²⁵ See CRC/C/20, 4th Session, 4 October 1993 for the full text of the discussion. Available on <http://www.unhcr.ch/html/menu2/6/crc/doc/days/exploit.pdf> accessed on 14 September 2007.

preventing them from going to school and that, in some cases, their conditions of employment amounted to slavery.¹²⁶

In addition, the Committee made certain decisions, namely, to invite financial institutions, including the World Bank and the International Monetary Fund, to a discussion about the need to protect the rights of the child in programmes of economic reform; to recommend that the United Nations Educational, Scientific and Cultural Organization take the lead in an international effort to make school education a real and effective alternative to exploitative child labour, including child prostitution; and to recommend that all Governments ratify the ILO standards on minimum age and on conditions of employment and that they be incorporated into national legislation and be enforced.

Finally, the Committee made certain recommendations. One area for action that was highlighted related to the establishment of national mechanisms for coordinating policies and monitoring the implementation of the UNCRC. These national mechanisms would be required to have specific competence in the area of protection from economic exploitation. Another recommendation was that states parties launch wide information campaigns on the UNCRC specifically addressed to children, in order for them to become aware of their rights (including the rights to study, to play and to take rest), of the measures of protection they can benefit from and of the risks they face when they are involved in situations of economic exploitation.

The other two areas of the Committee on the Rights of the Child's work that has significant influence on the issue of the economic exploitation of children are its Concluding Observations to States' Parties Reports as well as the Committee's General Comments.¹²⁷ Although no General Comment on child labour has been

¹²⁶ Detrick , p 573, note 54; CRC/C/20, Annex VI.

¹²⁷ See the discussion in section 3.2.1.1 of this chapter. See generally on the work of the Committee on the Rights of the Child Doek, note 57; Hodgkin and Newell, note 81; Doek J, 'The Protection of Children's Rights and the United Nations Convention on the Rights of the Child: Achievements and Challenges', *Saint Louis University Public Law Review*, 2003, p 235-252 and Doek J, 'What does the

released, General Comment No. 5 (2003), ‘General Measures of Implementation of the Convention on the Rights of the Child’¹²⁸ is a comprehensive guide for states on how to give effect to their obligations under the UNCRC.¹²⁹ Rishmawi comments:

‘General Comment No. 5 on General Measures of Implementation of the [UN]CRC draws not only on the Committee’s own past experience, but also other treaty bodies and UN fora, providing the basis for concrete programming and drawing up of policies by States Parties in relation to children’s rights’.¹³⁰

I would argue that the wealth of jurisprudence developed by the Committee on the Rights of the Child has contributed to ensuring that the UNCRC has a clear blueprint for implementation. In Chapter 4 and Chapter 8, when examining the significance of Convention 182, I point to the substantive provisions of the UNCRC and the Committee on the Rights of the Child’s jurisprudence to suggest that it was not necessary for the ILO to adopt a new standard on the worst forms of child labour.

3.2.3.3 Non-governmental organisation efforts and campaigns

Fyfe notes that since the International Year of the Child in 1979, non-governmental organisations have become an increasingly powerful force in the child labour arena, lobbying the UN system to adhere to the standards contained in the various international instruments and to take more effective action against child labour.¹³¹ He uses the examples of the Anti-Slavery Society and its well-documented country

Children’s Convention Require?’, *Emory International Law Review*, Vol. 20, Spring 2006, p 199 – 208.

¹²⁸ CRC/GC/2003/5, 27 November 2003.

¹²⁹ Rishmawi provides an in-depth analysis on the nature of states’ obligations under Article 4 of the UNCRC and illustrates how General Comment No. 5 provides additional and valuable content to the provision, see Rishmawi M, ‘Article 4: The Nature of State Parties’ Obligations’, in in Alen A, Vande Lanotte J, Verhellen E, Ang F, Berghmans E and Verheyde M (eds), *A Commentary on the United Nations Convention on the Rights of the Child*, Martinus Nijhoff Publishers: Leiden, 2006.

¹³⁰ Rishmawi, p 57, note 129.

¹³¹ Fyfe, p 137, note 25.

studies on child labour,¹³² as well as Defence for Children International which has taken up the human rights dimension of child labour and effectively lobbied UN agencies such as UNICEF to pay more attention to the issue.¹³³

The other internationally acclaimed campaign to end child labour is the Global March Against Child Labour. The Global March movement began with a worldwide march when thousands of people marched together to jointly put forth the message against child labour. The march, which started on January 17, 1998 finally culminated at the 1998 ILO Conference in Geneva, which discussed the adoption of Convention 182.¹³⁴ The Global March has a number of ongoing campaigns such as the South Asia March against Child Trafficking,¹³⁵ the Education Campaign,¹³⁶ the World Cup Campaign¹³⁷ targeted at the 2002 and 2006 FIFA World Cup tournaments and the Convention campaign to get countries that have not yet ratified Convention 182 to do so.¹³⁸

¹³² Anti-Slavery International can trace its history back to 1787 when the first abolitionist society was formed and was at the forefront of the movements to abolish the slave trade in Britain (in 1807) as well as slavery throughout the British colonies; in 1909 it merged with the Aborigines' Protection Society and played a key role in campaigning for and drafting the 1926 Convention on the Abolition of Slavery and the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery. In 1975, it worked for the creation of a group of experts within the United Nations dedicated to the elimination of slavery, now called the UN Working Group on Contemporary Forms of Slavery and in 1990 it changed its name to Anti-Slavery International with its main areas of work currently including forced and bonded labour, the worst forms of child labour, trafficking of human beings, and traditional or 'chattel' slavery. See <http://www.antislavery.org/homepage/antislavery/history.htm>, accessed on 14 September 2007.

¹³³ See also Creighton, p 365, note 8.

¹³⁴ <http://www.globalmarch.org/aboutus/index.php>, accessed on 14 September 2007. The mission of the March is stated as follows: 'The Global March Against Child Labour is a movement to mobilise worldwide efforts to protect and promote the rights of all children, especially the right to receive a free, meaningful education and to be free from economic exploitation and from performing any work that is likely to be harmful to the child's physical, mental, spiritual, moral or social development.'

¹³⁵ <http://www.globalmarch.org/childtrafficking/index.php>, accessed on 14 September 2007.

¹³⁶ <http://www.globalmarch.org/campaigns/educationcampaign/index.php>, accessed on 14 September 2007.

¹³⁷ <http://www.globalmarch.org/campaigns/worldcupcampaign/worldcup2006.php3>, accessed on 14 September 2007.

¹³⁸ <http://www.globalmarch.org/campaigns/conventioncampaign/index.php>, accessed on 14 September 2007.

The work of non-governmental organisations in the context of child labour is considered significant. Wiseberg lists four products of non-governmental organisation campaigns in the field of child labour.¹³⁹ First, amongst the most important results that non-governmental organisations have achieved is placing child labour on the international, regional and national agendas by drawing recognition to the problem. Second, they have been instrumental in the drafting of international law to protect children from economic exploitation, particularly the UNCRC and Convention 182. Thirdly, non-governmental organisations have played a key role in research, analysis and monitoring of child labour. Finally, she terms advocacy the ‘soul’ of the non-governmental organisational work in relation to child labour in that it has both exposed and attempted to address the worst forms of child labour.

However, apart from these roles played by non-governmental organisations (which can be termed ‘traditional’ if one views the actions and work of non-governmental organisations generally), in the context of child labour some innovative strategies have been developed to target private industries who exploit children in work.

One of these is social labelling. This occurs when non-governmental organisations label products and services with the intention of providing assurance to consumers that what they purchase has not been produced by children.¹⁴⁰ An example of such labelling is RUGMARK, a global non-profit organisation working to end child labour in India, Nepal and Pakistan, which certifies: ‘[t]he RUGMARK label is your best assurance that no illegal child labour was employed in the manufacture of a carpet or rug’.¹⁴¹ Hilowitz notes that the labelling is usually voluntary as the producer,

¹³⁹ Wiseberg L, ‘Nongovernmental Organisations in the Struggle Against Child Labour’, in Weston BH (ed), *Child Labor and Human Rights: Making Children Matter*, Lynne Rienner Publishers: Boulder, 2005, p 243 – 376. (p 350 – 357).

¹⁴⁰ Wiseberg, p 357–359, note 139, and Hilowitz J ‘Social labelling to combat child labour: Some considerations’, *International Labour Review*, Volume 136, No. 2, 1997, p 215 – 232 (p215).

¹⁴¹ Wiseberg, p 357, note 139 and Hilowitz, p 223 – 224, note 140. Wiseberg also provides the example of FIFA being targeted by the Global March Against Child Labour for ignoring the exploitation of children in the manufacture of soccer balls in countries such as Pakistan, India and China. The result

wholesaler or retailer who places the label on a product or service does so by choice.¹⁴²

However some concerns about this practice have been voiced.¹⁴³ First, a social labelling initiative can have a substantial effect on production practices in large export industry countries and this obviously affects stakeholders feelings of national and personal independence and also their production costs structure. Second, the business community are generally opposed to linking social causes with economic activities as they view it as a form of restraint of trade. Finally, there are concerns regarding the fate of the children who may lose their jobs as a result of labelling practices and the unintended consequences of the reduced income on dependant families. However, Lansky does attribute some significance to these efforts, namely, their role in improving poor working conditions and on raising adult wages, thereby contributing to the prevention of child labour, and their role in raising public awareness of the exploitation of child workers and thereby mobilising broader political support for international action.¹⁴⁴

Hilowitz, writing in 1997, concludes that while social labelling has produced benefits for some children in some countries and it is too early to predict what the long term results would be.¹⁴⁵ A similar observation is made by Wiseberg, writing in 2005, about the RUGMARK campaign.¹⁴⁶

Therefore it cannot be said with certainty whether social labelling, as an alternative method of combating child labour has been as successful as the more traditional

was that FIFA agreed not to put its industry seal on soccer balls made by children and subsequently manufacturers such as Adidas, Nike and Rheebock had to comply.

¹⁴² Hilowitz, p 217 – 218, note 140.

¹⁴³ Hilowitz, p 219 – 220, 230 – 231, note 140, and Lansky, p 253, note 25.

¹⁴⁴ Lansky, p 254-255, note 25.

¹⁴⁵ Hilowitz, p 232, note 140.

¹⁴⁶ Wiseberg, p 359, note 139. Other methodologies are used in the context of child labour such as Codes of Conduct and boycotting products. For a discussion on these see Wiseberg, note 139, Hilowitz, note 140 and Arat ZF, 'Analysing Child Labor as a Human Rights Issue: Its Causes, Aggravating Policies, and Alternative Proposals', *Human Rights Quarterly*, Volume 24, No. 1, February 2007, p 177 – 204 (p 198).

methods employed by non-governmental organisations, such as advocacy and research.

Generally though, it has been argued that progress in establishing a children's rights culture is often due to governmental collaboration with non-governmental organisations and this has manifested itself in the drafting process of the CRC as well as in the monitoring of State's implementation of the Convention.¹⁴⁷ Bayes argues that the importance of non-governmental organisations in assisting and exerting pressure on government is due to the fact that non-governmental organisations have particular knowledge of a child's situation, can consult with children and are able to identify effective means of intervention and protection.¹⁴⁸ Chapter 7 of this thesis will examine the manner in which the use of children in the commission of crime as a worst form of child labour has been addressed in the South African context. In particular it will attempt to show how government and the non-governmental sector have collaborated in these efforts and the value of involving civil society in implementing child labour policy and Convention 182.

3.3 The different approaches to child labour and the debates

Although beyond the purview of this thesis, it seems nevertheless necessary, at this point – after a discussion of Convention 138 and the UNCRC and before an examination of Convention 182 - to briefly give an account of the debates regarding child labour in the context of the child rights discourse.¹⁴⁹ The reason for this digression is that child labour is a key area in the child rights theoretical dialogue on child autonomy and children's evolving capacities.

¹⁴⁷ Bayes H, 'The Age of 'Agendas' for Children', *International Children's Rights Monitor*, Vol. 13, No. 2, 2000, p 10.

¹⁴⁸ Bayes, p 10, note 147.

¹⁴⁹ The theory of children's rights is both vast and complex and beyond the scope of this thesis save for a brief discussion in this section. For a far more detailed discussion see, amongst others, Freeman M and Veerman P (eds), *The Ideologies of Children's Rights*, Martinus Nijhoff Publishers: Dordrecht, The Netherlands, 1992 and Alston P, Parker S and Seymour J (eds), *Children, Rights and the Law*, Clarendon Press, Oxford, 1992.

As a precursor to discussing these debates regarding child labour, Fyfe poses the question as to the extent to which human rights, and children's rights, can be truly universal, given the wide range of socio-economic, religious and cultural realities in the world.¹⁵⁰ He notes that there are significant divergent perceptions from one country to another regarding both the age at which childhood ends and the child's role in the family and society, as well as different methods of upbringing and socialisation. He concludes that these issues should not detract from the clear evidence that 'notwithstanding differences in culture, ideology and level of economic wealth, a whole range of children's rights are fundamentally shared by all peoples'. He proceeds to describe the debate between the 'protectionists' and the 'liberationists', whose two schools of thought being defined as (quoting Franklin) 'those interested in protecting children and those in protecting children's rights'.¹⁵¹

Archard's opinion is that there is a central tension between the rights in the UNCRC—one between protection and participation rights.¹⁵² He argues that the participation approach represents children as subjects or agents, capable of exercising for themselves certain fundamental powers such as freedom of expression and freedom of association. On the other hand, the protectionist approach represents children as patients or objects, potential victims of harmful treatment and thus rights such as the right to be protected against all forms of physical or mental violence and the right to be protected from economic exploitation are invoked.

Likewise, Smolin also describes the tension between protecting children on the one hand and 'liberating them from childhood' on the other.¹⁵³ The inherent tension, according to him rests firstly in the fact that protecting children from the evils of the world 'is self-contradictory because children inevitably live in the world made and

¹⁵⁰ Fyfe, p 166, note 25.

¹⁵¹ Archard also refers to the 'protectionists' as 'caretakers' or 'paternalists': Archard p 70 – 84, note 56. So too does Franklin, see Franklin B, 'The case for children's rights: a progress report', in Franklin B (ed), *The Handbook of Children's Rights: Comparative Policy and Practice*, Routledge: London and New York, 1995, p 10 – 14.

¹⁵² Archard, p 60 – 61, note 56.

¹⁵³ Smolin D, 'A tale of two treaties: Furthering social myths through the redemptive myths of childhood', *Emory International Law Review*, 17, Fall 2003, p 967 -1000.

governed by adults, and therefore cannot escape all of its ills'.¹⁵⁴ Secondly, he argues that liberating children from 'the bondage of childhood' is also self-contradictory because it is inevitable that in all spheres of life, whether legal or social, human beings pass through a developmental stage of dependency on adults. Therefore he explains that:

'[t]he two goals are contradictory to one another because our limited ability to protect children from the ills of the world is dependent on maintaining their legal and practical bondage to the authority of adults; to free them from the authority of adults is to send them into full competition with adults for the limited goods of this world, with full exposure to the ills of the adult world.'¹⁵⁵

He asserts that the solution to this tension can be located within, what he terms the 'positive approach' to the UNCRC (the 'negative approach' would be to view the UNCRC as a purely legal document to be implemented according to the letter of the law). The resolution is achieved through 'an implicit child development approach, under which the balance between protection and autonomy would shift progressively toward the latter as the child grew in age and maturity.'¹⁵⁶ He suggests that in so far as both parents and societies usually allow children to become more autonomous as they age and mature, this 'theoretical reconciliation... can have broad credence, at least as a general Principle.'¹⁵⁷

Franklin invokes a number of arguments in favour of adopting a liberationist approach. Firstly, he contends that children do reveal a competence for rational thought and can make informed choices. Secondly, he describes the argument that, if children are given participation rights, they are likely to make mistaken choices because they lack experience in decision making as tautologous, in that if they are not allowed to make decisions because they lack experience, how will they ever begin to make decisions. In the third instance, he states that the denial of participation rights to

¹⁵⁴ Smolin, p 971, note 153.

¹⁵⁵ Smolin, p 972, note 153.

¹⁵⁶ Smolin, p 975, note 153.

¹⁵⁷ Smolin, p 975, note 153.

children is unfair as they can do nothing to change or ameliorate the situation which excludes them.¹⁵⁸

On the other hand, Archard cites various arguments on behalf of the ‘caretaker’ approach.¹⁵⁹ He submits that self-determination is too important to be left to children; that the paternalist caretaker must choose what the child would choose if the child were competent to make choices; and choose with regard to the interests of the adult that the child will become. He asserts that the core of the argument is the fact that children do not simply grow with the passage of time into adults – they need to be cared for and supported in their maturation.

Freeman argues that the dichotomy drawn between the two approaches is ‘to some extent a false divide’ and should not divert attention away from the fact that the true protection of children does protect their rights.¹⁶⁰ He asserts that both approaches are correct in emphasising part of what needs to be recognised and both wrong in failing to address the claims of the other side. He formulates the following test to determine whether intervening in the life of a child to protect is justified:

“What sort of action or conduct would we wish, as children, to be shielded against, on the assumption that we would want to mature to a rationally autonomous adulthood and be capable of deciding our own system of ends as free and rational beings?”¹⁶¹

¹⁵⁸ Franklin, p 11 – 12, note 151. He also makes the point that the paternalist approach does not presumably seek to exclude children from decision making because they are children, but because they lack competence. Taken to its logical conclusion this argument results in not only children being denied the right to participate but all incompetent persons, including adults, being denied the right to participate. He argues that this leads to an unacceptably elitist approach - who would decide who is competent to participate and against what criteria?

¹⁵⁹ Archard, p 77 – 84, note 56.

¹⁶⁰ Freeman M, ‘Taking Children’s Rights More Seriously’, in Alston P, Parker S and Seymour J (eds), *Children, Rights and the Law*, Clarendon Press, Oxford, 1992, p 68 – 69 (52 – 71).

¹⁶¹ Freeman M, *The Rights and Wrongs of Children*, Frances Pinter: London, 1983, p 57.

In this way, Freeman concludes that children may be protected against their irrational actions but the goal is the rational independence of the child.¹⁶²

Smolin provides an example of how the two approaches play out in the child labour context:

‘[t]ake, for example, the question of a twelve-year old engaged, like his father or mother, in some kind of hard and onerous work. Our desire to free the child from the characteristic hazards and ills of the adult world suggest that we "protect" the child by removing him or her from the work force. If we restrict this "child's" legal capacity to work in the name of redemption from the ills of the adult world, we at the very same time condemn the child to another kind of bondage, that of the non-autonomous minor.’¹⁶³

I would argue that this quote sums up the concern regarding the goal of ‘protecting’ children from child labour and the overarching aim of the ILO regarding child labour (as set by Convention 138 and which persists today): abolition. This concern relates to the fact that the ‘protectionist’ or abolitionist approach ignores the fact that some children want to work, not necessarily in formal employment but either as a means of assisting family income or as a manifestation of their ‘rites of passage’.¹⁶⁴ From an African perspective this is especially true. Sloth-Nielsen, who has vast experience on the African continent regarding children’s rights, has noted the widespread disregard for Convention 138 because of the fact that it limits the child’s ability to become economically and individually empowered and fulfil his or her duties under Article 31 of the African Charter on the Rights and Welfare of the Child.¹⁶⁵

¹⁶² Freeman, p 57 – 58, note 161.

¹⁶³ Smolin, p 970, note 153.

¹⁶⁴ As Van Bueren states: ‘many children welcome the opportunity to work, regarding it as a “rite of passage to adulthood”’, Van Bueren, p 264, note 1.

¹⁶⁵ Personal communications between the author and Julia Sloth-Nielsen, October – November 2007. See also Sloth-Nielsen J and Mezmur B, ‘A dutiful child: The implications of Article 31 of the African Children’s Charter’, paper presented at the 10th ordinary meeting of the African Committee of Experts on the Rights and Welfare of the Child, Cairo, Egypt, October 2007, submitted to *The Journal of African Law* for publication. The authors refer to the duties of a child, including the child’s duty to work for the cohesion of the family, the child’s duty to assist the family in times of need and the child’s duty to serve his or her national community by placing his or her physical and intellectual abilities at its

Also in relation to working children, Hanson and Vandaele, quoting White, talk of three different approaches to child labour within the child rights context. First, there is the abolitionist approach which advocates for the total abolition of child labour; then there is the approach that contends that children can work when protective legislation exists and this is seen as the regulatory approach; finally the empowerment approach views children as active subjects or agents of change and focuses on promoting the self-organisation of working children.¹⁶⁶ But, importantly for the discussion on conduct which Convention 182 terms the ‘worst forms of child labour’, later they state that the value of children’s working rights (whether seen from the regulatory or empowerment approach) cannot be used as an argument to justify all cases in which children perform work: certain forms of child labour such as slavery or bonded labour are in no way justifiable.¹⁶⁷

Moving from the more general discussion to one of child labour, Fyfe submits that if children are given the right to work, they, like adults, will require protection from poor and dangerous working conditions but this should not erode their choice and autonomy in other matters. He describes the libertarian approach to child labour, as expressed by Morice, as one where children should not be treated as a special category, but should share the rights adults enjoy. Consequently if children work they should have the right to join trade unions because to reduce the problem of child labour to ‘protection’ is to exclude children from any decisions about themselves.¹⁶⁸

service. In relation to the last-mentioned duty, and noting that Article 15(1) of the African Charter on the Rights and Welfare of the Child protects children from all forms of economic exploitation and hazardous work, the authors argue, at p 23 of the paper, as follows: ‘...a clear distinction needs to be made between child work, on the one hand, with which the African Charter does not have a problem, and child labour and its worst forms...on the other, where a policy of “zero tolerance” is advocated. The kind of work envisaged by the African Children’s Charter – by imposing a duty on the child to serve his/her national community by placing his or her physical and intellectual abilities at its service – is the non-harmful child “labour”, which is often part-time and does not preclude educational opportunities.’

¹⁶⁶ Hanson K and Vandaele A, ‘Working children and international labour law: A critical analysis’, *The International Journal of Children’s Rights*, Volume 11, 2003 p 73 -146 at p 85 – 86.

¹⁶⁷ Hanson and Vandaele, p 86, note 166.

¹⁶⁸ Fyfe, p 169, note 25.

Fyfe's solution to the dilemma is to view the issue of child labour through the three 'Ps' construct: provision, protection and participation.¹⁶⁹

He argues that in the provision of services to child workers, the objective should be to promote their integrated physical, mental and social development. Protection is still needed in those areas of priority concern, such as exploitation in the sex and drug industries, hazardous work and within military service. Finally, he argues that children can be the agents of change and they have the right to self-expression and action. He concludes by submitting that the balance and emphasis between these three factors will be determined by the nature of the social context and stage of development of the children concerned.

This is all very well but while the debate is most pertinent when dealing with child labour generally, and even certain hazardous work, it takes on a new dimension when in the context of conduct which, in addition to economic exploitation, also constitutes criminal action against children, including recruiting children to commit crime. As stated by Hanson and Vandaele, children's working rights cannot be used as an argument to justify all cases in which children perform work, referring specifically to situations such as slavery. But what of the situation where (as will be discussed in chapter 7 on the illicit use of children in the commission of crime as a worst form of child labour) children chose to become involved in crime even where their involvement is initiated by an adult and then they also reject the notion that they are regarded as victims?¹⁷⁰ In other words, they choose to be solely viewed as perpetrators and not as victims, which they are - if in fact used or procured in the commission of the offence.

In this instance, none of the approaches can hold water. If we respect their autonomy and choice, we are throwing them to mercy of the criminal justice system because by

¹⁶⁹ Fyfe, 171, note 25.

¹⁷⁰ A recent study on the perceptions of children regarding the use of children in the commission of crime found that children did not see themselves as victims or having been used, they rather emphasised their decision to choose to commit crime. See Frank, C and Muntingh, L, *Children Used by Adults to Commit Crime (CUBAC): Children's Perceptions*, ILO, 2005, p35 -36 (copy on file with the author).

holding them solely accountable for their actions, we are not affording an appropriate intervention to address the fact that they are victims of a worst form of child labour. On the other hand, if we treat their wishes as irrelevant and regard them as victims of a worst form of child labour, we fail to give cognisance to their ability to evolve and make their own choices (which in any event is recognised by the setting of a minimum age of criminal capacity). In the context of the instrumental use of a child to commit crime, there is then an uneasy fit for a child who, in the child justice construct, is regarded as having full criminal capacity; the ability to voluntarily intend to commit crime and act in accordance with those intentions but, in the child labour construct, needs protection from influence that initiated the criminal action.

This poses difficult questions such as how, then, the law should treat children used in the commission of crime? Are all children entitled to be viewed as equal victims, given their age and ability to decide to participate in the commission of crime, or is there a sliding scale of victimization according to their age, maturity and ability to exercise the choice to participate in the commission of crime? This is further complicated by the type of crime the child committed. It would be far easier to regard a child aged 10 years used by a criminal syndicate to shoplift as a victim than a 16 year old boy recruited to murder a baby.¹⁷¹ I will argue that the use of children in the commission of crime presents particular difficulties when regarded as a worst form of child labour under Convention 182. The worst forms of child labour that deal with children who are clearly victims of heinous rights violations, such as slavery, debt bondage or child trafficking are an 'easy sell' under Convention 182, but the use of children in the commission of crime, in so far as it involves children who are both victims and perpetrators, requires a more nuanced approach that is perhaps beyond the sphere of influence of child labour.

3.4 Conclusion

¹⁷¹ See the discussion of *S v Mfazwe and 4 Others* in section 7.7 of Chapter 7, where it is clear that the presiding officer avoided calling a 16 year old boy, convicted of participating in the murder of a 6-month old baby, a victim of a worst form of child labour, despite being invited to do so.

This chapter has examined the flurry of activity regarding child labour in the last quarter of the 20th century. It has highlighted certain key issues that are alluded to in the following chapters and which also inform some of the conclusions of the thesis in Chapter 8.

In the first instance, what has emerged is the clear and consistent objective of the ILO to abolish child labour generally. This objective was set in Convention 138, became a fundamental principle of the ILO in 1998 and will be confirmed by Convention 182, as discussed in Chapter 4. Many commentators, quite correctly, call this objective into question. They point to the fact that working children often want to work, whether as a form of economic activity to benefit themselves, their families or out of a greater sense of duty to the community or country. The aim of abolishing child labour generally fails to recognise that there is non-harmful work and obfuscates the underlying need to address work and exploitative conduct that is in fact harmful to children.

However, this chapter has also shown a move towards prioritising certain forms of economic exploitation, which are regarded as extreme and intolerable. This emerges from the work of the UN Special Rapporteur on Child Labour Exploitation in the early 1980's and the programme strategy of IPEC in the 1990's. This development in thinking will manifest itself in Convention 182, which prioritises the worst forms of child labour and sets particular goals and measures to address them.

Of critical importance are the developments within the UN regarding child labour. While the ILO is the body that has traditionally dealt with the issue, the adoption of the UNCRC has brought with it a concern regarding conduct that violates children's rights to be protected from all forms of economic exploitation. The UNCRC addresses not only the traditional aspects of child labour dealt with by the ILO – minimum age standards and hazardous work – but it has gone further and identified the need to protect children from commercial exploitation of the most invasive kind – commercial sexual exploitation, trafficking and the use of children in drug related crimes. The substantive provisions of the UNCRC, its objectives and methodology, and the accompanying interpretations that the Committee on the Rights of the Child has employed to shape the Conventions provisions make it distinctly appropriate as a

mechanism for addressing the economic exploitation of children. I suggest, in Chapter 4 and Chapter 8, that it was therefore not necessary for the ILO to adopt Convention 182, though given that it is now one of the key international treaties in relation to children, it does have certain key attributes that make it to some extent significant.



Chapter 4

An examination of the development and content of Convention 182

Recent years have brought with them a growing disaffection with the ILO approach to child labour, namely, that it is a phenomenon that needs to be eradicated – an approach embodied in the overall aim of Convention 138: the total abolition of child labour by means of setting minimum ages of employment which are to be progressively raised.¹ White argues that if the serious limitations of this traditional approach are accepted then ‘more realistic, child-centred attempts to address the “child labour problem” will necessarily involve discussion about which kinds of children’s work are more abusive, harmful, “intolerable” or simply “worse” than others.’² In other words, the latest trend in addressing child labour has been to prioritise certain actions aimed at specific types of child labour, in particular the worst forms of child labour. This illustrates a move from targeting child labour as a whole, to targeting the most exploitative or harmful forms of child labour as a matter of priority. There are numerous debates regarding whether the elimination of all child labour is a desirable ideal as alluded to in section 3.1.1 of Chapter 3. However, these will not be dealt with in detail in this thesis, suffice to say that the global reality of children who work and children’s own wishes to become involved in work would constitute legitimate counter-arguments to the abolitionist approach. I, in turn, will question whether the move to eradicate the worst forms of child labour through Convention 182 is merely idealism or an achievable reality.

¹ See Myers W, ‘Considering Child Labour: Changing terms, issues and actors at the international level’, *Childhood: A global journal of child research*, Vol. 6, No. 1, 1999, p 17 and also White B, ‘Defining the Intolerable: Child work, global standards and cultural relativism’, *Childhood: A global journal of child research*, Vol. 6, No. 1, 1999, p 133-134. This overall aim of the total abolition of child labour is also to be found in the 1998 ILO Declaration on Fundamental Principles and Rights at Work discussed in section 3.2.3.1 of Chapter 3.

² White, p 134, note 1.

With the advent of the UNCRC, the serious economic exploitation of children was placed squarely on the children's rights agenda. In addition, as discussed in Chapter 3, the UNCRC recognised specific forms of economic exploitation that required measures to protect children, for instance, in the case of sexual exploitation, child trafficking and the use of children in the manufacture and trafficking of drugs. What follows is an attempt to trace the history of the development of Convention 182, which deals specifically with these types of conduct, with a discussion of some issues that will resonate later in the thesis when the implementation of a pilot programme to address the instrumental use of children in the commission of crime as a worst form of child labour is examined in Chapter 7.

4.1. Initial developments at the ILO

Following the adoption of the UNCRC, the progressive recognition of these types of economic exploitation as a topic for discussion regarding the elimination of child labour is evident in the work and observations of the ILO. In 1994, the General Report of the Committee of Experts on the Application of Conventions and Recommendations highlighted 'one aspect of significant disquiet', namely, forced child labour and the exploitation of children for prostitution and pornography, stating: '[n]o longer is such exploitation of children a responsibility only of the country in which it occurs, it is an international responsibility'.³ Likewise, in the same year, the General Report of the Conference Committee on the Application of Conventions and Recommendations noted that experts had given special attention to the problem of contemporary slavery, especially of children, and that child labour was, in most cases, forced labour and was often 'a form of economic exploitation which violated fundamental rights of the child and human rights in general as guaranteed in several ILO Conventions and in Conventions adopted in the United Nations'.⁴

³ General Report of the Committee of Experts on the Application of Conventions and Recommendations, 1994, document no. (ilolex): 041994, accessed at www.ilo.org/ilolex/ on 6 September 2007.

⁴ General Report of the Conference Committee on the Application of Conventions and Recommendations, 1994, document no. (ilolex): 111994, accessed at www.ilo.org/ilolex/ on 6 September 2007.

Importantly, the 1995 General Report of the Conference Committee on the Application of Conventions and Recommendations noted that the government representative of the United Kingdom questioned whether there was actually an adequate instrument to address child labour as any difficulties in this area tended to be examined under the Forced Labour Convention of 1930. He also noted that Convention No. 138 was not a suitable instrument to use for the investigation of this complex issue, as it had a very low ratification rate in comparison with other fundamental Conventions and clearly did not meet the needs of member States. In addition, the representative from the United Kingdom noted that Convention 138 was flawed because it was not directly concerned with the exploitation of child labour, and the representative suggested something more focused, that took the form of a new promotional Convention or a radical revision of Convention No. 138, was needed.⁵

In 1996 the Committee of Experts noted the outcome of the World Summit for Social Development (Copenhagen, 6-12 March 1995) calling for the prohibition of forced and child labour.⁶ This was accompanied in 1996, by a call from the government representative of the United States for the protection of children from exploitative and dangerous forms of labour, which call included that such protection should form part of the core standards of the ILO. It was echoed by the government representative of Finland (speaking on behalf of the Nordic countries) and the workers' representative of Argentina, who drew particular attention to the sexual abuse of children through prostitution and pornography, and stated that this should be the object of determined action in the ILO.⁷

Consequently, during the 83rd Session of the International Labour Conference in 1996, a resolution was adopted concerning the elimination of child labour and which called for

⁵ General Report of the Conference Committee on the Application of Conventions and Recommendations, 1995, document no. (ilolex): 111995, accessed at www.ilo.org/ilolex/ on 6 September 2007.

⁶ General Report of the Committee of Experts on the Application of Conventions and Recommendations, 1996, document no. (ilolex): 0419962, accessed at www.ilo.org/ilolex/ on 6 September 2007.

⁷ General Report of the Conference Committee on the Application of Conventions and Recommendations, 1996, document no. (ilolex): 111996, accessed at www.ilo.org/ilolex/ on 6 September 2007.

action by the Governing Body of the ILO.⁸ The preamble to the Resolution clearly illustrates that the UNCRC and World Summit on Social Development had focused attention on the issue of elimination child labour.⁹ The Resolution contains wording that shows the shift from harmful work and employment to a recognition that ‘the exploitation of children is a gross violation of their human rights and is against the principles of social justice’.

While the Resolution acknowledges that individual countries do prohibit the exploitation of children in domestic law, it stresses the need ‘to immediately proceed with the abolition of its most intolerable aspects, namely the employment of children in slave-like and bonded conditions and in dangerous and hazardous work, the exploitation of very young children, and the commercial sexual exploitation of children’. The terminology used, such as ‘immediate’ and ‘intolerable’, is interesting as it illustrates the beginnings of the idea that there are ‘extreme’ cases of child labour and that whatever course of action is followed, their abolition should be measured against a time-table and must be ‘urgent’. The differentiation between all child work and work that because of its most harmful nature requires pressing attention was also a feature of the work of IPEC, which adopted an evolving strategy of prioritising certain forms of child labour.¹⁰ The idea that this form the basis of an ILO standard came to fruition with the obligations contained in Convention 182 for states to take time-bound measures for the elimination of the worst forms of child labour. The preamble to the Resolution also accepts that the type of child economic exploitation under discussion takes place outside of ‘lawfully established enterprises’ and constitutes illegal activity.

⁸ Resolution concerning the elimination of child labour, adopted on 18 June 1996. Accessed on 18 September 2007 at <http://www.ilo.org/public/english/standards/relm/gb/docs/gb267/gb-3.htm> .

⁹ See Cullen H, ‘Child Labor Standards: From Treaties to Labels’, in Weston BH (ed), *Child Labor and Human Rights: Making Children Matter*, Lynne Rienner Publishers: Boulder, 2005 p 90, where she mentions developments such as the UNCRC and the UN World Summit on Social Development as prompting the ILO to concern itself with broad developments in children’s rights.

¹⁰ See the discussion on IPEC in section 3.2.3.1 in Chapter 3.

The Resolution took a two-pronged approach. Firstly, it invited governments, and where appropriate, employer and worker organisations, to, for instance, ratify all international instruments regarding child labour if they have not already done so; develop policies and set priorities to end ‘the most intolerable aspects of child labour’; translate child labour policies into action plans and strengthen international co-operation.¹¹ Secondly, it invited the Governing Body of the ILO to instruct the Director General of the ILO, for instance, to assist member states through technical assistance to undertake studies and in-depth research on child labour and to present proposals regarding the convening of an international conference on the elimination of child labour (at an appropriate stage). No mention is made of a possible new convention on child labour in the document. What is evident is the notion that child labour must still be eliminated through, amongst others, the ratification of international instruments (obviously referring to Convention 138) and that extra action is needed in relation to ‘intolerable’ forms of child labour.

Following the Resolution, the Director General, at the 267th Session of the ILO Governing Body, set forth his proposals for action on the Resolution.¹² Paragraph 7 notes that the ILO had begun the process leading to the adoption of new international standards on child labour, and these would be placed on the agenda of the International Labour Conference in 1998. The focus of the new standards would be on ‘extreme forms of child labour, such as hazardous work, forced and bonded labour, child prostitution and child pornography’. Again, the terminology is of interest and the struggle to achieve an acceptable term for the nature of child labour under discussion is evidenced by the use of the word ‘extreme’ and then ‘intolerable’ again in Paragraph 9, where a proposed action

¹¹ There is a great emphasis in both the preamble to the Resolution and the recommendations made to states regarding the provision of education to children, health services, poverty alleviation and rehabilitation services. This shows the recognition of the need for a broader response to address child labour than that contained in, for instance, Convention 138 (see Chapter 3 for a discussion on the shortcomings of Convention 138).

¹² ILO Governing Body, Third Item on the Agenda: Effect to be given to the resolution concerning the elimination of child labour, adopted by the Conference at its 83rd Session (June 1996), GB.267/3, Geneva, November 1996, accessed on 18 September 2007 at <http://www.ilo.org/public/english/standards/relm/gb/docs/gb267/gb-3.htm> .

plan to provide practical support to countries for designing national programmes of action to address these types of child labour is discussed.

This was followed by more targeted discussions in the upper echelons of the ILO. In 1997, the Committee of Experts reiterated its comments on forced child labour, child prostitution and child pornography made in its 1994 General Report, further appealing to member states, which had not already taken action, to assist in the eradication of ‘these deplorable practices’ by, amongst others, preventing the involvement of persons within their borders in such practices and ensuring the punishment of those who advertise or promote such activities.¹³

In a similar vein, the issue was raised in the General Report of the Conference Committee in the same year.¹⁴ While several government representatives, including Egypt, Kenya and Belgium stated their concern regarding the problem of child labour, others, such as Canada, India and the Netherlands conveyed their hope for an effective new convention on child labour. In addition, opinions were expressed about the gap in coverage of the child labour problem between the Forced Labour Convention (No. 29) and the Minimum Age Convention (No. 138), and the still relatively low number of ratifications of the latter. The Committee intimated that, at a time of substantially heightened international awareness of the problem, the discussions signaled the occasion for the possible adoption of new standards. Interestingly, and constituting a more circumspect approach, I would argue, the employer representatives cautioned against a new treaty. While they expressed their support for all measures taken to combat forced labour and the exploitation of child labour, particularly in the form of child prostitution and pornography, they were of the view that concrete action needed to be taken to alleviate these ‘evils’ and to identify the reasons behind them and were of the view that special campaigns were a more appropriate means of combating these problems than the development of new standards.

¹³ General Report of the Committee of Experts on the Application of Conventions and Recommendations, 1997, document no. (ilolex): 041997, accessed at www.ilo.org/ilolex/ on 6 September 2007.

¹⁴ General Report of the Conference Committee on the Application of Conventions and Recommendations, 1997, document no. (ilolex): 111997, accessed at www.ilo.org/ilolex/ on 6 September 2007.

Finally, it has been observed that the idea of setting priorities in relation to child labour had been gaining momentum since the early 1990's. This is evidenced by the establishment of IPEC in 1992 and the content of its terms of reference, which give priority to the end of the most abusive and exploitative forms of child labour.¹⁵ Lansky, therefore, argues that one of the merits of a new international child labour instrument (at the time of his writing the Convention was still being drafted) would be to consolidate the 'legal underpinnings' of IPEC.¹⁶ Cullen also suggests that IPEC was the 'principal locus of the ILO's efforts to implement the child labour prohibition' and was the first institution within the ILO to effect a prioritisation approach to child labour.¹⁷ These observations will be borne out in the example of the IPEC Pilot Programme on the use of children in the commission of crime in Chapter 7.

I would argue that these initial moves within the ILO to take steps against serious economic exploitation of children set the tone for the final Convention. To begin with, although the 1996 Resolution does not mention a new international instrument, the discussions of the Committee of Experts and International Labour Conference Committee clearly point to a desire that the ILO, following other international developments such as the UNCRC, introduce new standards dealing with serious economic exploitation. I would suggest that it appears no serious consideration was given to whether the UNCRC was in actual fact adequate in this regard; the members of the respective Committees instead focused on the inadequacies of the existing ILO Conventions. In the concluding chapter of this thesis I return to this point, and argue that ultimately the adoption of Convention 182 was not necessary in light of the pre-existing provisions of the UNCRC, but that Convention 182 has nevertheless added some value to the international framework of measures to address the economic exploitation of children that constitute the worst forms of child labour.

¹⁵ Lansky M, 'Perspectives: Child Labour: How the challenge is being met', *International Labour Review*, Vol. 136, No. 2, 1997, p 232-257 at p 245.

¹⁶ Lansky, p 249, note 15.

¹⁷ Cullen, p 103, note 9.

In addition, the major features of Convention 182 can be seen as emerging from the initial discussions and work on the issue. Notably, and possibly unsurprisingly given the aim of the abolition of child labour as framed in Convention 138, is the idea that the 'intolerable' forms of child labour should be eliminated, ended or abolished. Again, I would argue that little attention was paid to whether this was an achievable outcome, given the fact that the conduct in question, forced labour, commercial sexual exploitation and trafficking in children, are markedly different from conduct previously dealt with by the ILO under the umbrella of child labour. The regulation of working conditions for children, the setting of a minimum age for admission to employment of children and the prohibition on employing children in certain hazardous work is located and managed within a country's 'legitimate' economy or markets, which are 'regulatable' for the want of a better term. In contrast, conduct that is termed 'worst forms of child labour', such as slavery, child trafficking and the use of children in armed conflict, is by no means 'regulatable'. It would be absurd to suggest that the institution of labour inspectors, one of the key monitoring and regulating mechanisms of the ILO, would be a suitable means to eliminate child trafficking or the use of children in armed conflict, whereas labour inspectors prove effective in regulating industry and commerce in relation to hazardous working conditions. Although the 1996 Resolution acknowledges the criminal nature of conduct that constitutes the intolerable forms of child labour in question, it fails to recognise the attendant difficulties of addressing such activities, for instance, such conduct being housed within the 'second' or 'criminal' economy.

On the other hand, the ILO must be commended for initiating a move to raise the bar on the nature of normative obligations contained in an international instrument. The approach to adopt 'something more', which requires states to take concrete, strategic and comprehensive measures to address the serious economic exploitation of children cannot be faulted. Although, I will try illustrate that couching these obligations in normative terms such as 'immediate' and 'priority', was somewhat misguided and ill-informed. Also, I would point to the fact that many of the measures adopted in Convention 182 in the end were already being put in place in certain countries, indeed quite effectively,

through IPEC programmes and Memoranda of Understanding.¹⁸ I will show, using the South African example in Chapter 7, that Convention 182 ultimately is more effectively implemented when accompanied by an IPEC programme.

I would, therefore, argue that Convention 182 originated with the aspiration of the ILO to be seen to address certain heinous forms of economic exploitation of children. Although well intentioned, the resulting Convention did not marry the potential new methods of action and policy -making with the realities of the goals it set. I ultimately argue, in my concluding chapter, that the failure to align the goals and methods of the Convention detracts from its significance.

4.2 The 1997 child labour conferences

The year 1997 also marked the occasion of three key child labour conferences, held in Amsterdam, Trondheim and Oslo. For the sake of brevity, only two will be discussed here, but this does not detract from the fact that all three significantly contributed to the debates on the drafting process of the new Convention and thereby targeted the focus on specific issues of content, in particular the need for the Convention to include provisions regarding implementation.

The first conference was held in Amsterdam on 26-27 February 1997 and organised by the Netherlands Ministry of Social Affairs and Employment, the Netherlands Ministry of Foreign Affairs and the ILO.¹⁹ At the conference, the ILO presented a background

¹⁸ For example, in Tanzania: see Mmari D, 'Combating Child Labor in Tanzania: A Beginning', in Weston BH (ed), *Child Labor and Human Rights: Making Children Matter*, Lynne Rienner Publishers: Boulder, 2005, p 169-185 and Mallya W, 'Awareness raising on child labour: Experience from Tanzania', paper delivered at the Regional Child Labour Conference (RECLISA) held in Johannesburg, South Africa, 4-6 July, 2006 (copy on file with the author). The country example of South Africa will be discussed in detail in Chapter 7.

¹⁹ Amsterdam Child Labour Conference Report: Combating the most intolerable forms of child labour: a global challenge, hereinafter referred to as Amsterdam Conference Report, accessed on 18 September 2007 at www.ilo.org/public/english/comp/child/conf/amsterdam/index.htm (hereinafter Amsterdam Conference report).

document that detailed the nature and extent of global child labour, the consequences for the child and society, and the measures required at national and international levels to deal with it.²⁰ These measures included: adopting a time-bound programme of action encompassing removal, rehabilitation and prevention²¹ and the adoption of new international labour standards banning the most intolerable forms of child labour. What is interesting to note from a perusal of the proposals for measures of action is, firstly, the continued effort to find an acceptable term for the nature of child labour under discussion: there is the inter-changing use of the words ‘extreme’ and ‘intolerable’. Second is the inclusion, for the first time, of the use of children in the production and trafficking of drugs or other illegal activities, which had henceforth not been mentioned by the Committee of Experts, the Conference Committee or the Resolution on the Elimination of Child Labour.²²

The Conference had a workshop dedicated to the proposed new instrument on child labour.²³ The workshop had two main themes, firstly, a justification of the need for new

²⁰ Background Document prepared for the Amsterdam Child Labour Conference, International Labour Office, Geneva, 1997 accessed on 18 September 2007 at www.ilo.org/public/english/comp/child/conf/amsterdam/background.htm .

²¹ Echoes of this proposal are found in the design of the pilot project to address the instrumental use of children in the commission of crime in South Africa discussed in chapter 7 of the thesis.

²² The background document provides some scant detail of this particular type of activity. It notes that children help with the cultivation of plants used as raw materials for producing drugs as well as being used for marketing drugs and that in the major cities of Asia and Latin America some street children are used in the drug trade. The document notes that the drug trade is organised by adults who also use children for pickpocketing and car theft. Finally, it notes that gangs of children are covertly organised by adults in several Central and Eastern European cities for use in crime. Importantly, the report notes that the children are subject to violence from adults who manipulate them, as well as violence from the police. A similar finding of the insensitivity of the police to the needs of such children was found in the Pilot Programme on the instrumental use of children in the commission of crime in South Africa, which is discussed in Chapter 7.

²³ Workshop No. 3 – Instruments on the Elimination of Exploitative and Hazardous Forms of Child Labour, International Labour Office, 1997, accessed on 18 September 2007 at www.ilo.org/public/english/comp/child/conf/amsterdam/workshop3.htm .

standards and, secondly, an overview of the content of the proposed instruments. First, while noting that there are international treaties that deal with child labour such as the UNCRC, the ICESCR and the ICCPR, it was stated that no ILO Convention had yet been adopted dealing with intolerable forms of exploitation of child labour. The workshop discussed both the ILO Forced Labour Convention of 1930 as well as Convention 138, but concluded that all the extreme forms of child labour were not covered by the former, which was confined to forced labour, and that Convention 138 was problematic due to its slow ratification rate, its very general scope and the fact that it is silent on activities that are contrary to the human rights of children.

Importantly, the concern was expressed that a new instrument might duplicate existing standards. However, it was argued that a new treaty whose explicit aim would be the immediate abolition of the most intolerable forms of child labour would enable more direct and effective action against the 'most exploitative and dangerous' types of child labour to be taken; firstly, because it would focus specifically on this objective, and secondly it would clearly specify the obligations of the parties to the Convention. Finally, the new instrument would be part of a more comprehensive and long term vision as set out in Article 1 of Convention 138.

It is evident that thought had been given to how such a new instrument would take the fight against child labour further than had previously been done in international law. While the UNCRC represented the seminal children's rights treaty, a specific instrument aimed at effective action against extreme or intolerable or dangerous instances of child labour would be distinguishable from the UNCRC as well as being complementary in its overall aim. However, it is arguable that the UNCRC, through its provisions and the UN Committee of the Rights of the Child's Concluding Observations, General Days of Discussion and General Comments, remains the most influential child rights treaty.²⁴

²⁴ See generally Doek J, 'The Protection of Children's Rights and the United Nations Convention on the Rights of the Child: Achievements and Challenges', *Saint Louis University Public Law Review*, 2003, p 235-252. He points to the influence of the UNCRC on the establishment of IPEC, increased awareness on the issue of child labour and the adoption of Convention 182.

The second purpose of the workshop was to exchange views on the questionnaire prepared by the International Labour Office as the initial stage in the process of drafting a new convention, the responses to which would inform the content of the instrument. Some of the questions related to the form of the instrument, for example whether it should be a convention, a recommendation or a convention supplemented by a recommendation, and the content, including what types of ‘extreme’ forms of child labour should be included.²⁵ One of the major conclusions of the workshop was that, notwithstanding the existing instruments, there was a need for new instruments focusing exclusively on the most intolerable forms of child labour, preferably a convention stating the basic principles combined with a recommendation in the form of a plan of action.²⁶

The Conference produced a Declaration at the end of its deliberations calling for, amongst other things, immediate action to eliminate child labour; that all countries launch without delay a ‘time-bound programme of action to eliminate child labour’ and that all countries participate in the preparation of new international standards on the elimination of the most intolerable forms of child labour.²⁷ In discussing the types of child labour in need of elimination, such as commercial sexual exploitation, forced labour and trafficking, only the use of children in the drugs trade, in relation to the use of children to commit crime, is mentioned in the Declaration – this amounts to a narrow interpretation

²⁵ It is interesting to note that the questionnaire lumped together the use of children in prostitution, pornography, production or trafficking of drugs and other illegal activities as one type of extreme form of child labour. This needs to be contrasted with the end result in Convention 182, where the illicit use of children in the commission of crime is a separate category in the definition of worst forms of child labour. Also no mention is made of the use of children in armed conflict as an extreme form of child labour.

²⁶ Amsterdam Conference Report, p 17, note 19.

²⁷ Amsterdam Declaration on the Elimination of the Most Intolerable Forms of Child Labour, February 1997, accessed on 18 September 2007 at www.ilo.org/public/english/comp/child/conf/amsterdam/declaration . Again, the terminology used is instructive: the urgency of the situation is indicated through the word ‘immediate’, the terminology of ‘most intolerable’ forms of child labour has been adopted by the conference and the idea of using ‘time-bound programmes of action’ has been identified as a suitable means of addressing child labour – an idea which ultimately found its way into Convention 182.

of the illicit use of children and is somewhat surprising as the ILO background document mentions the broader concept of children used in illegal activities generally as well as in the drug trade.

While the Amsterdam Conference seemed to focus the international discourse on the issue of child labour and how to address the serious or extreme or most intolerable aspects thereof, including a discussion on the desirability of new international standards, the International Conference on Child Labour held in Oslo, Norway in October 1997 took a more detailed approach to how legislation, enforcement and practical action could be synthesised to eliminate child labour.

The deliberations and discussions of the Oslo Conference demonstrate a concerted effort to ensure comprehensive action against the exploitation of children, with much attention paid to strategies to counter the global incidences of child labour. The ILO prepared two issue papers and two technical papers for the Conference.²⁸ The Issue Paper and Technical Paper on Practical Action to Eliminate Child Labour dealt with some of the information obtained and lessons learned from IPEC's work, such as: the need for strategic action aimed at mainstreaming child labour issues in a coherent national policy and plan of action; that the elimination of the 'most intolerable forms of child labour' must be a priority;²⁹ and the collection of reliable data on child labour and attendant analysis thereof.

²⁸ Practical Action to Eliminate Child Labour, ILO Issue Paper, 1997; Legislation and Enforcement, ILO Issue Paper, 1997; Practical Action to Eliminate Child Labour, ILO Technical Paper, 1997 and Legislation and Enforcement, ILO Technical Paper, 1997, accessed on 18 September 2007 at www.ilo.org/public/english/comp/child/conf/oslo/. The Technical Paper on Legislation and Enforcement is a condensed version of a report prepared for a discussion of child labour at the 86th Session of the International Labour Conference which was scheduled to address the adoption of a new international instrument on child labour.

²⁹ The types of 'most intolerable' child labour listed are slavery and bonded labour, child prostitution and child pornography, use of children in the drugs trade and hazardous work. Interestingly, the Technical Paper, in note 28, acknowledges that the total elimination of child labour will take time, but prioritises

These two papers complemented the Issue Paper and Technical Paper on Legislation and Enforcement. The latter two noted that ‘[t]he struggle against child labour cannot be won through legislative action alone, but it certainly cannot be won without it’.³⁰ While acknowledging the Convention on the Rights of the Child and Convention 138 and Recommendation 146, as well as the ILO Convention on Forced Labour (1930), the papers note that a new international instrument would call for the ‘immediate suppression of extreme forms of child labour’ as well as call for effective enforcement measures. It is implicit in the reasoning of the Technical Paper that the existing Conventions do not go far enough, and what is needed is an international instrument that creates obligations to take targeted action beyond mere legislative and administrative measures. Again drawing on lessons learned, the papers set out steps which would be integral to assisting with the enforcement of child labour legislation, for example: that legislation needs to be complemented by socio-economic programmes and policies for universal education and to address poverty as a root cause of child labour; that there is a need for a total prohibition of work by very young children;³¹ that there is a need for the strengthening of the role of labour inspectors;³² the simplification of legal and administrative procedures and awareness raising. I would argue that many of these steps constitute existing obligations under the UNCRC (and Convention 138) in any event, and that while targeted action against the most serious forms of economic exploitation of children is certainly warranted, the ILO did not need to enact a new set of standards.

Importantly, yet in the face of the call for the elimination of the most intolerable forms of child labour,³³ the Technical Paper clearly acknowledges the difficulty of enforcing

these forms as to be eliminated first. As alluded to above, the goal of elimination may have problematic consequences for implementation.

³⁰ See in particular the background section of the ILO Issue Paper on Legislation and Enforcement, note 28.

³¹ The Issue Paper defines very young children as children under 12 years of age, note 28.

³² The reason this is mentioned is that the Technical Paper noted that the enforcement of Convention 138 is hampered by the weaknesses in the labour inspection system of many countries, note 28.

³³ The Technical Paper most certainly appears to set this as an aim of the new international instrument, note 28. In addition, the Final Report of the Conference notes that there seemed to be general consensus on the

legislation prohibiting bonded labour and the commercial sexual exploitation of children, precisely because of their 'clandestine' and 'invisible' nature. In addition, the highly lucrative and profitable nature of commercial sexual exploitation is mentioned.

While acknowledging that the ultimate aim of eliminating these types of child labour is most desirable, there is a need for proper recognition to be assigned to the nature of the criminal activity involved. Therefore, securing the goal of elimination to a time-bound plan of action (given the long-established, hidden nature and, in some cases, the organised criminal business-like structures of commercial sexual exploitation and bonded labour), may have been setting the bar too high. Of course the obligation to undertake a time-bound programme of action is a useful way of ensuring states commit themselves to addressing child labour according to an identifiable time-scale, but it might nevertheless be too arbitrary when dealing with serious forms of child labour, which also constitute criminal actions. Nonetheless, this course of action for dealing with the serious cases of economic exploitation was set and as will be seen in the following discussion, resulted in a Convention that adopted this precise goal and manner of achieving it.

A final document was prepared for the Conference, which was a joint ILO/UNICEF Paper examining strategies for the elimination of child labour.³⁴ Much of the document seems to have also informed Convention 182 and Recommendation 190, particularly in relation to the content of plans of action and policy for eliminating child labour. Very briefly the Paper identifies the link between poverty and exploitation, while acknowledging that poverty does not automatically lead to child labour. It emphasises the need for both social and economic policies to address child labour, particularly the role played by education. Finally, the Paper makes certain proposals regarding practical steps

ultimate objective of the total abolition of child labour and that commitments should be supported by time-bound programmes of action aimed at ending child labour within an explicitly defined period of time, see Final Report of the International Conference on Child Labour, Oslo, Norway, October 1997, accessed on 18 September 2007 at www.ilo.org/public/english/comp/child/conf/oslo/report.htm.

³⁴ Strategies for Eliminating Child Labour: Prevention, Removal and Rehabilitation (Synthesis Document), Joint ILO/UNICEF Paper, October 1997, accessed on 18 September 2007 at www.ilo.org/public/english/comp/child/conf/oslo/syn/htm.

for eliminating child labour, for example: prioritising the elimination of the most intolerable forms of child labour in the shortest time possible;³⁵ that governments must prioritise time-bound programmes for the elimination of child labour and for achieving free, universal compulsory primary education; the adoption of protection and rehabilitation schemes as well as the provision of resources for these; the design and implementation of programmes for the withdrawal of children from the most extreme forms of exploitation and plans for preventing children from entering the labour force³⁶ and the strengthening of international co-operation to combat trafficking and commercial sexual exploitation especially by means of developing international agreements to facilitate the detection, prosecution and punishment of offenders responsible for such criminal acts.

The outcome of the Conference was the unanimous adoption of the Agenda for Action, which would serve as a guideline for policy development and the formulation of programmes at national and international levels.³⁷ The Agenda for Action was based on three key areas: basic education, legislation and social mobilisation. While the Conference recognised that these were not the only areas for action in effectively eliminating child labour, they were regarded as critical elements of any multi-sectoral strategy.

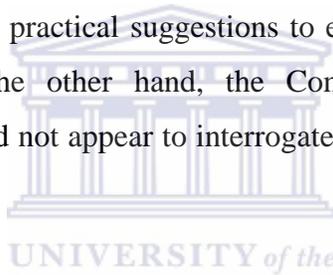
³⁵ This is despite, earlier in the same paragraph, acknowledging the elimination of child labour is a long term goal and cannot be achieved 'overnight'.

³⁶ It is interesting to note that the term 'labour force' implies employment in the traditional sense of the word, and that prevention from entering situations that might involve serious forms of economic exploitation are not included. Paragraph 63 of the Joint Paper does mention the need to identify children from becoming involved in intolerable forms of child labour before it is too late, especially girls, and that programmes designed to provide education, skills and access to 'dignified forms of livelihood' have been proven to be most effective. But the document does not deal with the issue of crime prevention policies aimed not only at supporting children but addressing crime more generally in society.

³⁷ See Part IV of the Final Report of the Oslo Conference, note 33.

Myers argues that the Agenda for Action reflected the fact that there was little common understanding of what actually constituted the 'child labour problem'.³⁸ He noted that the reiteration of the elimination of child labour as the ultimate objective of the Agenda, without clarifying whether the target is children participating in all work or just in harmful work, is indicative that agreement on what the term 'child labour' actually meant was not politically possible, although it was evident from the context of the conference that the priority was the most damaging forms of child labour.

It can be argued that the discussions at these two conferences most certainly contributed to the discourse that ensued about the content of Convention 182 and Recommendation 190. While on one hand, the preparation documents were based on research conducted by the ILO and in that sense provided evidence-based inputs into the deliberations of the Conferences and made various practical suggestions to enhance future enforcement and implementation efforts, on the other hand, the Conferences adopted the already established terminology and did not appear to interrogate the implications of some of the proposals more deeply.



Thus, it would appear from the Conferences' deliberations and outcomes that generally the course of the development of Convention 182 was proceeding in a direction hitherto not embarked on, namely to ensure that the new international standards were not just about legislative measures, as contained in other ILO Conventions, but also effective enforcement. However, what is of concern is that the overall goal and means of achieving

³⁸ Myers, p 22 -23, note 1. He points to two definitions of child labour: firstly, where it is an approximate synonym of child work, an approach adopted by trade unions, consumer groups and the ILO who promote the view that young children should not work, a view implicit in Convention 138 which prohibits work or employment under a particular minimum age; a second approach to child labour, adopted by many child rights organisations, is one where it represents work that is injurious to children and their best interests, and which focuses attention on removing them from the detrimental aspects of work and not the work itself. He argues that although both of these do overlap in part, they are essentially contradictory. From a policy standpoint, therefore, there needs to be clarity regarding whether the social objective is to protect children from being harmed in their work or to rather keep them out of work altogether.

it, namely the elimination of the most intolerable forms of child labour by means of immediate action involving time-bound programmes, may not have been thought through adequately enough to foresee likely problems in achieving such an objective.

A further problem regarding the subject matter of this thesis, namely the use of children in the commission of crime, is that this issue was the one area where little evidence or scientific research supported its inclusion in the list of ‘extreme’ forms of child labour by the Conferences. I will suggest in Chapter 7 and Chapter 8, that the use of children in the commission of crime, whilst most certainly exploitative, is not an ‘easy fit’ in Convention 182 – a contention borne out by the outcomes of the Pilot Programme on children used by adults as a worst form of child labour.

4.3 The drafting process of the new international instruments

4.3.1 86th Session of the International Labour Conference of the ILO in 1998

The new child labour standards which were scheduled to be discussed at the 86th Session of the International Labour Conference and adopted in 1999 were developed according to the traditional double-discussion procedure according to Article 39 of the Standing Orders of the Conference.³⁹ Briefly, this procedure requires numerous consultations with governments and representative national employer and worker organisations. It started in April 1996 when the ILO Governing Body decided in March of that year to include the issue on the agenda of the 1998 International Labour Conference. The initial consultation was conducted by correspondence and entailed a questionnaire (as discussed at the Amsterdam Conference).⁴⁰ This was sent to governments in September 1996 and they were requested to send their replies to the International Labour Office by 30 June 1997.

³⁹ See the Amsterdam Conference, Workshop No. 3 – Instruments on the Elimination of Exploitative and Hazardous Forms of Child Labour, note 23 above.

⁴⁰ A copy of the questionnaire is available in Report VI (1): Questionnaire - Child Labour, Report submitted to the 86th Session (1998) of the International Labour Conference, International Labour Office,

At the 86th Session of the International Labour Conference a Committee on Child Labour was appointed by the ILO General Conference to examine the conclusions proposed by the International Labour Office based on the replies to the questionnaire.⁴¹ The Committee had before it Report VI (1), which was the questionnaire on child labour circulated to governments and other representatives in 1996, and Report VI(2), which summarised the responses to the questionnaire submitted by the states that had responded,⁴² both of which reports were prepared by the International Labour Office for the sixth item on the agenda of the Conference.

Report VI(1) chronicled the exploitation and abuse of working children, surveying international and national law and practice and, through an accompanying questionnaire, seeking the views of governments, employers' and workers' organisations on the possible scope and content of a new international instrument.⁴³ In motivating for this new international legal instrument, ILO Report VI(1) noted that the current climate at the time provided "unknown opportunities and possibilities that should enable us to make a directive assault on child labour".⁴⁴ It argued that the new convention would fill the gaps in current international legal instruments, set clear priorities for national and international action and build on Convention No. 138.⁴⁵ It noted that an obstacle to the greater ratification of Convention No. 138 was the fact that many States viewed its provisions as too complex and difficult to apply in its entirety and therefore there was a need to complement the Minimum Age Convention and focus on the most intolerable forms of

Geneva, 1996 accessed on 24 September 2007 at <http://www.ilo.org/public/english/comp/child/publ/target/question.htm> (hereinafter ILO Report VI(1)).

⁴¹ See Report of the Committee on Child Labour, 86th Session of the International Labour Conference, International Labour Office, Geneva, June 1998 for the composition of the Committee and a summary of its work accessed on 24 September 2007 at <http://www.ilo.org/public/english/standards/reln/ilc/ilc86/> (hereinafter Report of the Committee on Child Labour).

⁴²Report VI (2): Child labour, Sixth item on the Agenda, 86th Session of the International Labour Conference, International Labour Office, Geneva, June 1998, accessed on 24 September 2007 at <http://www.ilo.org/public/english/standards/reln/ilc/ilc86/rep-vi.htm> (hereinafter ILO Report VI(2)).

⁴³ ILO Report VI(1), Introduction, note 40.

⁴⁴ ILO Report VI(1), p 57, note 40.

⁴⁵ ILO Report VI(1), p 57, note 40.

child labour.⁴⁶ In addition, the Report provided various other reasons for the need for a further child labour convention,⁴⁷ such as the fact that there was economic development in developing countries in Asia and Latin America and that such development was predicted for Africa as well. This was seen as an indication that countries were able to put in place time-bound programmes to combat and eliminate child labour much as they had achieved rapid growth rates and increased per capita income and other socio-economic objectives within time-bound development programmes. Furthermore, special attention was necessary for children who are subjected to even greater exploitation and abuse on account of their particular vulnerabilities, such as the very young and girls.

In submitting the Reports to the Committee, it is interesting to note that the representative of the Secretary-General of the ILO referred to the Proposed Conclusions contained in Report VI(2) and referred to the fact that they were short and contained fundamental principles, yet they also allowed for sufficient flexibility to facilitate wide ratification.⁴⁸ This point was made, possibly on account of the fact that, in contrast, Convention 138 was lauded by many as being flexible, but, in reality, in the 20 years following its adoption, it has been characterised by a very slow ratification rate. It must be acknowledged that the motivation given by the Secretary-General's representative was somewhat prescient, as Convention 182 was destined to have a very fast and prolific ratification rate. In addition, the terminology used by the Proposed Conclusions when referring to the worst forms of child labour had yet to be agreed. The International Labour Office had proposed the expression 'extreme forms of child labour' to comprise: (i) all forms of slavery and practices similar to slavery, such as the sale and trafficking of children, forced or compulsory labour, debt bondage and serfdom; (ii) the use, engagement or offering of a child in illegal activities, for prostitution, production of pornography, or pornographic performances; and (iii) any other type of work or activity which, by its nature or the circumstances in which it was carried out, was likely to

⁴⁶ ILO Report VI(1), p 57, note 40. See also the discussion in section 3.1 of Chapter 3 regarding the slow ratification rate for Convention 138.

⁴⁷ ILO Report VI(1), p 57, note 40.

⁴⁸ See Report of the Committee on Child Labour, note 41.

jeopardise the health, safety or morals of children, so that they should not be used or engaged in such work or activity under any circumstances. This differs from the final text, particularly in respect of the use of children in illegal activities as this would become a separate worst form of child labour, distinct from commercial sexual exploitation and child pornography.

After taking the Reports into account, the Committee discussed the proposed texts. In its Report, the Committee on Child Labour, having acknowledged the need for urgent action, noted that the basic obligation of states which ratify the Convention should be to take measures to secure the prohibition and immediate elimination of the worst forms of child labour.⁴⁹ It is noteworthy that at long last there is a reference to the term 'worst forms of child labour' which was destined to be the term in the adopted text of the Convention.⁵⁰

As far as the preamble to the Convention was concerned, there was much discussion in the Committee around the words 'prohibition', 'immediate' and 'elimination'.⁵¹ Suppression was changed to elimination; prohibition was added and there was a protracted discussion about the use of the word 'immediate'. The government member of India proposed to add the word "progressive" to modify "elimination". He argued, I

⁴⁹ See Report of the Committee on Child Labour, note 41, under the section on general discussion.

⁵⁰ The use of the word 'worst' was a proposal by the worker members in the Committee. The reason given was that the words "extreme" or "intolerable" had certain connotations that made those terms inappropriate. Noting that some forms of child labour were worse than others, he emphasised that "the worst" forms of child labour was understandable to the general public who supported the work of the Committee. The employer members opposed the amendment, and thought there was general agreement that "extreme" was a good word in this situation. The view was held that the term "worst" was too vague. After some discussion, the employer Vice-Chairperson stated that if the choice between "extreme" and "the worst" had no effect on the content or meaning of the instruments, the employer members would support "the worst" forms of child labour and so the amendment was adopted. See Report of the Committee on Child Labour, note 41, under the section on consideration of the Proposed Conclusions contained in Report VI(2).

⁵¹ See Report of the Committee on Child Labour, note 41, under the section on consideration of the Proposed Conclusions contained in Report VI(2).

would suggest correctly, that while developing countries might be able to prohibit the practice immediately, they would not be able to eliminate child labour - even its worst forms - overnight, since it required progressive action. After much discussion, the Chairperson of the Committee stated that the wording "progressive elimination", as proposed, would not do justice to the general consensus in the Committee on the need for urgent action to eliminate the worst forms of child labour. The issue was resolved when the Committee agreed to a proposal by the worker members in a spirit of compromise to insert "and comprehensive" action. The amendment was adopted to read as follows:

‘[t]he Preamble should note that new instruments should be adopted for the prohibition and for immediate and comprehensive action for the elimination of the worst forms of child labour as the main priority for national and international action and that these instruments complement the Minimum Age for Admission to Employment Convention and Recommendation, 1973, which remain the fundamental instruments for the abolition of child labour’.

The Committee also noted that there was agreement that the instruments should apply to all persons under the age of 18. It was also stated that the definition of the worst forms of child labour was the subject of a passionate, yet highly focused and dignified debate, during which the notion that the Convention should be practical, immediately applicable and targeted at the worst forms of child labour prevailed.

In relation to the actual worst forms of child labour to be included in the Convention, surprisingly, given that children in armed conflict is not even regarded as economic exploitation by the UNCRC, the Committee was asked to consider the situation of child combatants and children in armed conflicts but a decision on this matter was deferred until the second discussion, which would take place during the 87th Session of the International Labour Conference.

The Committee agreed to define the worst forms of child labour as follows: (a) all forms of practices similar to slavery, such as the sale and trafficking of children, forced or compulsory labour, debt bondage and serfdom; (b) the use, procuring or offering of a

child for prostitution, for the production of pornography, or for pornographic performances; (c) the use, procuring or offering of a child for illegal activities, in particular for the production and trafficking of drugs, and (d) any other type of work or activity, which by its nature or the circumstances in which it is carried out, is likely to jeopardise the health, safety or morals of children. This is different to the Proposed Conclusions contained in Report VI(2), and shows the recognition of the instrumental use of a child in the commission of crime as a worst form of child labour for the first time.

Furthermore, the Government members of Belgium, Denmark, Finland, Netherlands, Norway, Spain, Sweden and Switzerland introduced an amendment to add a new point to the content of the proposed Convention, which related to creating an obligation on states to design and implement national programmes of action to eliminate as a priority the worst forms of child labour. The government representative of Sweden explained that ratifying countries needed to have national programmes of action and that the Convention should be more action oriented. A debate centred on whether the proposed amendment should be included in the Convention or the Recommendation. The employer members opposed its inclusion in the Convention, while the worker members supported it and the government members were almost evenly divided about the issue. To facilitate progress in the debate, the employer members supported inclusion in the Convention, with the implicit understanding that their preference would have been for inclusion in the Recommendation, and that the placement of the particular text in either the Convention or Recommendation would be reviewed again in the second discussion in 1999.⁵²

Following the discussion by the Committee on Child Labour at the 86th Session of the Conference, and in accordance with Article 39 of the Standing Orders of the Conference, the International Labour Office prepared and communicated to the governments of member states a report containing a proposed Convention and a proposed

⁵² The new proposal for the Convention in this regard then read: '(1) Each Member which ratifies the Convention should design and implement programmes of action to eliminate as a priority the worst forms of child labour. (2) Such programmes of action should be designed and implemented in consultation with relevant government institutions and employers' and workers' organisations.' This formed the basis for Article 7(1) of the final Convention.

Recommendation concerning the prohibition and immediate elimination of the worst forms of child labour, based on the conclusions adopted by the Conference at its 86th Session.⁵³ Governments were invited to send any amendments or comments they might wish to make so as to reach the International Labour Office by 30 November 1998, or to inform it, by the same date, whether they considered that the proposed texts constituted a satisfactory basis for discussion by the Conference at its 87th Session in 1999.

4.3.2 87th Session of the International Labour Conference 1999

At the 87th Session of the International Labour Conference, the representative of the ILO Secretary General presented to the Committee on Labour two reports: Report IV(2A), which contained summaries of the comments received from governments, after consultations with the most representative organisations of workers and employers on the texts prepared by the Office following the 86th Session of the International Labour Conference, in 1998, and Report IV(2B) which contained the text of the Proposed Convention and Recommendation.⁵⁴ Report IV (2 B) provides a version of the proposed texts, amended in the light of the observations made by governments and by employers' and workers' organisations. In addition, some slight changes were made, where appropriate, in the wording of the texts, mainly to ensure full convergence between the two versions of the proposed instruments. The idea was that these texts would serve as a basis for the second discussion, at the 87th Session (1999), on the question of child labour.⁵⁵

⁵³ See Report IV (2B) Child Labour, Fourth Item on the Agenda, 87th Session of the International Labour Conference, International Labour Office, Geneva, June 1999 accessed on 25 September 2007 at <http://www.ilo.org/public/english/standards/realm/ilc/ilc87/rep-iv2b.htm> (hereinafter Report IV(2B)).

⁵⁴ Report of the Committee on Child Labour (Corr.), 87th Session of the International Labour Conference, International Labour Office, Geneva, June 1999, Paragraph 5, accessed on 25 September 2007 at <http://www.ilo.org/public/english/standards/realm/ilc/ilc87/com-chil.htm> (herein after Committee on Child Labour Report 1999).

⁵⁵ Report IV (2B), note 53.

The representative of the Secretary-General also highlighted some of the major issues likely to come up during the second discussion. The first concerned whether all hazardous work covered by the Convention 138 should be covered by the new Convention. Some comments received had expressed the view that the new Convention had a more limited scope and was concerned with hazardous work which posed imminent danger or with work which should not be tolerated under any circumstances.⁵⁶ Others, especially workers' organisations, had expressed a wish to give specific examples in the Convention of work likely to jeopardise the health, safety or morals of children, such as the criteria set out in Paragraph 3 of the proposed Recommendation.

The second major issue was whether or not to include child soldiers and the use of children in armed conflicts as a worst form of child labour.⁵⁷ He noted that the third contentious issue was whether the denial of access to education should be a criterion for determining the worst forms of child labour.⁵⁸ Various proposals had been suggested including, as a worst form of child labour, work that systematically denied children access to education. On the other hand some governments and employers' organisations opposed this on the basis that it would broaden the scope of the new Convention to include all child labour and not just the worst forms, which was the focus of the new

⁵⁶ Committee on Child Labour Report 1999, Paragraph 10, note 54.

⁵⁷ Committee on Child Labour Report 1999, Paragraph 11 note 54. In the general discussion in the Committee that followed, the South African government representative stated that an explicit reference to the prohibition of involvement of children in armed conflict should be made because it affected more than 300,000 children in approximately 30 conflicts in the world. He went on to note that child soldiers had difficulty demobilising once peace was restored as they had become accustomed to violence and experienced severe problems when they returned home and that the use of child soldiers should be considered an illegal activity, see Paragraph 39.

⁵⁸ Committee on Child Labour Report 1999, note 54, Paragraph 11. There was a big lobby from some countries to include this as a worst form of child labour. White, writing at the time of the final stages of drafting the Convention, expressed concern that work which systematically denied children access to education was not regarded as 'harmful work' and that there was little reference to education in the draft . White, p 140, note 1 above. While the systematic denial of access to education did not ultimately become a worst form of child labour, reference to education as a measure of eliminating worst forms of child labour did find its way into the Convention and Recommendation.

instrument. The fourth issue was the relationship between immediate and time-bound measures.⁵⁹ Finally, the fifth issue related to the possible role of non-governmental organisations (NGOs) and other concerned groups.⁶⁰ Several governments had stated that broader consultations should be required in the Convention and there was support from some workers' organisations for consultations with the concerned children and their families.

After considering the Reports presented to the Committee, it proceeded with its deliberations on the text.

As far as the title was concerned, a series of amendments were submitted and discussed concerning whether the title should refer to 'immediate prohibition', but not 'immediate elimination'; 'immediate measures for elimination', rather than 'immediate elimination'; 'effective' elimination, instead of 'immediate' elimination; and 'prohibition and

⁵⁹ Committee on Child Labour Report 1999, Paragraph 12, note 54. In the general discussion of the Committee, the South African government representative argued that there was no contradiction between the concepts of immediate measures and time-bound measures; the Convention should require States to take immediate measures, such as bringing their law and practice into line with international standards, and setting up the necessary institutional capacity and programmes aimed at prohibiting and eliminating the worst forms of child labour. However, he noted that the effective elimination of child labour needed well-conceived, strictly time-bound programmes, see Paragraph 39. Contrast this with the view of the government representative of India, who, while confirming his government's commitment to the full eradication of all forms of child labour, commented that all governments had to take immediate action to eliminate the worst forms of child labour, while bearing in mind their socio-economic context and specific situation regarding child labour. He was of the opinion that precipitate actions could drive children into even deeper forms of exploitation and should therefore be avoided. He stressed that child labour could only be eliminated gradually and that efforts must take into consideration the level of development of each country and be directly linked to the level of international co-operation necessary to promote socio-economic development and the eradication of poverty. He went on to stress that the new instruments should not address the problem of the worst forms of child labour purely in a political and civil rights context and suggested a number of areas in the draft texts that would need change, including that provisions related to the national implementation of the Convention had to reflect the complex nature of the phenomenon and not create untenable legal obligations for enforcement, see Paragraph 25 of the Committee Report.

⁶⁰ Committee on Child Labour Report 1999, Paragraph 12, note 54.

elimination' without any reference to 'immediate'. Consensus was ultimately reached on the phrase 'prohibition and immediate action for the elimination' of the worst forms of child labour.⁶¹

Likewise, a similar debate regarding the use of the word 'immediate' in Article 1 ensued, but this was less protracted. After consultations, the government member of the Netherlands proposed a sub-amendment which inserted the words 'immediate and effective' before 'measures', deleted the word 'immediate' before 'elimination' and added at the end of the Article the words 'as a matter of urgency'. The Article as sub-amended then read: '[e]ach member which ratifies this Convention shall take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency'. The sub-amendment was supported by the employer members and the worker members. Following an indicative show of support, Article 1 was adopted as amended.⁶² Although, the overall effect of the Convention still links the elimination of worst forms of child labour to time-bound action, thankfully the final text merely called for 'immediate measures' against worst forms of child labour as opposed to the 'immediate elimination' of the worst forms of child labour.

⁶¹ Committee on Child Labour Report 1999, Paragraph 61, note 54. The government representative of Morocco submitted an amendment to insert the word "immediate" before the word "prohibition" and replace the word "immediate" with the word "effective" before the word "elimination", so that the title would read as follows: "Proposed Convention concerning the immediate prohibition and effective elimination of the worst forms of child labour". The reason was that the amendment would better reflect that prohibition of the worst forms of child labour through legislative means could be immediate, whereas their elimination required time. The government member of India supported the amendment indicating the need to adopt an instrument which contained achievable goals. The worker and the employer members opposed the amendment, as did the government members of Canada, Finland, Netherlands, Switzerland and Zimbabwe, while the Government member of Angola supported it. The government member of Nigeria supported the first part of the amendment and proposed a sub-amendment to change the second part to read: 'effective measures for the elimination'. The government member of Morocco supported the sub-amendment, but in view of the insufficient support indicated for the amendment, withdrew it, see Paragraph 65.

⁶² Committee on Child Labour Report, Paragraphs 128 – 12, note 54.

After discussion on the inclusion of child soldiers and the use of children in armed conflict, which illustrated general consensus on the need to include this as a worst form of child labour, Article 3(a) as amended by the proposal from the informal working group was adopted to read as follows: ‘all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict’.⁶³

Originally there had been a proposal to include a new point after Article 3(c) to have a separate worst form of child labour on child soldiers, but as it had been included under Article 3(a) this proposal was withdrawn.⁶⁴ Although not the subject matter of this thesis, it is nevertheless submitted that the decision to include the use of children in armed conflict in the Convention demonstrated extremely poor judgment on the part of the ILO. This is perhaps the category of the worst forms of child labour that strikes most discord at being termed ‘labour’. As will be shown in section 7.7 of Chapter 7, there is a reluctance to link the concept of ‘child labour’ to children who have been recruited to commit crime on behalf of adults. The notion that child soldiers are engaged in ‘child labour’ is even

⁶³ Committee on Child Labour Report 1999, Paragraph 163, note 54. The government member of the United States indicated that the text that referred to the ‘forced or compulsory recruitment of children for use in armed conflict’ as a worst form of child labour proposed under Article 3(a) was a most important and positive addition to the Convention. He noted that it effectively addressed a critical concern: the abduction, coercion, and forced or involuntary recruitment of children for use as participants in armed conflict. The adoption of the above text would make the Convention stronger and would significantly strengthen current international standards concerning forced or compulsory enlistment. It would in no way undermine other international standards on the subject. The government member of Switzerland supported the consensus regarding an explicit mention of children involved in armed conflict. She believed that an explicit reference to child soldiers in the new Convention was appropriate and the recruitment and involvement of children in armed conflict could be defined as a worst form of child labour. Switzerland confirmed its commitment to work for a ban on involvement of persons under the age of 18 in armed conflicts, for instance, in the Working Group of the United Nations on the draft Optional Protocol on the involvement of children in armed conflicts to the UNCRC (as it was at that stage), see Paragraphs 151 and 157.

⁶⁴ Committee on Child Labour Report 1999, Paragraphs 168 – 169, note 54.

more unsettling. Even the UNCRC does not group its provisions on child soldiers and children in armed conflict together with the forms of exploitation found in Articles 32-36.

The worker members had also proposed the inclusion of a new subparagraph to read: ‘work which, by its nature or circumstances in which it is carried out, systematically denies a child access to basic education’ and this would be another worst form of child labour. They noted that most government and employer members had in principle supported the theory that a child denied access to basic education was denied the ability to develop. However, in view of the practical difficulties experienced by children in some countries in, for instance, merely surviving, they withdrew the amendment, though they retained their conviction on this issue.⁶⁵

The Committee also discussed various other amendments to both the Convention and Recommendation and then adopted both at its 20th sitting.⁶⁶ Of significance is the fact that no votes had to be cast in deciding on the text as there was a concerted effort to proceed by consensus, though this obviously implies that much compromise had taken place, which is evident from the Committee’s Report.⁶⁷ In concluding its work, certain closing statements were issued by the governments of the members states. It became clear that the Convention was regarded as a flexible instrument and capable of wide ratification.⁶⁸

As a final note regarding the drafting process, it is of significance that non-governmental organisations, such as the Global March Against Child Labour, and the UN Committee on the Rights of the Child participated in the drafting of the Convention, apart from the usual tripartite combination of governments, employer organisations and worker

⁶⁵ Committee on Child Labour Report 1999, Paragraph 170, note 54.

⁶⁶ Committee on Child Labour Report 1999, Paragraph 386, note 54.

⁶⁷ Committee on Child Labour Report 1999, Paragraph 387, note 54.

⁶⁸ As expressed by, amongst others, the government representatives of Pakistan, the United Kingdom and the United States, see Committee on Child Labour Report 1999, Paragraphs 400, 401 and 403 respectively, note 54.

organisations.⁶⁹ Likewise, White applauds the fact that representatives of working children's organisations actively participated in the 3 child labour conferences held in 1997 and provided inputs to the 1998 ILO conference on child labour.⁷⁰ This level of participation signaled a truly internationally consultative process in the adoption of the new Convention.

4.4. Worst Forms of Child Labour Convention 182 (1999) and Recommendation 190

On 17 June 1999, the General Conference of the ILO adopted the Worst Forms of Child Labour Convention No. 182 and Worst Forms of Child Labour Recommendation 190.

The preamble to the Convention mentions the need to adopt new instruments for the prohibition and elimination of what the Convention terms 'worst forms of child labour'. It goes on to link their elimination to immediate and comprehensive action; the importance of free basic education; the need to remove the children concerned from all such 'work' and the provision of rehabilitation and social integration while at the same time addressing the needs of their families.

At the outset, the preamble notes that the new Convention is meant to *complement* (emphasis added) Convention 138 and Recommendation 146 and reinforces their position as fundamental instruments on child labour, thereby confirming that the overall ILO approach is still the eradication of child labour.⁷¹ In addition, the preamble also alludes to the UNCRC as well as other international treaties, which it refers to as covering worst forms of child labour, such as the Forced Labour Convention, 1930, and the United

⁶⁹ See, the Committee on Child Labour Report 1999, Paragraphs 56 – 60, note 54, and Report IV (2A) Child Labour, Fourth Item on the Agenda, 87th Session of the International Labour Conference, International Labour Office, Geneva, June 1999.

⁷⁰ White, p 139, note 1.

⁷¹ See White and Myers on this issue, note 1 above.

Nations Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 1956.

It is submitted that while treaties such as the Slavery and Forced Labour Conventions did not contain a child centred approach, this was obviously not the case in relation to the UNCRC, which covered most of the issues contained in Convention 182, albeit not explicitly through an action-oriented approach. Therefore, while there may have been a need for more concerted action and strategic interventions to address conduct that constitutes worst forms of child labour, I would still question the assertion that a whole new set of standards was needed for their prohibition and elimination.

Article 1 of the Convention gives effect to the first paragraph of the preamble by requiring ratifying states to ‘take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency’.⁷² It is interesting to note the somewhat dramatic use of language in this Article to stress the exigency of the need to address these types of conduct and the final text illustrates a compromise on the placement of the word ‘immediate’, which was destined to be placed before ‘elimination’ As noted in the previous section, this would probably have created enforcement problems and instead the Article reads that states must act immediately in *taking steps* (emphasis added) to eliminate worst forms of child labour.⁷³ The obligation

⁷² Article 2 defines a child as all persons under 18 years of age, in conformity with the provisions of the UNCRC and other instruments such as the African Charter on the Rights and Welfare of the Child.

⁷³ In discussing the adopted text of the Committee on Child Labour, the government representative of India stated that: ‘[t]he title of the document and of the draft Convention as well as Article 1 clearly define the objective of this instrument, which is to address measures for the prohibition and elimination of the worst forms of child labour. We believe that this recognition is of critical importance as the phenomenon of the worst forms of child labour, when it is rooted in poverty, cannot be eliminated overnight or merely legislated away. The most effective way of addressing the problem is to progressively eradicate the root cause, which is poverty, through national action and international cooperation. We welcome the fact that these aspects are fully recognised in the draft Convention. At the same time, we recognise in equal measure the need to undertake immediate steps for the elimination of the worst forms of child labour, and to deal with this issue as a matter of urgency.’ See Committee on Child Labour Report 1999, Paragraph 389, note 54.

contained in the Article is given further substance and content in Articles 6 and 7 of the Convention, which deal with the nature of the measures that states need to take. In addition, the Article clearly enunciates the overall aim of the Convention, namely, that states must ‘prohibit and eliminate’ worst forms of child labour as contained therein. White comments that the proposed (at the time his writing the Convention was in the final stages of drafting) Convention ‘represents formal recognition and embodiment of the principle that *is* both helpful and possible to differentiate between more and less “intolerable” or “extreme” forms of children’s work’.⁷⁴

Article 3 of the Convention, without defining them precisely, sets out what the worst forms of child labour are, namely:

(a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict;

(b) the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances;

(c) the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties;

(d) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children’.

The type of conduct that constitutes worst forms of child labour is broad and far-reaching and represents some of the most reprehensible forms of economic exploitation that children can be subjected to.⁷⁵ One can clearly see the move away from regulating

⁷⁴ White, p 139, note 1.

⁷⁵ In the discussion of the proposed text of Article 3 of the Convention, advice was sought from the ILO Legal Advisor by the government representative of Australia on whether the use of language addressing

employment to ensure fair conditions, working hours, remuneration and so forth, to an arena where economic exploitation also constitutes serious human rights violations and criminal action. Smolin, while noting that the definition of worst forms of child labour contained in Article 3 incorporates some of the most dangerous violations of human rights to which children are subject, also observes 'that the treaty's definitions appear to expand, rather than merely prioritise, the traditional concerns of the international labor movement'.⁷⁶ What he is referring to is the fact that the worst forms of child labour as contained in Article 3(a) – (c) also constitute criminal action, which is not necessarily within the purview of the ILO. As argued in Chapter 8, the inclusion of these types of conduct points to the origins of the Convention being potentially based on the need of the ILO to be seen to address economically exploitative violations of the rights of children.

Having noted the shift between Convention 138 with its focus on employment and work, whether formal or informal, and Convention 182 with its focus on conduct that is not traditionally seen as work but rather criminal activity, there is nonetheless an overlap between Convention 182 and Convention 138 as regards the worst form of child labour contained in Article 3 (d), namely, hazardous work.

As noted above, Article 3(1) of Convention 138 states '[t]he minimum age for admission to any type of employment or work which by its nature or the circumstances in which it is carried out is likely to jeopardise the health, safety or morals of young persons shall not be less than 18 years'. This provision is aimed at setting out what type of work is not permissible for children who are admitted to employment after they have completed compulsory schooling and attained the age of 15 years (obviously keeping in mind the derogation possible under Article 3(3)). It can thus be interpreted as prohibiting child

criminal acts of adults would present a legal difficulty in view of the intention to define the worst forms of child labour. The Deputy Legal Advisor responded by way of providing a practical example. He said that children making bricks in conditions of debt bondage were engaged in a worst form of child labour and were victims of it; whereas the adult who put them to such work was a criminal profiting from such work and therefore distinct. See Committee on Child Labour Report 1999, Paragraphs 141 and 143, note 54.

⁷⁶ Smolin D, 'A tale of two treaties: Furthering social myths through the redemptive myths of childhood', *Emory International Law Review*, Vol. 17, Fall 2003, p 993.

labour or non-permissible work, as opposed to child work or employment that is permissible under the Convention. The wording of Article 3 (1) of Convention 138 ('employment or work which by its nature or the circumstances in which it is carried out is likely to jeopardise the health, safety or morals of young persons') and Article 3 (d) of Convention 182 ('work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children') is so similar that it can be argued that the non-permissible work or child labour referred to in Convention 138 has now been upgraded, so to speak, to a worst form of child labour under Convention 182.

This is reinforced by the provisions of Paragraph 4 of Recommendation 190, which allows states, after consultation with relevant worker and employer organisations, to allow for children 16 years and older to be admitted to such work provided they have received adequate instruction or vocational training in the type of work and their health, safety and morals are protected. This provision mirrors the exception to Article 3(1) of Convention 138, as contained in Article 3(3); however because contained in the Recommendation, it is not binding.

The Convention is silent as to what constitutes hazardous work under Article 3(d), instead requiring states, under Article 4, to determine through domestic law what types of work would amount to this worst form of child labour.⁷⁷ By adopting this approach,

⁷⁷ In the discussion of the proposed text of Article 4 of the Convention, advice was sought from the ILO Legal Advisor on a number of issues. Concerning the question on the nature of the obligation arising from a reference to a Recommendation in a Convention, the Deputy Legal Adviser stated that though it was infrequent, a number of international labour Conventions made such references to ILO Recommendations as well as to United Nations Recommendations. He explained that such references did not make it mandatory for Governments to comply with the provisions of the Recommendations, and that in this case, it was a procedural obligation to take into consideration the contents of the Recommendation in question. The content of a Recommendation did not become binding by such reference. With regard to which international standards were relevant to Article 4(1), the representative of the Legal Adviser said that these were too numerous to list, but for example there were standards concerning toxic substances, dangerous processes, heavy weight, night work and so on. Such reference did not oblige member States that had not ratified these instruments to comply with them, merely to take them into account. Regarding the question on the meaning of 'in consultation with', he stated that the obligation to consult was commonly included in

Convention 182 illustrates the flexibility of its application, as in the case of Convention 138 in this respect. This flexibility recognises the diversity of national situations as well as industries and sectors, dangerous to children, which differ from country to country.⁷⁸ Nonetheless, Article 4(1) does try guide states in this determination by requiring them to have regard to relevant international standards and referring them to the provisions of Paragraph 3 of Recommendation 190, which requires states to give consideration to various conditions when determining the types of work referred to under Article 3(d) of the Convention.⁷⁹ This may also be read in conjunction with Paragraph 10 of

international labour standards and was an element of the decision-making process. Under such a provision, Governments were obliged to consult with the social partners before a decision was taken, but were not obliged by the result of the consultation. However, Governments had to consult and to consider the elements discussed in good faith because consultation without consideration would not respect the spirit of the obligation. See Committee on Child Labour Report 1999, Paragraph 135, note 54.

⁷⁸ During the discussions by the Committee on Child Labour regarding the text of Article 3(d), the employer members stated that they wanted to make it clear that the proposed Convention should not require governments to intervene in situations in which children worked for their parents on bona fide family farms or holdings. They recognised that there could be instances in which children were employed on farms that were not bona fide family farms. In such situations, they noted that parents had little or no control over working conditions and therefore could not protect their children from abuse and exploitation. They also suggested that there could also be situations in which title to, or effective control of, land was held by a family, but the family employed children who were also subject to abusive working conditions. These latter situations - unlike family farms and holdings where no abuse of children occurred - were intended to be addressed by this Convention. The worker members recognised that there were differences between bona fide family farms and those farms that misused that title and in effect were not family and thus engaging workers, including children, in contravention of standards for good working conditions. They were of the opinion that the proposed Convention should not be interpreted in any way to allow the abuse of children by not extending coverage to such situations. The worker members wished to distinguish family farms that did not interfere with children's schooling and which were truly within a protected family environment to situations in some countries where there were farms of hundreds of acres which were exploiting non-related persons and were still referred to as family farms. See Committee on Child Labour Report 1999, Paragraphs 172 and 173, note 54.

⁷⁹ These are: '(a) work which exposes children to physical, psychological or sexual abuse; (b) work underground, under water, at dangerous heights or in confined spaces; (c) work with dangerous machinery, equipment and tools, or which involves the manual handling or transport of heavy loads; (d) work in an unhealthy environment which may, for example, expose children to hazardous substances, agents or

Recommendation 146, which provides some guidance on what constitutes hazardous work under Convention 138, but which is not as far reaching as Recommendation 190.⁸⁰

In addition, Article 5 of Convention 138 allows for states to exclude its application to various branches of activity or types of undertakings *except* (emphasis added) for mining and quarrying; manufacturing; construction; electricity, gas and water; sanitary services; transport, storage and communication; and plantations and other agricultural undertakings mainly producing for commercial purposes. Therefore, it is considered necessary that children be protected from hazardous work in these branches of activity or undertakings and states are prohibited from excluding such from the application of the Convention even if their economy is still developing.

Thus, there exist clear guidelines on what constitutes hazardous work, even though the subject matter is left to individual countries to determine. Before moving on to the remaining worst forms of child labour as contained in Convention 182, it is necessary to emphasise the distinction between Article 3(d) and the other worst forms of child labour. Article 3(a)-(c) deals with conduct, which is regarded as either criminal or action that constitutes atrocious human rights violations. While the conduct described in Article 3(d) also amounts to a serious form of economic exploitation, it traditionally occurs within the context of industry and employment, in other words, within the traditional labour regulation milieu. The nature of the economic exploitation constituting hazardous work differs to that which is contained in Articles 3(a) – (c), and as such, the action needed to address it would also differ.

As for the other worst forms of child labour, definitions are not provided, and this can be problematic for implementation, especially as will be evidenced in Chapter 7, in the more

processes, or to temperatures, noise levels, or vibrations damaging to their health; (e) work under particularly difficult conditions such as work for long hours or during the night or work where the child is unreasonably confined to the premises of the employer.’

⁸⁰ Paragraph 10 states: ‘[i]n determining the types of employment or work to which Article 3 of the Minimum Age Convention, 1973, applies, full account should be taken of relevant international labour standards, such as those concerning dangerous substances, agents or processes (including ionising radiations), the lifting of heavy weights and underground work.’

detailed discussion on Article 3(c), namely, the instrumental use of children to commit crime. Likewise, the UNCRC does not take the matter further, for although providing for the rights of children to be protected from, amongst others, prostitution, pornography and trafficking (Articles 34 and 35), no definitions for these actions are provided. However, definitions can be gleaned from various other international instruments that deal with the conduct termed worst forms of child labour.

For instance, the meaning of ‘all forms of slavery or practices similar to slavery’ as contained in Article 3(a), can be obtained from Article 1 of the Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention of 1926, which defines slavery and the slave trade as:

‘[s]lavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised’ and the slave trade ‘includes all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves.’

These definitions are supplemented by the provisions of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1957, which, in Article 1, also provides definitions for debt bondage as:

‘the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined;’ and serfdom as: ‘the condition or status of a tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is not free to change his status’.

Forced or compulsory labour can glean substance from the ILO Convention Concerning Forced or Compulsory Labour No. 29, which in Article 2 defines forced labour as ‘all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily’.⁸¹

In relation to trafficking, in 1999 the only vaguely comprehensive definitions that were available were those contained in Articles 1 and 2 of the International Convention for the Suppression of the ‘White Slave Traffic’ of 1910.⁸² Article 1 provided that trafficking was when someone, in order to gratify the passions of another person, procured, enticed, or led away, even with her consent, a woman or girl under age, for immoral purposes. Article 2 also provided that trafficking occurred when someone, in order to gratify the passions of another person, procured, enticed, or led away a woman or girl over age, for immoral purposes by fraud, or by means of violence, threats, abuse of authority, or any other method of compulsion.⁸³ In 1949 the United Nations adopted the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, but the definition provided herein, while similar to that of the 1910 Convention (discussed in section 3.3 of Chapter 3), only defined trafficking for the purposes of prostitution.⁸⁴ This is a very outdated and unsatisfactory definition.

Nonetheless, only a short wait for an acceptable definition was required. The following year saw the adoption of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention

⁸¹ In the discussion of the proposed text of Article 3(a) of the Convention, advice was sought from the ILO Legal Advisor. Referring to the link between Article 3(a) and Convention No. 29, he stated that each Convention was autonomous and unless there was a specific reference they remained autonomous. He noted that the definition of forced labour contained in Article 2 of Convention No. 29 remained valid for the purposes of the proposed Convention unless it defined the term differently. Convention No. 29 did not define debt bondage and serfdom, which were defined in United Nations instruments. See Committee on Child Labour Report 1999, Paragraph 136, note 54.

⁸² Discussed in section 2.3.3.3 of Chapter 2.

⁸³ These provisions have been discussed in more detail in Chapter 3.

⁸⁴ In the intervening years the Convention for the Suppression of the Traffic in Women and Children, 1921 was adopted, but did not take the definition of trafficking further.

Against Transnational Organised Crime (2000), which, in Article 3, provided a comprehensive definition of trafficking in persons, and which has become the international standard for this particular phenomenon.⁸⁵

Likewise, although the UN Special Rapporteur on the sale of children, child prostitution and child pornography has alluded to definitions for child prostitution and child pornography, it was only when the UN Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution⁸⁶ and child pornography⁸⁷ was adopted in 2000 that internationally acceptable definitions incorporated in a legal instrument became available.⁸⁸ In relation to child prostitution, it has been noted that in the drafting process, some countries raised a potential problem where prostitution was legal below the age of 18 years, or where the age of consent was below the age of 18 years.⁸⁹ However, Jankanish points out that as far as age of consent is concerned, the

⁸⁵ This Protocol will be briefly discussed later in this chapter in section 4.6.2, but in Article 3 the Palermo Protocol defines "trafficking in persons" as "the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs". However, in respect of children who are trafficked, Article 3(c) states that "the recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered 'trafficking in persons' even if this does not involve any of the means set forth in sub-paragraph (a) of this Article". Therefore child trafficking can occur when a child is transferred, recruited, harboured and so forth, for the purposes of exploitation alone and proof of threats, force or other forms of coercion is not necessary to establish the crime of trafficking in children.

⁸⁶ Article 2(b) states '[c]hild prostitution means the use of a child in sexual activities for remuneration or any other form of consideration'.

⁸⁷ Article 2(c) states '[c]hild pornography means any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes'.

⁸⁸ This Protocol will also be briefly discussed later in the chapter.

⁸⁹ Jankanish M, *Targeting the Intolerable: Toward the Adoption of New International Labour Standards on Extreme Forms of Child Labour*, International Labour Office: Geneva, 1998, p 8 (copy on file with author).

wording of the proposed instrument did not include consensual sexual acts and therefore an age of consent set lower than 18 years would not fall foul of the Convention. Nevertheless, it would be a crime to entice persons under 18 years into sexual acts, procure them for prostitution or to draw economic benefit from sexual activities involving children and, since the victimisation of children was the focus of the new Convention, a blanket prohibition against such victimisation was included in the draft instrument.⁹⁰

As far as Article 3 (c) is concerned, namely, the use, procuring or offering of a child for illicit activities, especially in relation to the production and trafficking of drugs, the only vaguely similar provision in international treaties is Article 33 of the UNCRC, which (although limited to drugs and psychotropic substances) also does not provide a definition of what constitutes the use of a child in this context. The obvious questions of ‘use by whom’ and ‘how’ spring to mind, yet remain unanswered.⁹¹ These unanswered questions point to the fact that the inclusion of this category of exploited children in the Convention was not based on any careful consideration or evidence-based research on what the intended outcome of its inclusion would be. These difficulties will be discussed in Chapter 7 and Chapter 8, and I conclude that the practical implementation of the Convention in South Africa has drawn attention to the shortcomings of the substantive provisions of the Convention.

Davidson noted that one of the most striking differences between Convention 182 and Convention 138 are the categories of labour dealt with by them: Convention 138 categorises industries that are not illegal in and of themselves, however, when children are employed in those industries they are subject to Convention 138 scrutiny, whereas Convention 182, on the other hand, addresses activities that are illegal in nearly every

⁹⁰ Jankanish, p 8, note 89.

⁹¹ Questions posed by William Myers, personal correspondence with the author, 19 September 2007. Myers is well known in the field of child labour, has written numerous books, articles and reports on the issue and is considered an expert on both Convention 138 and Convention 182.

country.⁹² However, while child prostitution, child pornography, child trafficking, slavery and so forth may be criminalised, it is submitted that not every country has recognised the use or procuring or offering of a child to commit criminal activity as a crime as such. There may be recourse under national laws to prosecute persons who so use, offer or procure children under offences such as conspiracy and incitement,⁹³ but these are general laws and do not specifically cover the situations envisaged by Article 3(c).

Article 5, which requires that states must, in consultation with employers' and workers' organisations, provide for appropriate monitoring mechanisms, marks a recognition by the ILO of the necessity that monitoring plays in the implementation of international treaties. In particular, the type of monitoring required by Article 5 is internal or national monitoring of the implementation of the Convention's provisions as opposed to monitoring by a treaty body such as the United Nations Committee on the Rights of the Child. The UNCRC does not have a clause similar to Article 5 and it is only through General Comments of the Committee of the Rights of the Child that states are exhorted to monitor and evaluate the implementation of the UNCRC domestically.⁹⁴ Recommendation 190 provides further guidance on what constitutes appropriate monitoring mechanisms and how monitoring should be effective. Paragraphs 5 – 8 of the Recommendation suggest, amongst others, data collection and analysis, the designation of domestic monitoring institutions and submission of information to the ILO.⁹⁵ Davidson considers that the emphasis placed on gathering statistical information on the extent of

⁹² Davidson MG, 'The International Labour Organisation's Latest Campaign to End Child Labor: Will it Succeed Where Others have Failed?', *Transnational Law and Contemporary Problems*, Spring, 2001, p 217.

⁹³ For example, in section 18 of the South African Riotous Assemblies Act 17 of 1956.

⁹⁴ See, for example, Paragraphs 45 – 47 of General Comment No. 5: General measures of implementation for the Convention on the Rights of the Child, 2003, and Paragraphs 34 – 35 of General Comment No. 10: Children's Rights in Juvenile Justice, 2007.

⁹⁵ Similar recommendations regarding child justice are made by the UN Committee on the Rights of the Child's General Comment No. 10 discussed in section 6.3.1.1 in Chapter 6.

child labour will be an important addition to the struggle to protect children's human rights.⁹⁶

Together with Article 3, Articles 6 and 7 of the Convention constitute the 'meat' thereof in that they provide the 'how' to the aim of prohibiting and eliminating worst forms of child labour as a matter of urgency.

Article 6 requires states to 'design and implement programmes of action' by wide consultation within government and with employers and workers organisations and other concerned parties. Recommendation 190 provides more substance to this Article, but constitutes only a guideline and is not binding on states. This could be the reason for Paragraph 2 of the Recommendation, which sets out what the aim of programmes of action should be,⁹⁷ stating that programmes of action should be designed in consultation with children and their families in addition to governments and worker and employer organisations mentioned in the Convention. Obviously, while the input of children and their families is desirable, states might not have agreed to go so far as to include an obligation to consult with them, had this been elevated to the Convention proper.

The Recommendation regarding programmes of action will be given context in Chapter 5, when the South African CLPA is discussed, even though the first draft of this programme of action was initiated in 1996, three years before the Worst Forms of Child Labour Convention and Recommendation were adopted.

⁹⁶ Davidson, p 204, note 92.

⁹⁷ Paragraph 2 of the Recommendation states that the aims of the programmes of action should be: '(a) identifying and denouncing the worst forms of child labour; (b) preventing the engagement of children in or removing them from the worst forms of child labour, protecting them from reprisals and providing for their rehabilitation and social integration through measures which address their educational, physical and psychological needs; (c) giving special attention to: (i) younger children; (ii) the girl child; (iii) the problem of hidden work situations, in which girls are at special risk; (iv) other groups of children with special vulnerabilities or needs; (d) identifying, reaching out to and working with communities where children are at special risk; (e) informing, sensitising and mobilising public opinion and concerned groups, including children and their families.'

Of significance is the use of the word ‘priority’ in Article 6. While Convention 138 and 182 are both regarded by the ILO as fundamental Conventions, the prioritisation of the elimination of worst forms of child labour, taken together with the use of the words ‘immediate’ and ‘urgency’ in Article 1 of Convention 182, clearly sets out an obligation on states to first address worst forms of child labour, rather than progressively addressing child labour in general. This appears to indicate a shift from the generalist approach taken in international instruments such as the UNCRC or ACRWC. These latter instruments do not differentiate between rights and can be interpreted to advocate for simultaneous realisation of all rights – not promoting or encouraging the immediate recognition of some rights over others.

Article 7 sets out in more detail what constitutes ‘effective measures for the prohibition and elimination’ of worst forms of child labour, which includes the provision and application of penal other appropriate sanctions as required by Article 7(1).⁹⁸ In the discussions of the Committee on Child Labour on the text of Article 7 (1), the government member of Germany, speaking also on behalf of the government member of Austria, proposed an amendment aimed at ensuring that the child victims of child labour would not be subject to criminal prosecution. However, in order not to place the overall consensus in doubt, the amendment was withdrawn because it might have caused problems in the case of activities which might be considered as constituting a criminal offence committed by the child as well as by the adult, particularly in light of the worst form of child labour contained in Article 3(c).⁹⁹

More specifically, linking back to the use of the words ‘immediate’, ‘urgency’ and ‘priority’, Article 7(2) requires states to take ‘time-bound’ measures. Noguchi notes that the development of, what the ILO terms, Time-Bound Programmes (TBP’s) aims to help

⁹⁸ Paragraph 12 of Recommendation 190 suggests states should criminalise the worst forms of child labour set out in Article 3(a) – (c). In addition, Paragraph 13 states that countries should ensure penalties (including where appropriate criminal penalties) are applied to violators of national laws prohibiting hazardous work. The distinction between Paragraphs 12 and 13 illustrates that civil penalties may be effective for violations of hazardous work provisions but that the minimum required for the remaining worst forms of child labour is criminal sanctions.

⁹⁹ See Committee on Child Labour Report 1999, Paragraph 208, note 54.

national efforts accelerate the process of eliminating the worst forms of child labour through combining past ILO experiences of combining sectoral, thematic and geographically based approaches.¹⁰⁰ By referring to ‘TBP’s’ the ILO seems to have conflated the ‘programmes of action’ referred to in Article 6 and ‘time-bound measures’ referred to in Article 7.

The measures contained in Article 7(2) would, amongst others, prevent worst forms of child labour; provide assistance for the removal of children from worst forms of child labour and their rehabilitation and social reintegration; provide free basic education,¹⁰¹ and where possible, vocational training for children removed from worst forms of child labour; identify children at risk and take account of the needs of girls. These then constitute the basic minimum measures that states must provide to address worst forms of child labour: prevention and steps to identify children at risk as well as assistance to victims.¹⁰²



¹⁰⁰ Noguchi Y, ‘ILO Convention No. 182 on the Worst Forms of Child Labour and the Convention on the Rights of the Child’, *The International Journal of Children’s Rights*, Vol. 10, 2002, p 361.

¹⁰¹ The ILO International Labour Conference Committee has emphasised the relationship between the elimination of child labour, including its worst forms, and free, compulsory, universal, accessible and formal basic education, see for example ILCCR examinations of country responses to Convention 182: Examination of individual case concerning Convention No. 182, Worst Form of Child Labour, 1999, Niger (ratification: 2000), 93rd Session of the International Labour Conference, published 2005, document no. (ilolex): 132005NER182 accessed on 6 September 2007 at www.ilo.org/ilolex/; ILCCR: Examination of individual case concerning Convention No. 182, Worst Forms of Child Labour, 1999, Gabon (ratification: 2001), 96th Session of the International Labour Conference, published 2007, document no. (ilolex): 132007GAB182, accessed at www.ilo.org/ilolex/ on 6 September 2007 and ILCCR: Examination of individual case concerning Convention No. 182, Worst Forms of Child Labour, 1999, China (ratification: 2002), 96th Session of the International Labour Conference, published 2007, document no. (ilolex): 132007CHN182, accessed at www.ilo.org/ilolex/ on 6 September 2007.

¹⁰² Betcherman, Fares, Luinstra and Prouty, however, point out that the reality of child labour is complex and there is a need to understand the family dynamic, including household decision-making and the incentives and constraints facing families in order to consider interventions that address the underlying causes. They also note that while the incidence of child labour is associated with poverty, empirical research has shown that the link between poverty and child labour is weaker than often believed for

In relation to free basic education, while the UNCRC enshrines the right of all children to free basic education, by requiring the provision of free basic education for victims of worst forms of child labour it can be argued that Convention 182 requires states to actively ensure that these children are placed in a position to benefit from such education, even if this means that they receive it at a more advanced age than usual for this level of education.

However, over and above the provisions of Article 6 and 7 of the Convention, Paragraph 15 of Recommendation 190 provides a lengthy list of other measures that could be adopted to prohibit and eliminate worst forms of child labour.¹⁰³ It is not an exhaustive

numerous reasons. For example, children may work because the economic returns of working may be better than the returns from low-quality, inaccessible schools. See Betcherman G, Fares J, Luinstra A and Prouty R, 'Child Labour, Education and Children's Rights', *Social Protection Discussion Paper Series*, No. 0412, Social Protection Unit, Human Development Network, The World Bank, July 2004, p 3 - accessed in May 2007 from www.worldbank.org/sp. The concerns about relying too heavily on poverty as a cause of child labour have also been noted by the International Labour Conference Committee, which has said that viewing child labour and trafficking for child labour simply as a consequence of poverty was too simplistic as child labour was both a cause and consequence of poverty, see ILCCR: Examination of individual case concerning Convention No. 182, Worst Form of Child Labour, 1999 Niger (ratification: 2000), 95th Session of the International Labour Conference, published 2005, document no. (ilolex): 132005NER182 accessed on 6 September 2007 at www.ilo.org/ilolex/. The examination of Niger's case also illustrates the ongoing approach of the ILO to the total eradication of child labour, as the Conference Committee's observations continue to state: 'child labour would never be eliminated without the provision of universal education, but equally universal education would never be achieved without the elimination of child labour.'

¹⁰³ Paragraph 15 lists the following : '(a) informing, sensitising and mobilising the general public, including national and local political leaders, parliamentarians and the judiciary; (b) involving and training employers' and workers' organisations and civic organisations; (c) providing appropriate training for the government officials concerned, especially inspectors and law enforcement officials, and for other relevant professionals; (d) providing for the prosecution in their own country of the Member's nationals who commit offences under its national provisions for the prohibition and immediate elimination of the worst forms of child labour even when these offences are committed in another country; (e) simplifying legal and administrative procedures and ensuring that they are appropriate and prompt; (f) encouraging the development of policies by undertakings to promote the aims of the Convention; (g) monitoring and giving publicity to best practices on the elimination of child labour; (h) giving publicity to legal or other provisions on child labour in the different languages or dialects; (i) establishing special complaints

list and clearly states were reluctant to include such detailed obligations in the principal Convention.

Since the adoption of the Convention, the Committee of Experts on the Application of Conventions and Recommendations, appointed by the Governing Body of the International Labour Office to examine the information and reports submitted under Articles 19, 22 and 35 of the Constitution by States Members of the ILO on the action taken with regard to Conventions and Recommendations, issued a general observation regarding Convention 182 in 2005.¹⁰⁴

Based on a perusal of reports made by member states on the implementation of the Convention, the Committee made specific requests for information on measures taken in relation to trafficking (though it is not clear why only trafficking was singled out). These requests provide some insight into how governments must interpret Articles 6 and 7 in adopting measures to address trafficking as a worst form of child labour. The Committee asked for information relating to: legislative measures adopted or envisaged that prohibit trafficking of children under 18 years of age for the purposes of economic and sexual exploitation by making a contravention of the prohibition a criminal offence and imposing penal and other sanctions to act as an effective deterrent; the measures adopted or envisaged to prevent such trafficking and formulate and implement programmes of action targeting multiple levels of society (children, parents, local authorities, employers, teachers, etc.); the training, collaboration and awareness-raising of public officials

procedures and making provisions to protect from discrimination and reprisals those who legitimately expose violations of the provisions of the Convention, as well as establishing helplines or points of contact and ombudspersons; (j) adopting appropriate measures to improve the educational infrastructure and the training of teachers to meet the needs of boys and girls; (k) as far as possible, taking into account in national programmes of action: (i) the need for job creation and vocational training for the parents and adults in the families of children working in the conditions covered by the Convention; and (ii) the need for sensitising parents to the problem of children working in such conditions’.

¹⁰⁴ CEACR: General Observation concerning Convention No. 182, Worst Forms of Child Labour, 1999, published 2005, document no. (ilolex): 052005GEN182, accessed at www.ilo.org/ilolex/ on 6 September 2007 (hereinafter General Observation concerning Convention No. 182).

(labour inspection, the police forces, immigration service, judiciary, etc.) in combating the trafficking of children; statistics on the number of reported contraventions, investigations, prosecutions and convictions relating to trafficking and the text of any court decisions in such cases; the effective application of the principle of free and compulsory schooling for children, particularly for girls; and finally the time-bound measures taken to prevent the engagement of children in trafficking, remove children from trafficking, protect the victims of trafficking and provide for their rehabilitation and social integration.

Article 8, recognising the international and transnational elements attendant to some of the worst forms of child labour, requires states to take appropriate steps to assist one another through enhanced international co-operation and/or assistance including support for social and economic development, poverty eradication programmes and universal education.¹⁰⁵ Noguchi points out that while Article 8 does not create any obligation as

¹⁰⁵ In introducing the discussion on Article 8 during the deliberations on the proposed text of the Convention, the Chairperson of the Committee on Child Labour referred to formal and informal discussions which had taken place during the adoption of the Preamble, during which an attempt had been made to bring an agreed text to the Committee. The worker members had submitted the following composite text based on several amendments that had been submitted regarding Article 8: '[m]embers shall take appropriate steps to give effect to the provisions of this Convention through enhanced international co-operation and assistance including support for social and economic development, poverty eradication programmes and universal education'. The government member of India recalled the broad support for the proposal submitted by the worker members and the members of the Asia-Pacific Group on the Committee. He noted it was a balanced proposal, providing for flexibility and leaving it to individual member states to decide on the nature of such cooperation and assistance. He also observed that international cooperation in this context should not be viewed in terms of a donor-recipient relationship, but rather as a partnership on an equal footing from which all parties would stand to benefit. See Committee on Child Labour Report 1999, Paragraphs 234 and 238, note 54. The 2005 General Observation of the Committee on the Application of Conventions and Recommendations also emphasised the need to further integrate concerns relating to the trafficking of children into development and poverty reduction strategies through, for example programmes addressing the extension of primary education, the creation of economic opportunities and the improvement of government capacities to aid the poor. The Committee was convinced that these programmes contribute to breaking the cycle of poverty, which is essential for the elimination of the worst forms of child labour, and particularly the trafficking of children. The Committee

regards the specific form or level of assistance, the emphasis is placed on partnerships - it is left to individual states to decide what appropriate steps to take towards international partnerships.¹⁰⁶

Article 8 is also fleshed out by the Recommendation, which in Paragraphs 11 and 16 call for, amongst others, transnational and international exchange of information, co-operation in investigations and prosecutions, mutual legal assistance and technical assistance. Furthermore, even though not included in Convention 182, Paragraph 9 of Recommendation 190 suggests that government departments within states co-operate in their efforts to eliminate child labour and co-ordinate their activities. This is obviously a very important provision as it recognises the interdependence of actions in addressing child labour. The responses to worst forms of child labour will not only involve labour authorities, but also justice, health, social welfare, immigration and education. It is unfortunate that states did not agree to include this as an obligation in the Convention, as such co-operation could prove instrumental in the fight against worst forms of child labour.

The remaining provisions of the Convention deal with the technical issues of ratification and registration of the Convention.

Unlike Convention 138, Convention 182 has been the object of quick and plentiful ratifications. It entered into force on 19 November 2000 after two ratifications had been received and has been ratified by 165 member states of the ILO.¹⁰⁷ Of the eight fundamental Conventions of the ILO, Convention 182 is the fourth most widely ratified.¹⁰⁸

therefore encouraged broader international cooperation, which they regarded as essential for the mobilisation of resources for national programmes to eradicate the trafficking of children. See General Observation concerning Convention No. 182, note 104.

¹⁰⁶ Noguchi, p 364, note 100.

¹⁰⁷ Number of ratifications as at 25 September 2007. For information on ratifications of ILO Conventions generally, access <http://webfusion.ilo.org/public/db/standards/normes/appl/index.cfm?lang=EN> .

¹⁰⁸ The eight fundamental Conventions are: Convention 29 and Convention 105 (forced labour); Convention 87 and Convention 98 (freedom of association); Convention 100 and Convention 111

4.5 Analysis

Several commentators have pointed out problems regarding the implementation of international treaties generally. As Betcherman, Fares, Luinstra and Prouty point out, human rights laws related to children have limitations in that they are supported by governments and are the product of political consensus – they are not necessarily based on what experts believe should be done. Nonetheless, they argue that such Conventions constitute important benchmarks against which to assess the adoption of national law and development of national policy.¹⁰⁹ White expresses the concern that the implementation of universal or global standards is problematic when there is little or no firm knowledge basis on which to base such implementation.¹¹⁰

Smolin also alludes to the implementation of international instruments being a hurdle, but for somewhat different reasons. Citing Hathaway, who found that the ratification of human rights treaties by authoritarian governments can be associated with worse human rights practices, he argues that the ratification of human rights treaties has the effect of reducing the pressure on governments to actually conform to human rights norms.¹¹¹ He ascribes part of the problem to the fact that the international community rewards

(discrimination) and Convention 138 and Convention 182 (child labour). The most widely ratified is Convention 29 on Forced Labour with 172 ratifications. Only four states have not ratified any of the fundamental Conventions, namely, Brunei Darussalam, Marshall Islands, Samoa and Timor-Leste. The United States of America has only ratified two fundamental Conventions: Convention 182 and Convention 105 on the Abolition of Forced Labour.

¹⁰⁹ Betcherman, Fares, Luinstra and Prouty, p 5, note 102.

¹¹⁰ White, p 135, note 1. He argues that most interventions in the field of child labour, whether at a global, national or local level, are not based on scientific knowledge but rather politics, negotiation and the production of consensus. This is evidenced quite clearly by the debates during the drafting of Convention 182, some of which are described briefly in this chapter. I would also suggest that his statement is true regarding the inclusion of the use of children in armed conflict and children used in the commission of crime as worst forms of child labour, because their inclusion in the Convention as worst forms of child labour was not based on any empirical knowledge or scientific research.

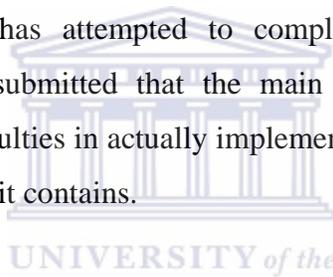
¹¹¹ Smolin, p 985, note 76.

ratifications, while only rarely punishing violations. This alludes to the fact that international instruments such as the UNCRC, as also Convention 182, have no real enforcement mechanisms at international level. The implementation of Conventions is merely monitored at international level: the UNCRC by the UN Committee on the Rights of the Child and Convention 182 by the Committee of Experts on the Application of Conventions and Recommendations.¹¹² These Committees examine the reports of state parties to the Conventions and issue observations, requests and recommendations, but have no power to hold states accountable for failing to comply with their obligations under the Conventions.¹¹³

¹¹² The Committee of Experts on the Application of Conventions and Recommendations is appointed by the Governing Body of the International Labour Office to examine the information and reports submitted under Articles 19, 22 and 35 of the Constitution by States Members of the ILO on the action taken with regard to Conventions and Recommendations.

¹¹³ Apparently responding to suggestions that the World Trade Organisation is the one organisation that can hold countries accountable in eliminating child labour and can or will influence the destiny of most or even many child laborers, Dillon calls the idea 'completely fanciful'. In justifying her observation, she argues that there is nothing in WTO law concerning child labour, apart from the abstract debate as to whether or not Article XX of the GATT should allow member countries to maintain import bans on the products of child labour. She explains that Article XX of the General Agreement on Tariffs and Trade, 'deals with "general exceptions" to the substantive GATT requirements. With the caveat that trade restrictions covered by this Article may not be "applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on trade," GATT parties are allowed to maintain measures that can be justified for reasons of public morals, the protection of human, animal or plant life, relating to the products of prison labor, or to the conservation of exhaustible natural resources, and similar public interest objectives.' She points out that most child labour is tied to a given national economy, and does not bear any direct relationship to Multinational Enterprises, and likewise, most child labour is not related to export trade, although clearly some is. Therefore she submits that relying on GATT Article XX to justify import bans in such cases is certain to generate more hostility, and have little effect on the underlying problem. Where there is no relationship of the labour exploitation to exports, GATT Article XX is essentially irrelevant in any case (in the instances of worst forms of child labour other than hazardous work). See Dillon S, 'A Deep Structure Connection: Child Labor and the World Trade Organisation', *ILSA Journal of International and Comparative Law*, Spring, 2003, p 433-456.

However, the non-compliance with Convention 182 can also be addressed through two procedures under the ILO Constitution – firstly, under Article 24, representations on non-compliance with an ILO Convention can be submitted by employers’ or workers’ organisations and examined by a Committee set up by the ILO Governing Body or under Article 26, states can submit complaints to a Commission on Inquiry of independent persons regarding another state that is not complying with its obligations under the Convention, with the end result being possible action being taken against the state (but no indication of what action this might be is given by the Constitution).¹¹⁴ Yet despite the fact that there is no legal mechanism to hold states liable for non-compliance, many states do try to conform with their obligations under international children’s rights treaties through the enactment of national legislation (albeit somewhat unsuccessfully giving full effect to obligations in the Conventions).¹¹⁵ The discussion in Chapters 5, 6 and 7 will examine how South Africa has attempted to comply with her obligations under Convention 182. It will be submitted that the main issue of concern is not non-compliance, but practical difficulties in actually implementing the Convention on account of the nature of the obligations it contains.



Smolin argues that Convention 182 ‘represents a relatively rare attempt within the human rights field to prioritise rights as a part of a strategic plan to eliminate the most egregious rights violations’.¹¹⁶ This observation is indicative of the fact that the Convention goes

¹¹⁴ See Noguchi, p 367, note 100. She argues that, even if not actually used, the existence of such procedures has a strong influence in pressurising governments to take action.

¹¹⁵ For example, ratification of the UNCRC sparked numerous law reform processes that resulted in legislation such as the Ghanaian Children’s Act 560 of 1998, the Kenyan Children’s Act No. 8 of 2001, Chapter 586 Laws of Kenya and the South African Children’s Act 38 of 2005. In relation to Convention 182 the Employment of Children and Young Persons Act (Laws of Zambia, 2004), for example, specifically prohibits employment of any child under 18 in ‘any type of employment or work which by its nature or the circumstances in which it is carried out, constitutes a worst form of [child] labour.’

¹¹⁶ Smolin, p 984, note 76. See also Noguchi, p 355-6, note 100. Betcherman, Fares, Luinstra and Prouty also note that Convention 182 has received acclaim for achieving consensus between developed and developing countries and is largely viewed as having avoided a Euro-American bias, Betcherman, Fares, Luinstra and Prouty, p 7, note 102.

further than just obliging states to take legal and administrative steps to realise the rights contained in an international legal instrument. It specifically obliges states to take particular, clearly enunciated measures aimed at implementing its content. Not only do Articles 6 and 7 require states to design and implement plans of action and take effective time-bound measures to prevent worst forms of child labour, provide direct assistance for removing children from the worst forms of child labour and ensure access to free, basic education, but these obligations are supplemented by a non-binding blueprint, in the form of Recommendation 190 on how and what can be done to achieve this. This is a move, within children' rights instruments, to bolster implementation efforts through the creation of targeted and specific legal obligations; an approach which is aimed at attempting to ensure concrete results. As stated by Noguchi, the obligation to design and implement programmes of action to eliminate the worst forms of child labour, together with effective and time-bound measures, has been argued to take States' obligations beyond simple prohibitions.¹¹⁷

I would suggest that Convention 182 is significant as it represents an attempt to bind states to certain action in an international legal instrument, in a manner hitherto not utilised. The idea that specific action steps constitute a 'minimum core' (to borrow a term from the socio-economic rights debates) of measures needed to address certain rights violations, and that these measures should be binding on states, is certainly a novel and potentially effective approach. However, it does not overcome the difficulties inherent in the lack of mechanisms to hold states, which fail to comply with their obligations under the Convention, accountable.

Nonetheless, although it is acknowledged that Convention 182 did adopt a new approach regarding the substantive provision of concrete obligations for implementation by states,

¹¹⁷ Noguchi, p 360, note 100. See also Kooijmans J, 'The Struggle against Child Labour: A winnable fight', in Alen A, Bosly M, De Bie M, Vande Lanotte J, Ang F, Delens-Ravier I, Delplace M, Herman C, Reynaert D, Staelens V, Steel R and Verheyde M (eds), *The UN Children's Rights Convention: theory meets practice*, intersentia: Antwerpen-Oxford, 2007, p 267 – 287, who regards Convention 182 as an action-orientated instrument.

this approach is diluted by the overall aim of the Convention, namely, the *elimination* of worst forms of child labour by means of *time-bound* programmes of action (my emphasis). As I have alluded to in prior sections in this thesis, and will show again in Chapter 7, I would argue that the goal of elimination set against time-bound measures will ultimately detract from the significance of including such positive obligations in Convention 182, because *eliminating* (emphasis added) conduct, which is both criminal and long-standing, against an artificial deadline is a goal, potentially doomed to fail.

Despite the use of the word 'eliminate', Hanson and Vandaele argue that Convention 182 adopts a regulatory approach to child labour. While it seeks to abolish certain intolerable forms of child labour, it shifts the discussion away from abolishing all forms of child labour and recognises that there are tolerable forms of child work.¹¹⁸ However they note that the extent to which tolerable child work is possible is still defined by international labour standards i.e. that it cannot be below the minimum ages as set forth in Convention 138 and the ages must be progressively raised, illustrating that Convention 182 did not change the ILO strategy with regard to child labour, namely ultimate eradication, even though it recognised that some forms of child labour may be allowed.¹¹⁹ They conclude that Convention 182 is a tool for mobilisation and prioritisation rather than an expansion of international law. In addition, they argue that Article 6 of the Convention and Paragraph 3 of the Recommendation allow for the views of children to be taken into account and in this way, for the first time, an international instrument on child labour recognises the value of children's input.¹²⁰ Thus they illustrate that Convention 182

¹¹⁸ Hanson K and Vandaele A, 'Working children and international labour law: A critical analysis', *The International Journal of Children's Rights*, Vol. 11, 2003 p 116 – 117.

¹¹⁹ Jankanish, writing before the adoption of Convention 182, also notes that the overall approach of the new Convention was intended to prioritise certain intolerable, extreme forms of child labour with immediate action, but that this would still occur within the long term goal of abolishing child labour. See Jankanish, p 3, note 89.

¹²⁰ Hanson and Vandaele, p 117, note 118.

encapsulates some aspects of the three approaches to child labour described by White, but the dominant approach remains an abolitionist one.¹²¹

However, taking legislative measures to domesticate international obligations is only one step, actual realisation of rights contained in Conventions and the achievement of their aims is another. This will require the translation and operationalisation of the rights and obligations contained in law, as well as the measures contained in policy, into the roles and responsibilities not only of government officials, but all stakeholders that are in any way connected with the goal of prohibiting and eliminating child labour. In other words, the content of Convention 182 and Recommendation 190 will have to find a place in the work of health officials, social welfare officials, educators, judges, prosecutors, private attorneys, police and child care workers, to name a few obvious role-players outside of labour departments or ministries. Implementation can also be problematic in other respects. In relation to education, Betcherman, Fares, Luinstra and Prouty argue that sometimes the economic benefits sending a child to work will outweigh the benefits of sending the child to school, for example, where education is too costly or the quality of education provides little benefit.¹²²

¹²¹ Hanson and Vandaele, p 120 – 122, note 118. The three approaches described by White are discussed in section 3.3.2 of Chapter 3. Also see White B, ‘Shifting Positions on Child Labor: The Views and Practice of Intergovernmental Organisations’, in Weston BH (ed), *Child Labor and Human Rights: Making Children Matter*, Lynne Rienner Publishers: Boulder, 2005, p 327.

¹²² Betcherman, Fares, Luinstra and Prouty, p 15, note 102. They discuss direct costs such as expensive schools fees or high transportation costs. They also argue that where there are economic incentives to send children to school, families might still not be able to meet the current costs of schooling when a chronically poor family is concerned or a family who is in a ‘situation of transitory poverty because of a shock (e.g, job loss of a parent, drought etc.)’. They provide some policy approaches that may address child labour and school attendance for example, improving incentives for children to go to school by making school attendance more accessible and reducing or eliminating school fees; removing constraints stopping children going to school through poverty reduction strategies, social safety nets and conditional cash or food transfers; and using legislation to encourage schooling and discourage labour through the enforcement of compulsory education laws. See also Sloth-Nielsen J and Mezmur B, *Free education is a right for me: A report on the right to free and compulsory primary education*, Save the Children, 2007.

Interestingly, it has been argued that Convention 182 constitutes *jus cogens*.¹²³ However, I would argue that it is too soon to make this assertion and that the UNCRC is more readily regarded as having achieved *jus cogens* status.¹²⁴ Convention 182, while possibly earning stature through its quick and ample ratification process, still has to prove that it is heeded to by individual states, and this will more readily appear from its implementation. And here lies the rub. While Convention 182 has gone further than the UNCRC, for example, by requiring states to do considerably more than just prohibit and take legislative and administrative action against worst forms of child labour, the potential failure of states to meet the goal of elimination of worst forms of child labour contained in the Convention might considerably diminish its credibility in the international community if measurable progress is not achieved.

The significance of Convention 182 can therefore only be properly assessed by an examination of law and national action plans designed to implement it as well as the *actual impact* of those laws and plans. The significance of Convention 182 for the purpose of this thesis will be examined in the following chapters, especially in relation to the Children's Act 38 of 2005, the Children's Amendment Bill 19F of 2006, the South African CLPA and the work done regarding the instrumental use of children in the

¹²³ Both Celek and Bullard argue that the exploitation of child labour should be regarded as a violation of international customary law. Celek goes even further and argues that because of this status, all states have standing to bring violations to the International Court of Justice even if the violation does not affect that state and in that way, there could be effective enforcement of child labour norms and standards. See Celek BM, 'The International Response to Child Labor in the Developing World: Why are we Ineffective?', *Georgetown Journal on Poverty Law and Policy*, Winter, 2004, p 87 – 113 and Bullard MG, 'Child Labor Prohibitions are Universal, Binding, and Obligatory Law: The Evolving State of Customary International Law Concerning the Unempowered Child Laborer', *Houston Journal of International Law*, Fall, 2001, p 139 – 184.

¹²⁴ The former Chairperson of the Committee on the Rights of the Child, Jaap Doek, has confirmed the *jus cogens* status of the UNCRC: '192 states have ratified the Convention, this means that principles of the CRC have become international customary law, which actually applies to all states' during the Day of General Discussion: Working Group 1 on the 'child's right to be heard in judicial and administrative proceedings' on 15 September 2006 accessed at <http://www.crin.org/resources/infoDetail.asp?ID=10227> on 26 September 2007.

commission of crime as a worst form of child labour. However, as far as its general significance is concerned, its innovative approach to combating child labour through the prioritisation of worst forms of child labour and the inclusion of practical implementation measures (such as national plans of action) as obligations of the Convention most certainly point to it breaking the mould of international legal instruments previously aimed at addressing the economic exploitation of children. Nevertheless, I would again caution that care must still be exercised when examining its significance in practice, as the minefield that is termed ‘worst forms of child labour’ will in all likelihood not be as easily overcome (or as the Convention itself requires: eliminated through time-bound measures) as seems to have been intended by the drafters of Convention 182.

4.5.1 The terminology: ‘worst forms of child labour’ and ‘eliminate’

As discussed above, there was initially some uncertainty what to term the types of conduct covered by Convention 182. The words ‘extreme’ and ‘intolerable’ were bandied about before consensus was reached on ‘worst forms of child labour’.¹²⁵ The term implies that there are other types of child labour which are not as bad, and most certainly in so far as it refers to heinous violations of human rights, the term is helpful. However, it is argued that the word ‘labour’ leads to confusion and may detract from the effective implementation of the Convention. Obviously, the types of human rights violations dealt with by the Convention are rooted in economic exploitation more generally, but the use of the word ‘labour’ to discuss the use of children in armed conflict, child pornography or housebreaking syndicates does not sit well at first blush. Noguchi notes that some people ask whether child prostitution is regarded as work by the ILO on account of its inclusion under the term worst forms of child labour and she answers ‘[n]o’.¹²⁶ She points out that child prostitution, child pornography and the sale or trafficking of children are crimes against children, must be treated as such but are also forms of economic exploitation

¹²⁵ It is noted by Jankanish that the terms ‘extreme’ or intolerable’ were used merely to reflect the focus of the new instrument and has no legal significance for the operative part of the Convention, being only descriptors and terms of convenience, See Jankanish, p 5, note 89.

¹²⁶ Noguchi, p 358, note 100.

linked to slavery and forced labour. Similarly, Myers notes that some working children would not dignify criminal conduct as 'work'.¹²⁷ In Chapter 7, a case is discussed which dealt with the issue of the illicit use of a child in the commission of a crime, and it will be illustrated that officials within the criminal justice system had great difficulty in regarding the recruitment of a child in the commission of a murder as a worst form of child 'labour', but that the concept of the child being exploited was easier to grasp. This reluctance to recognise such conduct as a worst form of child labour could impact on judicial recognition of Convention 182, as will be argued in Chapter 7.

It has been noted, that in the early years of the development of Convention 182, certain terminology was used that ultimately found its way into the Convention itself. One such term is 'eliminate'. As pointed out previously, while it is obviously imperative that children are not subject to economic exploitation of such magnitude as is at issue here, the lofty goal of elimination is somewhat problematic as will be seen in the discussion on the instrumental use of children in the commission of crime in Chapter 7. It is perhaps a non sequitur not to aim for the elimination of child labour when dealing with actions that are so harmful to children and which constitute such serious instances of human rights violations; however, as will be discussed in other sections of this thesis, to link elimination with time-bound programmes of action may have been too ambitious and short-sighted particularly given the true nature of the types of unlawful conduct at stake.

Smolin argues that the Convention is an example of the significance, for ratification efforts, of not interpreting child rights treaties as legally enforceable documents subject to adjudication as there is no reasonable prospect that a country (he uses the United States) could literally implement 'immediate and effective measures to secure the ... elimination' of criminal conduct such as child prostitution and child pornography.¹²⁸ He suggests that a literal interpretation of the Convention 'would render its core undertaking a practical impossibility'. He submits that:

¹²⁷ Personal correspondence between the author and William Myers, dated 26 September 2007.

¹²⁸ Smolin, p 998, note 76.

‘it would be irresponsible to ratify a convention knowing that the nation was incapable of fulfilling its core undertakings...[h]owever, if it is seen as a form of political and social mobilisation addressed broadly to governments, legislatures, bureaucracies, NGOs, and various sectors within society, then it becomes responsible and laudable to ratify it’.¹²⁹

While this is certainly a compelling argument, from a legal viewpoint it is unfortunately of little assistance. Convention 182 is an international legal instrument and is, as such, binding. This is reinforced by the ILO Constitution, which allows for the adoption of conventions and recommendations – the former binding the latter not. Implicit in the distinction between the two is the thought that states will agree to bind themselves to certain obligations but not to others. By adopting and ratifying Convention 182, states have bound themselves to eliminate worst forms of child labour. I would argue that the adoption of Convention 182, was therefore not done in a considered manner. Again, while the goal of elimination is eminently desirable, it is feared to be unattainable.

4.6 International legal developments since Convention 182

There have been a number of other legal instruments that have been adopted after Convention 182, which also deal with conduct that is considered a worst form of child labour. These instruments inform the present discussion in that they provide content for the definitions of some of the worst forms of child labour, such as child trafficking, child pornography and child prostitution and children in armed conflict. On account of the fact that the focus of the remainder of the thesis is the use, procuring or offering of a child for illicit activities as a worst form of child labour, the following discussion will be brief.

4.6.1 The Optional Protocol to the United Nations Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (2000) and the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (2000)

¹²⁹ Smolin, p 998, note 76.

On 9 March 1994, the United Nations Commission on Human Rights adopted a resolution in which it decided to establish an open-ended inter-sessional working group responsible for elaborating, as a matter of priority guidelines, for a possible draft optional protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography as well as basic measures needed for their prevention and eradication.¹³⁰ The working group proceeded to meet on a regular basis from 1995 onwards and had, amongst others, the benefit of the Programme of Action for the Elimination of the Exploitation of Child Labour¹³¹ and reports by the Special Rapporteur on the sale of children, child prostitution and child pornography to inform its work.¹³²

The Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography entered into force in January 2000. It aims to reinforce Articles 1, 11, 21, 32, 33, 34, 35 and 36 of the CRC and extends the measures that States Parties should undertake in order to guarantee the protection of the child from the sale of children, child prostitution and child pornography. The Optional Protocol on the sale of children, child prostitution and child pornography makes specific reference to the rights of the child to be protected from economic exploitation; from performing any work that is likely to be hazardous or to interfere with the child's education; and the significant and increasing international traffic in children for the purpose of the sale of children, child prostitution and child pornography. In addition, it provides useful definitions of the sale of children, child prostitution and child

¹³⁰ Resolution 1994/90 'Need to adopt effective international measures for the prevention and eradication of the sale of children, child prostitution and child pornography', adopted at the 66th meeting of the UN Commission on Human Rights on 9 March 1994.

¹³¹ UN Commission on Human Rights Resolution 1993/79, E/CN.4/RES/1993/79.

¹³² See for example, Report of the Special Rapporteur on the Sale of children, child prostitution and child pornography, Vitit Muntarbhorn, E/CN.4/1994/84 and Report of the Special Rapporteur on the sale of children, child prostitution and child pornography, Ofelia Calcetas-Santos, E/CN.4/1999/71. See also section 3.2.1.1 of Chapter 3, which discusses the work of the Special Rapporteur in relation to Article 34 of the UNCRC.

pornography that can inform the implementation of Convention 182 (as discussed in section 4.4 of this chapter).

In December 1995 the 26th International Conference of the Red Cross and Red Crescent passed a recommendation whereby parties to conflict must take every feasible step to ensure that children under 18 do not participate in hostilities and then at a regional level, the African Conference on the Use of Children as Soldiers adopted the Maputo Declaration in 1999, which set the minimum age for military recruitment at 18.¹³³ In addition the CRC contains several Articles that specifically refer to this issue, namely Article 38 on armed conflict and Article 39 on the rehabilitative care of child victims of armed conflicts. This is a special area of child rights that has been the focus of much activism and academic writing.¹³⁴ The Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict was adopted and opened for signature, ratification and accession on 25 May 2000.¹³⁵ The Optional Protocol entered into force 12 February 2002 and at writing has been ratified by 117 states.¹³⁶ It deals with issues such as participation of children in armed conflict (Article 1), compulsory recruitment of children into armed forces (Article 2), prohibits non-state entities from recruiting and deploying persons under 18 (Article 4) and deals with the rehabilitation and social reintegration of child victims (Article 7).

¹³³ Harvey R, *Recruitment and deployment of child soldiers – The beginning of the end?* Children and Armed Conflict Unit, University of Essex, 2000 accessed at <http://www.essex.ac.uk/armedcon/default.htm> on 3 October 2007.

¹³⁴ For instance see generally: Hall L and Kazemi N, 'Prospects for Justice and Reconciliation in Sierra Leone', *Harvard International Law Journal*, Winter, 2003, p 287 – 300; Wells, S, 'Crimes against Child Soldiers in Armed Conflict Situations: Application and Limits of International Humanitarian Law', *Tulane Journal of International and Comparative Law*, Spring 2004, p 287- 306 and Mezmur B, *Children at both ends of the gun: Towards a comprehensive legal approach to the problem of child soldiers in Africa*, unpublished LLM dissertation, University of Pretoria, 2005. In addition the Child Rights Information Network has a dedicated electronic newsletter on children in armed conflict, see www.crin.org.

¹³⁵ United Nations General Assembly Resolution, A/RES/54/263.

¹³⁶ See http://www.ohchr.org/english/countries/ratification/11_b.htm accessed on 3 October 2007.

Although both Optional Protocols do not have child labour or economic exploitation focus, they constitute the most definitive international legal guidance presently available on definitions and measures to be taken to address the issues of commercial sexual exploitation of children and the use of children in armed conflict. As such they are useful in interpreting what measures must be taken to implement Convention 182.

4.6.2 The Convention against Transnational Organised Crime (CTOC) (2000) and its Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (2000) (the Palermo Protocol) and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (the Palermo Protocol) and the Protocol against the Smuggling of Migrants by Land, Sea and Air (2000)

The UNODC describes the United Nations Convention against Transnational Organised Crime of 2000 (the Organised Crime Convention) as the international community's response to the need for a truly global approach.¹³⁷ Its purpose is to promote cooperation both for the prevention and for the effective fight against transnational organised crime (Article 1). It seeks to enlarge the number of States that take effective measures against transnational organised crime and to forge and strengthen international cooperation. It respects the differences and specificities of diverse legal traditions and cultures, while at the same time promoting a common language and helping to remove some of the existing barriers to effective transnational collaboration. The Convention focuses essentially on offences that are facilitative of the profit-making activities of organised criminal groups.

According to the UNODC, the Organised Crime Convention establishes general measures against transnational organised crime, whereas the two Protocols in question deal with specific crime problems. Each Protocol must be read and applied in conjunction with the Convention. The Organised Crime Convention applies to the two Protocols

¹³⁷ UNODC Toolkit to Combat Trafficking in Persons, United Nations Office on Drugs and Crime, 2006 accessed on 25 September 2006 at www.unodc.org/pdf/Trafficking_toolkit_Oct06.pdf (hereinafter UNODC Toolkit).

mutatis mutandis—“with such modification as the case requires”—and all offences established by the Protocols are also considered offences under the Organised Crime Convention itself.

The Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the Organised Crime Convention against Transnational Organised Crime, aims at preventing and combating the smuggling of migrants, as well as promoting cooperation among States parties, while protecting the rights of smuggled migrants.¹³⁸ The Palermo Protocol is the more widely referenced of these two instruments in relation to human trafficking. However, the UNODC urges States Parties to ratify both protocols. They point out that while trafficking in persons and smuggling of migrants are distinct crimes, they represent overlapping crime problems. Their legal definitions contain common elements. They argue that many victims of human trafficking begin their journey by consenting to be smuggled from one State to another. Smuggled migrants may later be deceived or coerced into exploitive situations and thus become victims of human trafficking. Protection and assistance services are required to be offered to victims of human trafficking but are not typically available to migrants who have been smuggled into a State. Thus, there is sometimes a concern that authorities may treat cases of human trafficking as cases of smuggling of migrants in order to minimise their responsibility to offer victim protection and support. For these and other reasons, the UNODC argues, it is important to ensure that States become parties to both Protocols, whenever possible.¹³⁹

The Palermo Protocol was developed to reinforce the Organised Crime Convention. It recognises that effective action to prevent and combat trafficking in persons, especially women and children, requires a comprehensive international approach in the countries of origin, transit and destination. Further that this should include measures to prevent trafficking, to punish the traffickers and to protect the victims of trafficking. Its development was premised on the knowledge that at the time of drafting, there was no universal instrument that addressed all aspects of trafficking in persons. The definitions

¹³⁸ UNODC Toolkit, p xiv, note 137.

¹³⁹ UNODC Toolkit, p xiv, note 137.

of trafficking contained in the Palermo Protocol have already been discussed in section of this Chapter.

It is noted that the initial deliberations did not specifically deal with trafficking in children and that the above definition was only produced after a submission made by the International Organisation for Migration, UNICEF, the Office of the UN High Commissioner for Human Rights and the UN High Commissioner for Refugees.¹⁴⁰ However, the submission called for far greater protections for children than that which was finally included in Article 3(c) and a further submission to expand the list of end-purposes of trafficking to include the worst forms of child labour as defined in ILO Convention 182 was not successful.¹⁴¹ It is unfortunate that the Protocol does not go further than it does in creating a special protective environment for children.

Article 4 defines the scope of the document and notes that the Protocol shall apply, except as otherwise stated herein, to the prevention, investigation and prosecution of a defined set of offences, where those offences are transnational in nature and involve an organised criminal group, as well as to the protection of victims of such offences.

Article 5 creates the obligation on States parties to adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in Article 3 of the Protocol, when committed intentionally.

¹⁴⁰ Gallagher A, 'Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis', *Human Rights Quarterly*, Vol. 23, 2001, p 988-989. On the Palermo Protocol, see generally Defeis EF, 'Protocol to Prevent, Suppress and Punish Trafficking in Persons – A New Approach', *ILSA Journal of International and Comparative Law*, Vol. 10, 2004, p 485 – 491; Futter, L, *The need for a regional mechanism to protect victims of human trafficking in Southern Africa*, unpublished M.Phil dissertation, University of Cape Town, 2007 and Kamidi R, *A Legal Response to Child Trafficking in Africa: A Case Study of South Africa and Benin*, unpublished LLM dissertation, University of Pretoria, 2007.

¹⁴¹ Gallagher, p 989, note 140.

Article 6 deals extensively with the need to create protection mechanisms for the protection of victims of trafficking in persons. While the provisions in this respect are many, of particular interest here is the directive in Article 6(3) that promotes bi-lateral and multi-lateral cooperation in the protection of victims. It states: “each State Party shall consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking in persons, including, in appropriate cases, in cooperation with non-governmental organisations, other relevant organisations and other elements of civil society...”

The Organised Crime Convention seeks to “promote cooperation to prevent and combat transnational organised crime more effectively”. The Protocol therefore places strong emphasis on the need for bi-lateral and multi-lateral cooperation and reference is made to this throughout the document, thus highlighting the need for a comprehensive, transactional, multi-sectoral approach to the combating of trafficking.

The Palermo Protocol is unique and has no precedent in that it focuses on all aspects of human trafficking. Critics have however issued a number of cautions with regard to this instrument. Hyland notes three distinct shortcomings. The first is that it does not contain any provisions for the protection from prosecution for acts that victims are forced to perform. Secondly, that ‘victim assistance’ as defined by the Protocol is discretionary, as it does not contain a definition or qualification for ‘appropriate cases’ as set out in Article 6. Finally, that, the Protocol does not mention the reintegration or provision of services once a victim is repatriated to his/her country of origin.¹⁴² To this I would add the fact that it fails to recognise the specific needs of child victims, distinct from adult victims of trafficking, in its provisions on victim assistance or protective measures.

4.7 Conclusion

Up until 1999, there existed general human rights treaties dealing with, for instance, trafficking, forced labour and slavery as well as Convention 138, which encapsulated

¹⁴² Hyland, quoted in Futter, p36, note 140.

hazardous work but was not widely ratified and had an overall, broad objective of eradicating child labour. However, these did not properly recognise specific action for children who were victims of extreme forms of economic exploitation, nor did they provide for a focused legal framework that would address these violations of children's rights as a matter of urgency. While the UNCRC is an all-encompassing expression of children's rights, it nonetheless constitutes a universal human rights treaty dealing with children and contains broad protective provisions. In addition, the Convention called only for states to ensure legislative and administrative measures to realise the rights contained therein, and implementation issues have in reality been assigned to pronouncements of the UN Committee on the Rights of the Child or positive actions by ratifying states to domesticate its provisions.

Convention 182, on the other hand, adopts a far more targeted approach. It recognises more concrete obligations may be needed for states and therefore includes, as an obligation, that states implement national plans of action, with a clear focus on issues such as prevention, education and rehabilitation of victims. It represents a clear effort by the ILO to place the worst forms of economic exploitation of children high on the child labour agenda. Its unanimous adoption and fast ratification also signal significant political will to 'do right' by children who are victims of worst forms of child labour.

However, there is reason for caution in regarding the Convention as a significant development in the child rights arena and ultimately achievable.

First, I would argue that many of the positive measures contained in Convention 182 constitute existing obligations under the UNCRC (and Convention 138) in any event, and that while targeted action against the most serious forms of economic exploitation of children is certainly warranted, the ILO did not need to enact a new set of standards.

Second, I would argue that the overall objective of Convention 182, namely the elimination of the worst forms of child labour, is highly questionable and in all probability unattainable. One of the reasons for this is that certain conduct termed 'worst

forms of child labour' such as commercial sexual exploitation, trafficking in children and the use of children in illicit activities are markedly different from conduct previously dealt with by the ILO under the umbrella of child labour. By stating that the goal of Convention 182 is the elimination of the worst forms of child labour, the ILO failed to recognise the difficulties attendant to conduct that is housed within the 'second' economy or 'criminal' economy. While the prohibition of the worst forms of child labour is manifestly achievable, elimination of conduct that is long-established and has an agenda all of its own is another.

Elimination is not the only hurdle that needs to be overcome. Given the use of the terms 'urgency', 'time-bound' and 'immediate' in the Convention, by ratifying it states have obliged themselves to undertake such action. But against what are those terms to be measured? Six months, one year, three years or a decade? Likewise, the decision to adopt time-bound measures also could back-fire on states. In light of political criticism aimed at inaction or failure to meet deadlines, are states prepared to set deadlines for action and results that could result in international and domestic censure?

Finally, at this point and as a precursor to the discussion that will follow in Chapter 6 and 7, the inclusion in Convention 182 of the use of children in the commission of crime as a worst form of child labour is questioned. This chapter has shown there was no evidential basis for including this conduct in the Convention (as in the case of the use of children in armed conflict). In addition, it is submitted that the example of the Pilot Programme on the use of children in the commission of crime in Chapter 7 will illustrate how the implementation of measures to address this worst form of child labour leads to the conclusion that the conduct should rather be dealt with under the broader umbrella of exploitation than in a Convention aimed at intolerable forms of 'child labour'.

However, it is still early days, the Convention is a bare 8 years of age, the implementation process undertaken by the individual states will ultimately be indicative of its impact. The remainder of the thesis will focus on examining the significance of the

Convention in South Africa, with a particular focus on the instrumental use of children in the commission of crime as a worst form of child labour under Article 3 (c).



Chapter 5

Child labour in the context of South African law and policy

This chapter shifts from the examination of international child labour law, to a more focused approach aimed at examining the influence of international child labour instruments, in particular Convention 182 and the instrumental use of children to commit crime as a worst form of child labour, on South African child labour law and policy.

What follows in this chapter is an examination of the Constitution of the Republic of South Africa (1996), the Child Care Act (1983), the Basic Conditions of Employment Act (1997), the Child Labour Programme of Action and an overview of the manner in which South Africa has responded to its obligations under Convention 182. It will also provide some insight into the law reform process that culminated in the Children's Act 38 of 2005 and the Children's Amendment Bill of 2006. This legislation is aimed at creating a comprehensive child law (excluding child justice provisions) to ensure that children realise their rights according to international law and the South African Constitution. This chapter will not examine criminal justice law and policy, as this will be discussed in detail in Chapter 6.

In addition, the chapter will only focus on developments post-1994, when South Africa entered her new democratic era, was readmitted to the international community and became a constitutional democracy, the reason being that Conventions 138 and 182 were only ratified in 2000 and it was only with the advent of the final Constitution in 1996 that South Africa had a credible human rights legal framework within which to operate.¹

5.1 Child Labour in South Africa

Prior to examining the legal framework, a brief outline of the context pertaining to

¹ See generally Sloth Nielsen J, 'Ratification of the Convention on the Rights of the Child: Implications for South Africa', *South African Journal on Human Rights*, Vol. 11, No. 3, 1995, p 401- 420.

child labour in South Africa is merited. In 1999 Statistics South Africa undertook a study on child labour in South Africa and some of the findings are as follows.² At the time of the survey, there were an estimated 13,4 million children in South Africa between the ages of 5 and 17 years with 36% (4,8 million) of children in this age group being engaged in economic work for 3 hours per week and other work for 7 hours per week. Approximately 4.5 million children aged between 5 and 17 years (33%) spent one hour or more per week fetching wood and/or water. In addition it was found that about one in every 31 children (3%, or 0,4 million) undertook economic activities (excluding fetching wood and water) for twelve or more hours, with boys being more likely than girls to be doing economic work.

The study also produced findings regarding why children were engaged in such activities. Of the children engaged in economic activities, 59% said they were working because they had a duty to help their family, and a further 15% said they worked to assist the family with money. The only other significant reason was for pocket money (16% of working children).³ Most children who engaged in economic activity did so unpaid in family enterprises, mostly in agriculture and retail. For all industries, the majority of children worked between three and seven hours a week.

Of the children engaged in narrowly-defined 'economic' work for three hours or more, 61% (2,1 million) said they were exposed to hazardous conditions: more than one in ten children aged 5 to 9 years who were engaged in economic activities had to do heavy physical work; this rose to nearly one in five for children aged 10 to 14 years, and one quarter of children aged 15 to 17 years. Children working in commercial agricultural areas were much more likely to be doing heavy physical work than children in any other industry. In addition, boys were more likely to be

² Statistics South Africa, Survey of Activities of Young People in South Africa: Country report on children's work-related activities, Department of Labour, 2001 accessed at <http://www.labour.gov.za/download/9499/Research%20report%20-%20Survey%20of%20Activities%20of%20Young%20People%20in%20South%20Africa%201999%20-%20Country%20Report.pdf> on 5 October 2007.

³ Although not conducted on the same scale as the SA Statistics study, for information regarding the reasons that children engage in crime in South Africa, see Frank C and Muntingh L, *Children Used by Adults to Commit Crime (CUBAC): Children's Perceptions*, ILO, 2005, which canvassed the views of 541 children on the use of children to commit crime. A more detailed discussion of the study is found in section 7.4.3 of Chapter 7.

exposed to such conditions than girls. Among girls, a larger proportion of those aged 10 to 14 years experienced hazardous conditions than the older and younger age groups.

There have also been numerous studies on child work in various commercial sectors in South Africa, as well as studies on activities which are considered to constitute worst forms of child labour. These studies have examined household work;⁴ domestic workers;⁵ child trafficking⁶ and children working in the tobacco industry;⁷ to name a few.

Interestingly, Levine has recently reviewed various pieces of research undertaken on different forms of child labour in South Africa, which included child slavery, agriculture, sex work in the mining industry and domestic work. She concludes that childhood poverty has not decreased in consequence of the laws that make child labour illegal and that human rights legislation cannot protect children from harm when the political economy of the country is rooted in structural inequality.⁸ This is confirmation of the concern that was expressed in the previous chapter regarding whether Convention 182 will actually have a significant impact of the lives of children who are victims of child labour or whether implementation difficulties will weaken the influence of the Convention. This question will also be examined in more detail in relation to the use of children in the commission of crime later in this thesis.

⁴ Bray R, *Who does the Housework? An Examination of South African Children's Working Roles*, Centre for Social Science Research Working Paper No. 45, 2003 (copy on file with the author).

⁵ Budlender D and Bosch D, *South Africa Child Domestic Workers: A National Report*, ILO, 2002; Koen K and Van Vuuren B, *Children in domestic service: A case of the Western Cape*, terre des hommes schweiz (tdh-ch), 2002 (copies on file with the author).

⁶ Martens J, Pieczkowski M and Van Vuuren-Smythe B, 'Trafficking in women and children for sexual exploitation in Southern Africa', International Organisation for Migration (IOM), 2003 and Molo Songololo, 'The Trafficking of Children for purposes of Sexual Exploitation- South Africa', Cape Town, 2000 (copies on file with the author).

⁷ Eldring L, Nakanyane S and Tshoedi M, 'Exploitation of the Marginalised: Child labourers in the tobacco growing sector in South Africa', in *Child Labour in the Tobacco Growing Sector in Africa*, report prepared for the IUF/ITGA/BAT Conference on the Elimination of Child Labour, Nairobi 8-9 October 2000 (copy on file with the author).

⁸ Levine S, 'The "picaninny wage". An historical overview of the persistence of structural inequality and child labour in South Africa', *Anthropology Southern Africa*, Vol. 29, No. 3&4, 2006, p 122- 131.

5.2 The Constitution of the Republic of South Africa

In 1993 South Africa adopted an interim Constitution.⁹ In terms of Chapter 5, power was granted to the Constitutional Assembly (which consisted of the National Assembly and Senate) to draft a new constitutional text as proscribed by the contents of the chapter. What resulted was the Constitution of the Republic of South Africa, which was adopted by the Constitutional Assembly on 8 May 1996.¹⁰ It was signed into law on 10 December 1996 as the Constitution of the Republic of South Africa Act 108 of 1996 and took effect on 4 February 1997. It has been lauded as one of the most progressive Constitutions in the world and is the supreme law of South Africa.

The final Constitution has a dedicated section on children's rights. Section 28 constitutes a 'mini-charter' of children's rights and covers diverse issues such as civil and political rights, including the rights to a name and nationality (Article 23 (1)(a)); socio-economic rights, for instance the right to basic nutrition, shelter, basic health

⁹ Act 200 of 1993. The drafting process, negotiation process and relevant content of the interim Constitution will not be examined in detail in this thesis. However, see generally Mureinik E 'A bridge to where?: Introducing the interim Bill of Rights', *South African Journal of Human Rights*, Vol. 10, Part 1, 1994, p31; Devenish G, 'An examination and critique of the limitation provision of the Bill of Rights contained in the Interim Constitution', *South African Public Law*, Vol. 10, No. 1, 1995, p 131; Carpenter G, 'The Republic of South Africa Constitution Act 200 of 1993: an overview', *South African Public Law*, Vol. 9, No. 2, 1994, p 222 and Botha N, 'International Law and the South African Interim Constitution', *South African Public Law*, Vol. 9, No. 2, 1994, p 245. As far as children's rights are concerned, Sloth-Nielsen notes that the text of the final Constitution is substantially similar to the equivalent text in the interim Constitution, however a number of children's rights were added and some aspects of the interim Constitution were elaborated on. The only significant change as far as the worst forms of child labour is concerned is that section 28(1)(i) was added, dealing with the child's right not to be used directly in armed conflict (other changes included the addition of a right to legal representation at state expense in civil proceedings). See Sloth-Nielsen J, 'Children', in Cheadle M, Davis D, Haysom N (eds), *South African Constitutional Law: The Bill of Rights*, Lexis Nexis Butterworths: Durban, 2005, p 23-6.

¹⁰ See *In re: Certification of the Constitution of the Republic of South Africa, 1996 1996 (10) BCLR 1253 (CC)*, which dealt with the compliance of text the final Constitution to the constitutional principles mandated by the Interim Constitution of 2003.

care services and social services (section 28(1)(c)); child justice (section 28(1)(g)); and it constitutionalises the best interests of the child principle (section 28(2)).¹¹

Writing on section 28, Devenish describes it as intending:

‘to give expression to the social and moral conscience of the South African nation and the desire of its leaders to give social compassion, some meaningful constitutional and legal effect in relation to the children of South Africa, who in the past have suffered so inordinately because of unconscionable laws and policies’.¹²

Yet despite children’s rights being assigned consideration in the final Constitution, they do not have special status as Constitutional Court has held that the argument that section 28(2) trumps other provisions of the Bill of Rights in all circumstances is ‘alien to the approach adopted by this Court that constitutional rights are mutually interrelated and interdependent and form a single constitutional value system’.¹³

¹¹ The Constitutional Court held, in *Minister of Welfare and Population Development v Fitzpatrick* 2000(3) SA 422 (CC), that in South African law, the best interests of the child, as contained in section 28(2) of the Constitution, is a right that all children enjoy and more than just a principle.

¹² Devenish G, *A Commentary on the South African Bill of Rights*, Butterworths: Durban, 2002, p 371 – 372.

¹³ *De Reuck v Director Public Prosecutions (Witwatersrand Local Division)* 2004 (1) SA 406 (CC) at para 55, quoted in Currie I and De Waal J, *The Bill of Rights Handbook*, Juta: Landsdowne, 2005, p 600. See also Sloth-Nielsen J and Mezmur B, ‘2+2=5? Exploring the domestication of the CRC in South African jurisprudence 2001 – 2006’, paper presented at the International Conference on Children’s Rights, University of Ottawa, March 14-17, 2007 (copy on file with the author). This approach can also be seen from the judgment in *The Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC). In this case, the Constitutional Court considered whether or not children had an immediate claim to housing by invoking their right to shelter in terms of section 28(1)(c). The Court considered both section 28(1)(c) and also section 26 of the Constitution (everyone has the right to access adequate housing) and held that there had no been no infringement by the State of the children’s rights in section 28(1)(c) since the primary obligation imposed by section 28(1)(c) fell upon the child’s immediate caregiver - the Court found that section 28(1) (c) did not create a direct and enforceable claim against the state by children. The right in section 28 (1) (c) did not create rights that are separate and independent for children and their parents. For general comment on the *Grootboom* case see Sloth-Nielsen J, ‘The Child’s Right to Social Services, the Right to Social Security and Primary Prevention of Child Abuse: Some Conclusions in the Aftermath of *Grootboom*’, *South*

Interestingly, in light of the brief discussion on the issue of the nature of childhood and how it plays out in the context of child labour, from a legal and constitutional perspective Currie and De Waal also note that section 28 does not confer on children a right to individual self-determination.¹⁴ They imply that the reason for this is as follows: first, it has always been controversial as to whether children are entitled to choose their own lifestyle, religion etc. and a balance has to be struck between the interests of children, parents and the state; second, children must (like everyone else) derive their claims to personal autonomy and personal self-fulfilment from the rights to dignity, privacy, freedom of religion, speech and perhaps association; finally, in the case of children, the limitation of these rights becomes harder to justify as the child grows older since the responsibilities of parents and the state towards a child are linked to the child's age. Therefore, it appears that the argument is that children will derive their autonomy from other provisions of the Constitution such as section 10 (the right to human dignity), section 14 (the right to privacy) and section 15 (the right to freedom of religion, belief and opinion).¹⁵ Currie and De Waal continue to argue

African Journal on Human Rights, Vol. 17, Part 2, 2001, p 210 - 231 and Liebenberg S, 'The Value of Human Dignity in Interpreting Socio-Economic Rights', *South African Journal on Human Rights*, Vol. 21, Part 1, 2005, p 1 – 31.

¹⁴ Currie and De Waal, p 601, note 13.

¹⁵ An example of the application of the argument can perhaps be found in the *Christian Education South Africa v The Minister of Education* 2000 (10) BCLR 1051 (CC) case. The central issue was whether the enactment of a blanket prohibition of corporal punishment in schools violated the rights of parents of children in independent schools to freely practice their religion. The main argument of the applicant was that the teacher's right to impose corporal punishment (with the consent of parents) was a vital element of their religion and that the blanket ban on corporal punishment contained in section 10 of the South African Schools Act (which prohibited the use of all forms of corporal punishment in schools) constituted an interference with their religious and cultural beliefs and was therefore unconstitutional. The Minister of Education (who opposed this application on the basis that a ban on corporal punishment for children was justified) relied on the equality clause, the right to human dignity, the right to freedom of security of the person (which includes the right not to be treated or punished in a cruel, inhuman or degrading way) and the rights of children to be protected from maltreatment, neglect, abuse or degradation entrenched in the Constitution – applying these rights to the situation of children. The Constitutional Court based its finding on the limitation clause of the Constitution (section 36) and held that section 10 of the South African Schools Act to be reasonable and justifiable as the effect thereof did not substantially infringe the applicant's right to freedom of religion, belief and opinion as enshrined in section 15 of the Constitution.

that when interpreting children's constitutional rights a balance has to be struck between a child's need for autonomy and his or her need for protection – '[a]utonomy develops gradually through parental socialisation and guidance and this means that parents should have a degree of latitude in deciding how to raise their children. However, the explicit protection of children's constitutional rights means that children cannot be regarded as mere extensions of their parents'.¹⁶

Child labour is dealt with in the Bill of Rights in the following sections:¹⁷

'Section 28(1) Every child has the right-

....

- (e) to be protected from exploitative labour practices;
- (f) not to be required or permitted to perform work or provide services that –
 - (i) are inappropriate for a person of that child's age, or
 - (ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral, or social development;

At the outset, it should be noted that section 37 of the Bill of Rights allows for the derogation of certain rights in times of States of Emergency. There are certain rights however, which are declared non-derogable and this includes section 28(1)(i) on children in armed conflict, but only in respect of children younger than 15 years. This provision has been criticised by the ILO Committee of Experts on the Application of Conventions and Recommendations as a derogation in respect of children between 15 years and 18 years of age is not compliant with Convention 182.¹⁸

¹⁶ Currie and De Waal, p 602, note 13.

¹⁷ Section 28(1)(i) also grants the child the right not to be used directly in armed conflict, and to be protected in times of armed conflict. As argued in Chapter 4, I suggest that child soldiers are an uneasy fit in Convention 182 and, in any event, are not the focus of this thesis. So, although the use of children in armed conflict is included in Convention 182 as a worst form of child labour, I will not be discussing this in any detail. However, for a more general discussion on children in armed conflict see Mezmur B, *Children at both ends of the gun: Towards a comprehensive legal approach to the problem of child soldiers in Africa*, unpublished LLM dissertation, University of Pretoria, 2005.

¹⁸ CEACR: Individual Direct Request concerning Convention No. 182, Worst Forms of Child Labour, 1999 South Africa (ratification: 2000), submitted: 2004, document no. (ilolex): 092004ZAF182, accessed at www.ilo.org/ilolex/ on 11 October 2007 and CEACR: Individual Direct Request

The first observation that must be made in relation to sections 28 (e) and (f) is that they are based on section 30 (1) (e) of the interim Constitution which reads: '[e]very child shall have the right-...not to be subject to exploitative labour practices nor to be required or permitted to perform work which is hazardous or harmful to his or her education, health or well-being.' This provision was drafted at a time when the UNCRC was adopted and in force but had not yet been signed or ratified by South Africa. Likewise, neither Convention 138 nor Convention 182 had been ratified by South Africa and in fact in 1993, Convention 182 was not even on the ILO's agenda.¹⁹ These three fundamental treaties providing an international legal framework for children were only ratified by the Republic in 1995 and 2000 respectively (both Convention 138 and Convention 182 were ratified at the same time). Nonetheless, the Constitutional Assembly deemed it necessary to include provisions aimed at protecting children from exploitative and harmful labour in the Constitution, which decision must have inevitably been informed by the international law climate.²⁰

A perusal of the seminal texts providing commentary on the final Constitution does not provide much insight into what exactly is conferred by the two provisions

concerning Worst Forms of Child Labour Convention, 1999 (No. 182) South Africa (ratification: 2000) submitted: 2006, document no. (ilolex): 092006ZAF182, accessed at www.ilo.org/ilolex/ on 11 October 2007.

¹⁹ In fact by the time that the final Constitution was finalised, the ILO had only adopted the resolution to place child labour on the agenda of the 1998 International Labour Conference and had not even considered making children in armed conflict a worst form of child labour, yet the Constitution had already included a provision protecting children from this type of exploitation. It must be acknowledged though that the inclusion of section 28(1)(i) is more probably due to the protections for children in armed conflict found in the UNCRC. This probability is also reinforced by the fact that its placement in section 28 is removed from the two sections dealing with child labour issues and thus should not be interpreted as a prescient inclusion in the Constitution, in anticipation of the use of children in armed conflict also being declared a worst form of child labour.

²⁰ The international law influence on the children's rights environment can be gleaned from developments such as the adoption of the Children's Charter of South Africa 1992, and the convening of an international conference on children's rights, see *International Conference on the Rights of the Child: Papers and reports of a conference convened by the Community Law Centre, University of the Western Cape, 1992*, University of the Western Cape, 1992 (copy on file with author).

contained in sections 28(1)(e) and (f).²¹ The commentaries all refer to existing international Conventions against which the Constitution can be interpreted, such as the UNCRC and ILO Conventions 138 and 182, yet fail to acknowledge the significance of the fact that South Africa adopted a constitutional principle relating to exploitative child labour before Convention 182 was adopted. While the ratification of Convention 182 means that South Africa now has to specifically prohibit the worst forms of child labour as set out in the Convention, as well as adopt the specified measures of implementation, South Africa had already, in the absence of such obligations, already adopted two constitutional principles that were aimed at prohibiting conduct that would later be regarded as worst forms of child labour.

Sloth-Nielsen, as well as Currie and De Waal, point out that neither section 28(1)(e) nor section 28(1)(f) completely abolishes child labour, citing one of the reasons as the fact that many children do work and in that way contribute to the survival of the family.²² This is an important observation, as the Constitution, in fact, does not even require a minimum age to be set, only that work or services performed by a child should not be 'inappropriate for a person of that child's age'. Even though South Africa had not ratified Convention 138 at the time of the drafting of the Constitution, it would, arguably, nevertheless have informed the drafting process. It is therefore noteworthy that the drafters chose not to follow the abolitionist route, rather making the constitutional principle flexible and child-centred, yet at the same time affording a measure of protection for very young children.²³

Overall the section seems to be balanced – it appears to adopt a prioritising approach to child labour, even before such an approach was introduced by Convention 182. As a point of departure, section 28(1)(e) requires children to be protected from

²¹ See Woolman S and Roux T (eds), *Constitutional Law of South Africa*, 2nd edition, Juta and Co. Ltd: Wetton, 2002, p 47-21 and 47-22; Devenish, p 387-388, note 12; Currie and De Waal, p 615, note 13 and Sloth-Nielsen, p 23 -18 and 23-19, note 9. See also Sloth Nielsen , note 1.

²² Sloth-Nielsen, p 23-18, note 9; Currie and De Waal, p 615, note 13.

²³ However, this constitutional principle is given content in national law through the provisions of section 52A of the Child Care Act 74 of 1983 as amended and section 43 of the Basic Conditions of Employment Act, which set the minimum age of employment in any event at 15 years of age. These provisions are discussed in more detail later in this chapter.

exploitative child labour, clearly making this the over-arching protection. Then section 28(1)(f) follows, requiring that, if and when children do work, such work should be appropriate for *that* (emphasis added) individual child as well as not interfering with the child's well-being, education, physical or mental health or spiritual, moral or social development – going even further than Article 3(1) of Convention 138, which only refers to 'health, safety or morals' of young persons.²⁴ Section 28(1)(f) reiterates the importance that education plays in the lives of children and seeks to protect the child's right to receive schooling, clearly linking the issue to child labour, which has been recognised as being one of the main factors in children not receiving education.

Unfortunately, the Constitution does not define terms such as 'exploitative' and 'inappropriate'. However, as has been noted in the previous chapters, the nature of child work and child labour is a decidedly complex one and therefore the use of such broad terms ensures a flexible approach to such a multifarious issue.

Section 39(1) of the Constitution obliges courts to consider international law when interpreting the bill of rights. Therefore, the terms used in sections 28(1)(e) and (f), as well as (i), can be informed by reference to the UNCRC, Convention 138 and Convention 182 amongst others. To date, however, none of these sections has been subject to judicial interpretation, unlike other children's rights provisions such as those contained in section 28(1)(c) on socio-economic rights;²⁵ section 28(1)(g) on the rights of children in conflict with the law,²⁶ and section 28(2) on the best interest of

²⁴ In fact, Article 1 of Convention 138 and Paragraph 2 of Recommendation 146 are the two places in the minimum age instruments where the child's physical and mental development are referred to, but in the context of requiring states to develop national policy and not necessarily law. The Constitution of the Republic of South Africa constitutes the supreme law of the country and the inclusion of concepts such as the child's 'well-being' and 'physical and mental development' signal the recognition that they constitute standards against which the protection of children from harmful labour practices must be measured in law, not just through policy.

²⁵ See for instance the *Grootboom* case, note 13, and *Minister of Health and others v the Treatment Action Campaign and Others* 2002 (5) SA 721 (CC).

²⁶ See for instance *DPP, KwaZulu-Natal v P* 2006(1) SACR 243 (SCA) and *Brandt v S* [2005] 2 All SA 1 (SCA).

the child.²⁷ An attempt was recently undertaken to persuade a court to make a finding that would give content to section 28(1)(e) with particular reference to the use of children in the commission of crime, but the court failed to make mention of Convention 182 or section 28(1)(e) in its judgment; this case will be discussed in section 7.7 of Chapter 7 of this thesis.

Thus, I would argue that the South African Constitution not only places a strong emphasis on child labour issues, but does so in a very nuanced manner. The fact that section 28(1)(e) and (f) specifically do not refer to the setting of a minimum age for work or that the overall objective is the abolition of child labour could be used as a basis to argue that the drafters of the Constitution, like leading commentators such as Myers and White,²⁸ recognised the fallacy of such an approach.

The Constitution, through all its provisions and not just section 28, provides a rights-based framework that is also the supreme law of South Africa within which children, who are victims of all the worst forms of child labour, can find protection under the law. Of significance is the fact that it was drafted prior to South Africa's adoption of Convention 182, yet can ensure the same level of protection to children that is envisaged by the Convention.

²⁷ See for instance the *Fitzpatrick* case, note 11, *Du Toit and another v the Minister of Welfare and Population Development* 2003 (2) SA 198 (CC) and *Fraser v Children's Court Pretoria North* 1997 (2) SA 261 (CC). For a general discussion on developments in children's rights through case law see Sloth-Nielsen J, 'Children's rights in the South African Courts: An overview since ratification of the UN Convention on the Rights of the Child', *The International Journal of Children's Rights*, Vol. 10, No. 2, 2002 and Sloth-Nielsen and Mezmur, note 13.

²⁸ Myers W, 'Considering Child Labour: Changing terms, issues and actors at the international level', *Childhood: A global journal of child research*, Vol. 6, No. 1, 1999, p 17 and also White B, 'Defining the Intolerable: Child work, global standards and cultural relativism', *Childhood: A global journal of child research*, Vol. 6, No. 1, 1999, p 133-134.

5.3 South African domestic laws relevant to child labour

5.3.1 Child Care Act 74 of 1983

The Child Care Act was adopted at the height of the apartheid years and as such was highly problematic as it was designed without taking the situation of the majority of South African children into account. As a result the Act has developed in a piecemeal way since coming into operation- having been amended a total of seven times since 1986.²⁹ It has also been the subject of constitutional challenges on a number of occasions, with certain provisions being declared unconstitutional by the Constitutional Court.³⁰ The South African Law Reform Commission was therefore tasked with undertaking a review of the provisions of the Act and completed this task, having drafted an entirely new piece of legislation that essentially codified laws relating to children. This law reform effort has resulted in the Children's Act 38 of 2005 and the Children's Amendment Bill 19F of 2006, discussed below in section 5.3.3.

The scope of the Child Care Act was very limited. It basically only covers children's courts, their functioning, the establishment of certain institutions to care for children and the protection and welfare of certain children (which includes adoption). The two provisions that it contains which relate to the present discussion are very ad hoc, were introduced as part of various amendments to the Act and although endeavour to create a protective framework for children, do not do so with a clear vision. The overall effect is one that illustrates that the drafters of the amendments did not have a clear understanding of what they were seeking to achieve.

The first relevant amendment to the Act was the introduction in 1991 of section 52A, which deals with the prohibition of employment of certain children.³¹ Section 52A (1)

²⁹ For a general discussion of the amendments to the Act, see Sloth-Nielsen J and Van Heerden B, 'Proposed Amendments to the Child Care Act and Regulations in the Context of Constitutional and International Law Developments in South Africa', *South African Journal on Human Rights*, Vol. 12, Part 2, 1996, p 247-264.

³⁰ For instance: the *Fraser* case, note 27 and the *Fitzpatrick* case, note 11.

³¹ Child Care Amendment Act 86 of 1991.

provides that: '[s]ubject to the provisions of this Act or any other law, no person may employ or provide work to any child under the age of 15 years'.³² Seemingly, this is an attempt to comply with the provisions of Convention 138, even though at the time South Africa had not ratified the Convention. However, if this is what it was, the provision falls short of the actual import of Convention 138, as it does not provide that employment is prohibited until the period of compulsory schooling is over (which is 15 years in South Africa). In other words, if a child turns 15 years in March of a particular year, an interpretation of the Child Care Act would allow him or her to immediately start working. However, the intent of Convention 138 was that the child should complete his or her last year of compulsory schooling and, therefore, would essentially only be allowed to start working at the end of that year and not from the actual date when he or she turned 15 years of age.

The remaining provisions of the section deal with the exclusion of certain work or employment from the provisions of sub-section 1;³³ the granting of exemptions from the application of sub-section 1;³⁴ and a prohibition for contravening the section.³⁵ If this was meant to be an attempt to bring South Africa in line with the international legal environment on child labour, then it certainly failed to meet the standards set by Convention 138. Although Convention 138 has been shown to adopt an abolitionist approach, one which is not particularly mindful of the complexities of child work, it nevertheless created a careful framework which was certainly flexible and allowed for developing countries to progressively meet their obligations while still providing a level of protection. Section 52A on the other hand is very wide in scope and although allowing for ministerial discretion in relation to exclusions of work and exemptions, it does not regulate in detail what is acceptable. In addition, even though a prohibition is

³² It has been noted that this section has wider application than the Basic Conditions of Employment Act 1997 as it outlaws both employment of such children, and provision of work and it is therefore likely that this section prohibits giving work to a child who works as an independent contractor, something the Basic Conditions of Employment does not do and for which it has been criticised (see the discussion on the Basic Conditions of Employment Act in the next section), and see the National Child Labour Programme of Action for South Africa, draft 4.10, Department of Labour 2003 .

³³ Section 2(a).

³⁴ Section 2(b), section 3 and section 4.

³⁵ Section 5.

enacted, no penalty is set and there are no provisions on how to monitor the application of the section. Currie and De Waal point out that the provision does not now satisfy the constitutional requirement that children must be protected from exploitative and harmful labour practices.³⁶ Sloth-Nielsen also points out that enforcement mechanisms in the sector are weak.³⁷

The second amendment to the Act that is of relevance occurred in 1999, and dealt with the commercial sexual exploitation of children.³⁸ While this issue obviously falls within the ambit of the discussion on Convention 182, its introduction to the Child Care Act was probably influenced by a range of other factors, such as the ratification by South Africa of the UNCRC in 1995, the work of the UN Special Rapporteur on the sale of children, child prostitution and child pornography, the First World Congress against Commercial Sexual Exploitation of Children in 1996, the drafting of the Optional Protocol to the UNCRC on the sale of children, child prostitution and child pornography, as well as the imminent adoption of Convention 182.

The amendment added a definition of commercial sexual exploitation of children to section 1 of the Act, which reads: ' "commercial sexual exploitation" means the procurement of a child to perform a sexual act for a financial or other reward payable to the child, the parents or guardian of the child, the procurer or any other person'. It also inserted section 50A, which reads:

‘(1) Any person who participates or is involved in the commercial sexual exploitation of a child shall be guilty of an offence.

(2) Any person who is an owner, lessor, manager, tenant or occupier of property on which the commercial sexual exploitation of a child occurs and who, within a reasonable time of gaining information of such occurrence, fails to report such occurrence at a police station, shall be guilty of an offence.

³⁶ Currie and De Waal, p 615, note 13.

³⁷ Sloth-Nielsen, p 23-19, note 9.

³⁸ Child Care Amendment Act 96 of 1996.

(3) Any person who is convicted of an offence in terms of this section, shall be liable to a fine, or to imprisonment for a period not exceeding 10 years, or to both such fine and such imprisonment.’

As noted above in section 3.2.1.1 of Chapter 3, the UNCRC does not define sexual exploitation but the first Special Rapporteur on the sale of children, child prostitution and child pornography, Vitit Muntarbhorn provided a definition of sexual exploitation, as did the Stockholm Declaration issued at the First World Congress against Commercial Sexual Exploitation of Children, and the Optional Protocol to the UNCRC on the sale of children, child prostitution and child pornography also provides useful definitions.³⁹ These definitions are much broader and flexible than the one provided in section 1 of the Child Care Act, as amended.

South Africa has also embarked on a law reform effort relating to sexual offences in order to ensure that the law is up to date and addresses all forms of sexual offences.⁴⁰ Chapter 3 of the Amendment Bill deals with sexual offences against children and includes provisions prohibiting acts of consensual sexual penetration with certain children/statutory rape, acts of consensual sexual violation with certain children/statutory sexual assault, sexual grooming of children and exposure or display of or causing exposure or display of pornography to children.⁴¹ Clause 17 deals with sexual exploitation of children and creates a number of offences such as the offence of living from the earnings of the sexual exploitation of a child (clause 17(5)), and the offence

³⁹ See section 3.2.1.1 of Chapter 3 for the text of these definitions.

⁴⁰ One of the reasons for the new legislation is the gap that exists as a result of the common law being out of touch with the ‘modern’ reality of sexual criminality. Therefore, whereas under the common law rape could only be committed against females and through vaginal penetration, the new law ensures that both males and females can be regarded as victims of rape as well as acknowledging that rape can consist of penetration of the vagina, anus or mouth of the victim: clause 2 of the Bill, copy on file with the author. At the time of writing the Sexual Offences Bill had been passed by parliament and is now the Criminal Law (Sexual Offences and Related Matters) Amendment Bill, 2007.

⁴¹ The Films and Publications Act 65 of 1996 as amended prohibits child pornography. This provides that ‘any person shall be guilty of an offence if he or she [possesses, creates, produces or distributes] a film or publication which contains child pornography or which advocates, advertises or promotes child pornography or the sexual exploitation of children.’

of promoting child sex tours (clause 17(6)). Clause 17(1) creates the offence of the sexual exploitation of a child, which it defines as follows:

‘(1) A person (“A”) who unlawfully and intentionally engages the services of a child complainant (“B”), with or without the consent of B, for financial or other reward, favour or compensation to B or to a third person (“C”)—
(a) for the purpose of engaging in a sexual act with B, irrespective of whether the sexual act is committed or not; or
(b) by committing a sexual act with B,
is, in addition to any other offence which he or she may be convicted of, guilty of the sexual exploitation of a child’.

Apart from general observations about the complex and legalistic manner in which the Bill was drafted as a whole, on a positive note this section is considerably better than the version contained in the Child Care Act as it allows for a broader scope of criminal conduct that could be regarded as sexual exploitation of children.

Overall, the Child Care Act does not comprehensively improve the protection for children who are victims of severe forms of economic exploitation. When it was first enacted, it had a very limited focus and gradually, as South Africa went through political changes, so too the Act was amended to allow for changing attitudes towards the vulnerabilities of all South African children. However, despite numerous amendments to the Act as a whole, it did not ultimately provide a comprehensive legal framework to realise the rights of children. Precisely for this reason, a new legislative process was embarked upon to produce such a law and this resulted in the adoption of the Children’s Act 38 of 2005, discussed in section 5.3.3 of this chapter.

5.3.2 Basic Conditions of Employment Act 75 of 1997

This Act replaced the Basic Conditions of Employment Act 3 of 1983, another piece of legislation passed during the apartheid years. In the 1983 Act the employment of children under 15 years was prohibited in section 17(a), but, again, not linked to the end of compulsory schooling and therefore falling short of the requirements of Convention 138. The 1997 Act, in section 43(1), now prohibits the employment of

children under 15 years of age,⁴² or under the minimum school leaving age if this is 15 years or older.⁴³ This provision therefore brings South African law in line with the provisions of Convention 138. Section 43(2) is aimed at incorporating the constitutional principle contained in section 28(1)(f),⁴⁴ and section 43(3) creates an offence for anyone to employ a child in contravention of sub-sections (1) or (2). It is surprising however, that given the findings of the Survey of Activities of Young People in 1999, which found that children under 15 years were engaged in work and that one of the reasons for this was their survival, that the Act did not allow for light work to be undertaken by children aged between 13 years and 15 years.⁴⁵

Likewise, the influence of Convention 138 can be seen in section 44(1), which provides for the Minister of Labour to make regulations to prohibit or place conditions on the employment of children who are at least 15 years and no longer subject to compulsory schooling. This is an attempt to make provision for the prohibition of employment in hazardous work for children under 18 years as envisaged in Article 3 of Convention 138. Two sets of regulations to protect children from exposure to hazardous work were drafted in 2006 as part of the Child Labour Programme of Action (CLPA). The regulations were drafted for both the Basic Conditions of Employment Act of 1997 and the Occupational Health and Safety Act of 1993 respectively. They had been approved by the Employment Conditions

⁴² Section 43(1)(a).

⁴³ Section 43(1)(b).

⁴⁴ Section 43(2) reads: '[n]o person may employ a child in employment – (a) that is inappropriate for a person of that age; (b) that places at risk the child's well, being, education, physical or mental health, or spiritual, moral or social development'.

⁴⁵ Bosch notes that if children were stopped from working many families would be detrimentally affected in the short term. He states that action against child work should only be taken if the child concerned would be better off after the action had been taken. See Bosch D, 'Child Labour', in Padayachee S (ed), *Children and The Law*, 2nd Edition, Lawyers for Human Rights, Pietermaritzburg, (2005), p 135. This would imply that it might be better if children were allowed to undertake light work between 13 and 15 years. The Committee of Experts on the Application of Conventions and Recommendations has also expressed concern that no provision for light work is allowed in the Basic Conditions of Employment Act, see also CEACR: Individual Direct Request concerning Minimum Age Convention, 1973 (No. 138) South Africa (ratification: 2000), submitted 2006, document no. (ilolex): 092006ZAF138, accessed at www.ilo.org/ilolex/ on 11 October 2007.

Commission in June 2006 but are still in the process of being considered by the Advisory Council on Occupational Health and Safety (ACOHS).⁴⁶

Interestingly, section 48, which is situated in Chapter 6 of the Act, prohibits all forced labour.⁴⁷ While the influence for the inclusion of this provision is most probably the ILO Forced Labour Conventions, its inclusion in a chapter dealing with children could be considered as recognition of a link between serious human rights violations and child labour, at a time before the adoption of Convention 182.

Having noted some of the arguments for protecting children from the dangers of engaging in work, especially exploitative labour, Convention 138, in Article 8, nevertheless recognises that children may under certain circumstances participate in artistic performances. This exception to the general prohibition on child work is permitted through section 50(2)(b) of the Basic Conditions of Employment Act.⁴⁸

⁴⁶ Draft Regulations on Hazardous work by children in South Africa, Version 7.1 of 6 August 2007, as adopted by the ACOHS Task Team, 6 August 2007, accessed at <http://www.child-labour.org.za/south-africa/documents-and-laws/legislation/labour-laws/draft-regulations-on-hazardous-work-and-children/> on 11 October 2007. The regulations are, amongst others, intended to: place conditions on work that may legally be performed by children who are at least 15 years old and no longer compelled to attend school; place conditions on work that may be performed by children younger than 15 years and who are still compelled to attend school and identify certain types of work that no child may be permitted to perform under any conditions. The conditions prescribed for employers of children relate to: safeguarding working children's access to nutrition, health care and education; controlling the circumstances in which children may work away from their parents; setting maximum daily and weekly hours of work; prohibiting piece work and task work, where the child is paid by volume of work rather than time worked; and prohibiting night time work, with some specific exceptions.

⁴⁷ The section reads: '(1) Subject to the Constitution, all forced labour is prohibited. (2) No person may for his or her own benefit or for the benefit of someone else, cause, demand or impose forced labour in contravention of subsection (1). (3) a person who contravenes subsection (1) or (2) commits an offence.'

⁴⁸ The section reads as follows: '(2) A determination in terms of subsection (1)— (b) may only be made in respect of section 43(1) to allow the employment of children in the performance of advertising, sports, artistic or cultural activities.' Section 50(1) allows the Minister of Labour to make a determination to replace or exclude any basic condition of employment provided for in the Act.

Accordingly, Sectoral Determination 10 allows for children under 15 years to participate in artistic performances, but carefully regulates such participation.⁴⁹

The Department of Labour can now assess applications for permits to engage children in work in this sector; if the application does not meet the requirements of the determination, it will be turned down or the applicant will be advised on what steps to take in order to ensure compliance. The Department will also be able to track the frequency of those utilising children in this sector so that if exploitation is suspected, inspections can be conducted and appropriate action taken.

Therefore, South African labour law appears at first blush to be fully compliant with the ILO requirements as set out by Convention 138, even though the Act regulating the work of children was adopted at a time when the Convention was not yet ratified. However, the Committee of Experts on the Application of Conventions and Recommendations has expressed some concern that the Act excludes the self-employment of children from its application.⁵⁰

⁴⁹ Sectoral Determination 10: Children in the Performance of Advertising, Artistic and Cultural Activities, South Africa. Some of the issues covered by the Sectoral Determination include: the parent's or guardian's consent to the work has to be given and parents and guardians must have reasonable access to the child during the work; the number of hours of work is strictly limited and, where applicable, such hours should not overlap with those of school attendance; night work is strictly regulated, rest periods are strictly enforced with employers having to provide recreational areas and employers must ensure children receive food and refreshments and that a child is not exposed to unhealthy practices, physical danger, emotional harm, excessive strain or stress at any time while working.

⁵⁰ CEACR: Individual Direct Request concerning Minimum Age Convention, 1973 (No. 138) South Africa (ratification: 2000), submitted: 2006, document no. (ilox): 092006ZAF138, accessed at www.ilo.org/ilolex/ on 11 October 2007. The Committee noted the South African government's acknowledgement that child labour is a complex and multidimensional phenomenon which results from various factors such as poverty, high adult unemployment rates, and the increase in the number of child-headed households due to the escalation of HIV/AIDS. The Committee was therefore of the opinion that it was inevitable that children would consider self-employment as a means of survival for themselves and their families. But it did note that, although currently there are no measures taken by the South African government to extend the application of Convention 138 to include all types of work, including self-employment, South Africa had a wide range of programmes aimed at directly and indirectly improving the situation of its children, such as poverty eradication programmes. The

5.3.3 The Children's Act 38 of 2005 and the Children's Amendment Bill 19 of 2006

5.3.3.1 Child trafficking and worst forms of child labour

The development of the Children's Act has a long history as it began in 1997 and is still ongoing.⁵¹ In 2002 the South African Law Reform Commission (previously known as the South African Law Commission) released its report and a draft Children's Bill.⁵² This initial version of the Bill (SALRC Children's Bill) constituted a concrete attempt to create a child rights legal framework in domestic law that ensured South Africa would be complying with many of its obligations under the UNCRC. However, subsequently Bill 70B of 2003 which was the version tabled in parliament had large sections of the original version excised, for instance, amongst others, provisions requiring the national policy framework for children provisions,

Committee also noted the South African government's undertaking that the matter of covering self-employment in the BCEA will be brought before the relevant stakeholders for consideration.

⁵¹ For a history of the drafting process, see Skelton A and Proudlock P, 'Interpretation, objects, application and interpretation of Act', in Davel C and Skelton A (eds), *Commentary on the Children's Act*, Juta & Co.: Lansdowne, 2007. The Children's Amendment Bill 19F of 2006 was passed on 22 November 2007, but the law reform process will not be complete until regulations are finalised for the law, and it is anticipated that this will only occur in 2008.

⁵² *Report on the Review of the Child Care Act and Children's Bill*, Project 110, The South African Law Commission, December 2002. After the South African Law Reform Commission released its Report and draft Bill, it was handed to the Department of Social Development (DSD), which is the lead department responsible for the Children's Act and which will be accountable for its implementation. A composite version of the Children's Act was approved by Cabinet on 20 October 2003, but because some of the powers and obligations in the Bill fell under the responsibility of national government in terms of section 75 of the Constitution and some powers and obligations fell under the responsibility of provincial government in terms of section 76 of the Constitution, the Bill was split in two. The Children's Bill 70B of 2003 was the one introduced into parliament and thereafter the focus of parliamentary debates at the Portfolio Committee on Social Development and the National Council of Provinces. It was eventually passed by the National Assembly in December 2005 and became the Children's Act 38 of 2005. However, as at date of writing is only partially promulgated and therefore the Child Care Act is still in operation. The Children's Amendment Bill 19F of 2006, passed by the South African parliament on 22 November 2007, will amend the Children's Act 38 of 2005. This contains the sections of the composite version of the Bill that provincial government will be responsible for.

provisions creating an Ombuds for children and provisions on legal representation for children.⁵³ Nevertheless, most of the protective provisions for children remained.⁵⁴

Of relevance for the present discussion regarding the impact of Convention 182 on South Africa are certain of the definitions, provisions relating to trafficking, and the protective mechanisms contained in the Act. More specifically, the Children's Amendment Bill 19F of 2006 prohibits with the worst forms of child labour in clause 141, including the use of children in the commission of crime, and criminalises constituting the worst forms of child labour in clause 305.

The definition section of the Children's Act, in section 1, contains useful explanations of terms which are used in the Act. In particular, trafficking in relation to a child is defined, as well as exploitation in relation to a child.⁵⁵ Previously it has been thought that a fundamental problem in responding to the issue of trafficking is the lack of a precise and coherent definition and the tendency is rather to define trafficking as broadly as possible.⁵⁶ In so far as the definition contained in the Children's Act is similar to that contained in the Palermo Protocol (discussed in section 4.6.2 of

⁵³ For a general discussion on children's right to legal representation in legal proceedings see Skelton A, *Special Assignment: Interpreting the right to legal representation in terms of section 28(1)(h) of the Constitution of South Africa*, conference paper presented at the Miller Du Toit Inc and UWC Law Faculty Family Law Conference, 1-2 April 2004, copy on file with the author. See also Sloth-Nielsen and Mezmur, note 13.

⁵⁴ For a commentary and interpretation of the provisions of the Act see Davel C and Skelton A (eds), *Commentary on the Children's Act*, Juta and Co., Lansdowne, 2007.

⁵⁵ Trafficking is defined as follows: ' "trafficking", in relation to a child— (a) means the recruitment, sale, supply, transportation, transfer, harbouring or receipt of children, within or across the borders of the Republic— (i) by any means, including the use of threat, force or other forms of coercion, abduction, fraud, deception, abuse of power or the giving or receiving of payments or benefits to achieve the consent of a person having control of a child; or (ii) due to a position of vulnerability, for the purpose of exploitation; and (b) includes the adoption of a child facilitated or secured through illegal means.' Exploitation is defined as follows: ' "exploitation", in relation to a child, includes—(a) all forms of slavery or practices similar to slavery, including debt bondage or forced marriage;(b) sexual exploitation;(c) servitude;(d) forced labour or services;(e) child labour prohibited in terms of section 141 (worst forms of child labour); and (f) the removal of body parts'.

⁵⁶ South African Law Reform Commission, *Discussion Paper 103: Review of the Child Care Act*, Project 110, 2001, p 1125.

Chapter 4), the Act goes a long way to achieve certainty in South African law in that the definition provides clarity as to what constitutes exploitation.

However, it is argued that there are a few problems with the definition. First, the definition as contained in Palermo Protocol refers to trafficking in persons and in Article 3(c) the Protocol states that the means listed in Article 3(a) do not need to be involved if there is the recruitment, transfer harbouring or receipt of a child for the purposes of exploitation. Therefore, the definition as contained in the Children's Act has created a greater evidential burden than necessarily required by the Palermo Protocol. Second, the Children's Act extends the definition of trafficking to include "the adoption of a child facilitated or secured through illegal means" irrespective of whether the child is exploited or not by the "adoptive" parents. It is submitted that, since the international law defines trafficking in relation to the purpose that there must be some form of intended exploitation of the victim, the adoption of a child facilitated or secured through illegal means is better referred to as an "illegal adoption" and not trafficking.⁵⁷ Finally, it is submitted that the fact that the definition of the Palermo Protocol formed the basis of the trafficking definition, and that Chapter 18 of the Children's Act contains a provision bringing the Palermo Protocol into force of law in South Africa, clearly indicates that it was this instrument (as opposed to Convention 182) that influenced the provisions on trafficking in the Children's Act.⁵⁸ That is not

⁵⁷ See generally, Gallinetti J, *Southern African Perspectives on Child Trafficking*, paper presented at the 8th Penal Sciences Conference held in Cuba, November 2004 and Gallinetti J and Kassan D, 'Trafficking of children in Africa: an overview of research, international obligations and existing legal provisions', Sloth-Nielsen J (ed), *Essays on children's rights in the context of Africa*, United Kingdom, Ashgate Publishing, forthcoming.

⁵⁸ Section 282 provides that the the UN Protocol to Prevent Trafficking in Persons has force of law in South Africa, thereby ensuring that South Africa is obliged to provide for all the forms of assistance to victims as contained in the Protocol. Furthermore, the chapter deals with extra-territorial jurisdiction and international co-operation as required by the UN Protocol to Prevent Trafficking in Persons. Importantly, the chapter also provides for reporting of a child who is a victim of trafficking to a designated social worker. The duty to report lies with immigration official, police official, social worker, social service professional, medical practitioner or registered nurse who comes into contact with a child who is a victim of trafficking. These professionals are therefore critical in identifying child victims of trafficking and initiating the process whereby such victims can receive assistance. In addition, section 286 deals with the assistance that must be rendered to a child who is a victim of trafficking and includes the return of a child victim of trafficking who is a citizen or permanent resident

to say that Convention 182 had no influence, but the Palermo Protocol is certainly the seminal document on trafficking in persons (including children) and its provisions set a clear framework for implementation in domestic law.

In addition, the components of the definition of ‘exploitation’ also point to the influence of the Palermo Protocol as they are clearly aimed at providing content to what is meant by exploitation in the context of the trafficking definition, rather than constituting a general definition of exploitation of children. This observation applies equally to the discussion on the other worst forms of child labour that follows.

Although the South African Law Reform Commission is presently investigating and proposing comprehensive legislation for trafficking in persons,⁵⁹ the first real legislative attempt to deal with trafficking of children is the Children’s Act 38 of 2005.

Clause 141 of the 2003 composite version of the Children’s Bill that was approved by the South African Cabinet provided a prohibition on worst forms of child labour. However, I would argue that it was problematic for a number of reasons. First, it also prohibited the employment of a child under 15 years of age, which is dealt with in the Basic Conditions of Employment Act 1997. The version in the composite version of the Children’s Bill also failed to link the prohibition of admission to employment to the end of compulsory schooling as was not done in the Basic Conditions of Employment Act. In addition, while clauses 141 (1)(b) and (c) purported to cover worst forms of child labour contained in Article 3 (b) and (c) of Convention 182, they did not follow the exact wording of the international instrument.⁶⁰ Particularly clause 141(1)(c) mentioned ‘employ’ in relation to the use of a child in illicit activities,

to South Africa (which involves co-operation by the Department of Home Affairs); escorts for the child at state expense where necessary and referral of the child to a designated social worker on the child’s return to South Africa. Section 290 also deals with the repatriation of a victim of child trafficking in South Africa to his or her country of origin provided certain issues are considered, including the safety of the child.

⁵⁹ See South African Law Reform Commission, *Issue Paper 25: Trafficking in Persons*, Project 131, 2004.

⁶⁰ They read as follows: ‘(b) use, procure, offer or employ a child for purposes of commercial sexual exploitation; (c) use, procure, offer or employ a child for illicit activities, including drug production and trafficking.’

thereby implying such action could actually be regarded as legitimate employment! This was certainly not contemplated by the drafters of Convention 182. Third, clause 141(1)(d), although referring to forced labour (which in any event is prohibited by the Basic Conditions of Employment Act 1997), did not also refer to other types of conduct in Article 3(a) of Convention 182 such as slavery, debt bondage, serfdom and the use of children in armed conflict. Clause 141(1) (e) was particularly badly drafted as it prohibited conduct specified in both Article 3(d) of Convention 182 and section 28(1)(f) of the Constitution,⁶¹ the former being more narrowly constructed than the latter, with the overall effect being something akin to ‘overkill’.

Interestingly, clause 141 (3) required the Minister of Labour to ‘take all reasonable steps to assist in ensuring the enforcement of the prohibition on the worst forms of child labour, including steps providing for the confiscation, in terms of the Prevention of Organised Crime Act, 1998 (Act No. 121 of 1998), of assets acquired through the use of such child labour’. This, seemingly, is an attempt to ensure some form of implementation envisaged by Articles 6 and 7 of Convention 182, but it by no means meets the standards set therein. In addition, a mere reference to the Prevention of Organised Crime Act, while acknowledging that many of the activities that constitute worst forms of child labour are linked to organised crime, does not constitute comprehensive implementation measures for all worst forms of child labour.

Generally, while the original clause 141 (as contained in the composite Children’s Bill of 2003) certainly constituted an attempt to domesticate the provisions of Convention 182, it did so in a very hap hazard manner. Ultimately, however, it does signal the first direct influence of Convention 182 on South African domestic law.

By the time that the Children’s Amendment Bill 19 of 2006 was sent to the provincial legislatures and National Council of Provinces, clause 141, now entitled ‘child labour and exploitation of children’, had undergone considerable changes.⁶² Clause 141(1)

⁶¹ It reads as follows: ‘[n]o person may... (e) encourage, induce or force a child, or allow a child, to perform labour that— (i) by its nature or the circumstances is likely to harm the health, safety or morals of a child; or (ii) places at risk the child’s well-being, education, physical or mental health, or spiritual, moral or social development.’

⁶² Clause 141 in Bill 19D of 2006 (each new version of the Bill results in the ‘tagging’ of the Bill to reflect that there are new changes – so Bill 19D of 2006 represents the fact that it is the 4th version of

(a) merely restated the provisions of the Basic Conditions of Employment Act which encompasses the minimum age for admission to employment as well as a prohibition on hazardous work, the latter prohibition essentially constituting a worst form of child labour contemplated by Article 3(d) of Convention 182. Gone was the wording of both Article 3(d) and section 28(1)(f), in favour of the wording in the Basic Conditions of Employment Act, which in any event follows the wording of section 28(1)(f).

The problem with clause 141(1)(c) and the word ‘employ’ remained. The idea of children being ‘employed’ to commit crime is highly problematic and will also be addressed in the section 7.7 of Chapter 7. Likewise, clause 141 (1)(d), by prohibiting the use, procuring or employ of a child for child labour was basically restating the prohibition in clause 141 (1)(a) as child labour is defined in section 1 of Act 38 of 2005 as ‘work by a child which— (a) is exploitative, hazardous or otherwise inappropriate for a person of that age; and (b) places at risk the child's well-being, education, physical or mental health, or spiritual, moral, emotional or social development’. This was essentially a restatement of section 43(2) of the Basic Conditions of Employment Act, except that the words ‘exploitative’ and ‘hazardous’ were also included.⁶³

Clause 141(2) created a mandatory reporting obligation for social workers and child care professionals. The provisions of section 150(1) and 150(2) of the principal Act, Act 38 of 2005, require that social workers take action when children are found to be victims of child labour and so a cross-reference to these provisions may well have been in order. It is surprising that this version of Clause 141, while clearly

the Bill that was tabled before parliament) now read: ‘(1) No person may— (a) employ a child contrary to the provisions of the Basic Conditions of Employment Act, 1997 (Act No. 75 of 1997); (b) use, procure, offer or employ a child for purposes of commercial sexual exploitation; (c) use, procure, offer or employ a child for illicit activities, including drug production and trafficking; or (d) use, procure, offer or employ a child for child labour; (2) A social worker or social service professional who becomes aware of instances of child labour or contraventions of the provisions of the Basic Conditions of Employment Act, 1997 must report it to the Department of Labour.’

⁶³ Section 43(2) reads: ‘[n]o person may employ a child in employment – (a) that is inappropriate for a person of that age; (b) that places at risk the child’s well, being, education, physical or mental health, or spiritual, moral or social development’.

constituting an attempt to domesticate the provisions of Convention 182, did so in such a confusing and imprecise way.

On 22 November 2007, the South African parliament passed the Children's Amendment Act Bill 19F of 2007 (the 6th version and final version of the tabled Bill). Again, considerable changes had been effected to clause 141.⁶⁴ On a positive note, the clause more closely resembles Article 3 of Convention 182. Reference is made to slavery, forced labour, debt bondage, serfdom and trafficking, as well as commercial sexual exploitation and the use of children to commit crime, which were in the previous version of the Bill.

Yet, if clause 141 constitutes an attempt to comply with Article 3 of Convention 182, its final formulation continues to be puzzling. First, it still retains the use of the word 'employ' in relation to worst forms of child labour, and now it is applied to all the forms listed. While, it may not have been the drafter's intention to liken the worst forms of child labour to 'employment', the fact remains that the use of 'employ' has that effect. Second, there is now a double prohibition of child trafficking – it is an offence in terms of section 284 of the Children's Act to traffic a child and now it is also an offence in terms of clause 305 of the Children's Act.⁶⁵ Clause 141(1)(c) of Bill 19D of 2006 referred to the use of children in 'illicit activities', which is the wording contained in Article 3 of Convention 182, and as explained in section 4.4 of Chapter 4 and section of Chapter 6, covers a broad range of conduct. Clause 141(1)(d) now limits the scope of the use of a children in the commission of crime, as a worst form

⁶⁴ Clause 141 of the final version reads: '(1)No person may— (a) use, procure or offer a child for slavery or practices similar to slavery, including but not limited to debt bondage, servitude and serfdom, or forced or compulsory labour or provision of services; (b) use, procure, offer or employ a child for purposes of commercial sexual exploitation; (c) use, procure, offer or employ a child for trafficking; (d) use, procure or offer a child or attempt to do so for the commission of any offence listed in Schedule 1 or Schedule 2 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977); or (e) use, procure, offer or employ a child for child labour. (2) A social worker or social service professional who becomes aware of— (a) any instance of a contravention of sub-section(1)(a), (b), (c) or (d) must report it to a police official; and (b)any instance of child labour or a contravention of the provisions of the Basic Conditions of Employment Act, 1997(Act No. 75 of 1997) must report it to the Department of Labour.'

⁶⁵ Section 305 was amended by the Children's Amendment Bill 19F of 2006 to criminalise clause 141(1).

of child labour, to conduct specified as offences in Schedule 1 and 2 of the Criminal Procedure Act 51 of 1977 instead of requiring that use of a child in all illegal activities constitutes a worst form of child labour.⁶⁶

This last-mentioned amendment to the clause is especially difficult to understand given the recommendations made by government as an outcome of the Pilot Programme on the use of children in the commission of crime (discussed in section 7.6 of Chapter 7) requiring a specific offence for persons to use children in the commission of crime. I suggest that this latest development, taken together with the attempt to criminalise such conduct in the Child Justice Bill 49 of 2002 (discussed in section of Chapter 6) and the outcome of the Baby Norton case regarding the use of one of the Accused in her murder (discussed in section 7.7 of Chapter 7), points to a general discomfort as to the inclusion of this type of conduct *as a worst form of child labour* (emphasis added), and a uncertainty on how it should be included in the law.

Again, it is surprising that the final version of clause 141 did not follow the wording of Article 3 of Convention 182. Whatever the short-comings of Convention 182 are, Article 3 is truly a clear and concise statement of what actions constitute worst forms of child labour and South Africa's failure to adopt the wording contained therein is startlingly unexpected.

5.3.3.2 Legal mechanisms that may be utilised to assist victims of worst forms of child labour

Children who are victims of a worst form of child labour have been subjected to a severe form of economic exploitation, and although a formal legal intervention in the life of a child should be a last resort, it is eminently justified in certain cases, especially where a child has been subjected to commercial sexual exploitation, trafficked, subject to slavery or forced labour and his or her family life interfered with.

⁶⁶ This includes most common law and statutory offences such as theft, murder, armed robbery but excludes, for example, driving offences, for instance driving under the influence of alcohol. It is still much more limited than what was intended by Article 3 of Convention 182 as it does not cover the full range of illegal activities, and indeed not 'illicit' activities as specified in the Convention.

Section 150 of Act 38 of 2005 sets out the grounds on which a child can be found to be in need of care and protection.⁶⁷ There are various consequences attached to a child being in need of care and protection. These include removal from the situation causing the child to be in need of care and protection and being placed in temporary safe care pending a children's court determination.⁶⁸

Once a court has found the child to be in need of care and protection, it can make various orders including an alternative care order, which includes an order placing a child in the care of a person designated by the court to be the foster parent of the child; in the care of a child and youth care centre; or in temporary safe care. Alternatively the court can make a child protection order, which includes an order that a child remains in, be released from, or returned to the care of a person, subject to conditions imposed by the court; or instructing an organ of state to assist a child in obtaining access to a public service to which the child is entitled.

In addition, in terms of section 150(2) a child who is a victim of child labour may be a child in need of care and protection and must be referred for investigation by a

⁶⁷ Section 150(1) provides that a child is a child in need of care and protection if he or she: '(a) has been abandoned or orphaned and is without any visible means of support; (b) displays behaviour which cannot be controlled by the parent or care-giver; (c) lives or works on the streets or begs for a living; (d) is addicted to a dependence-producing substance and is without any support to obtain treatment for such dependency; (e) has been exploited or lives in circumstances that expose the child to exploitation; (f) lives in or is exposed to circumstances which may seriously harm that child's physical, mental or social well-being; (g) may be at risk if returned to the custody of the parent, guardian or care-giver of the child as there is reason to believe that he or she will live in or be exposed to circumstances which may seriously harm the physical, mental or social well-being of the child; (h) is in a state of physical or mental neglect; or (i) is being maltreated, abused, deliberately neglected or degraded by a parent, a care-giver, a person who has parental responsibilities and rights or a family member of the child or by a person under whose control the child is.' In the interpretation section, 'abuse' is defined, amongst other things, as: '(d) a labour practice that exploits the child; or (e) exposing or subjecting a child to behaviour that may harm the child psychologically or emotionally.' For a general commentary on children in need of care and protection in the Children's Act see Matthias C and Zaal N, 'Children in need of care and Contribution Orders', in Davel C and Skelton A (eds), *Commentary on the Children's Act*, Juta and Co.: Lansdowne, 2007.

⁶⁸ This can be effected by a police official or designated social worker on grounds set out in sections 151 and 152 of Act 38 of 2005.

designated social worker.⁶⁹ Significantly, this is not a mandatory obligation and this is surprising given the seriousness of the situation that a child who is a victim of child labour may find him or herself in. However, at the same time, the discretionary nature of the obligation recognises the reality of child work, especially within the family, which work may not be harmful to the child.

If after investigation a social worker finds that the child is not a child in need of care and protection, the social worker must, where necessary, take measures to assist the child, including counselling, mediation, prevention and early intervention services, family reconstruction and rehabilitation, behaviour modification, problem solving and referral to another suitably qualified person or organisation.⁷⁰ So in this instance, even though there is no court order pertaining to the child being found in need of care and protection, a social worker must still provide services where needed. It is unclear how this will be monitored as it is merely founded a statutory obligation and not on an order of court. If the social worker fails to comply, court proceedings may have to be instituted.

The value of this legislation lies in the fact that it takes the issue of worst forms of child labour outside of the sphere of criminal justice and includes it in welfare legislation. The main implications of the Act for children who have been found to be victims of child labour or exploitation relates to the care and protection of these children, who are identified as vulnerable. The provisions of the Act provide a concrete, legal framework that can deliver services to children who are victims of child labour and exploitation. This legislative emphasis on the welfare of children who are victims of child labour is a positive development as it moves the focus away from simply prohibiting worst form of child labour.⁷¹

⁶⁹ The section states as follows: '(2) A child found in the following circumstances may be a child in need of care and protection and must be referred for investigation by a designated social worker: (a) a child who is a victim of child labour; and (b) a child in a child-headed household.'

⁷⁰ Section 150(3).

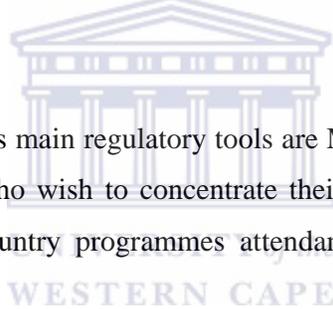
⁷¹ See generally, Gallinetti J, 'Worst forms of child labour – a view from out of Africa', in Sloth-Nielsen J (ed), *Essays on children's rights in the context of Africa*, United Kingdom, Ashgate Publishing, forthcoming.

Although these provisions can be regarded as complying with the implementation provisions contained in Articles 6 and 7 of Convention 182, especially with regard to removing children from situations that constitute worst forms of child labour and providing them with assistance, Convention 182 cannot be said to have influenced them as they form part of the ongoing development of a child care system that has been in place for many decades. Yet, it is now one that is much more refined and child-centred than that which existed previously under the Child Care Act .

5.4 The South African Child Labour Programme of Action

In 1996, the Department of Labour signed a Memorandum of Understanding with the ILO,⁷² which was aimed at ensuring that South Africa would benefit from international experience and assistance in addressing child labour, subject to the views of South Africans as to what should be considered as child labour, and how the issue should be addressed.⁷³

It has been noted that IPEC's main regulatory tools are Memoranda of Understanding signed with governments who wish to concentrate their efforts on child labour and that IPEC considers the country programmes attendant to these Memoranda as a



⁷² In its Concluding Observations on South Africa's Initial Country Report to the Committee on the Rights of the Child, the Committee noted that South Africa had signed a Memorandum of Understanding with the International Programme for the Elimination of Child Labour of the ILO to undertake a national survey with a view to compiling comprehensive national child labour statistics. While the Committee noted South Africa's efforts to bring domestic legislation into conformity with international labour standards, it was concerned that over 200,000 children between the ages of 10 and 14 years were engaged in work, mainly commercial agriculture and domestic service. The Committee encouraged South Africa to improve its monitoring mechanisms to ensure the enforcement of labour laws and protect children from economic exploitation. The Committee also recommended that South Africa reinforce its efforts to ratify the Worst Forms of Child Labour, 1999 (No. 182). See Concluding Observations of the Committee on the Rights of the Child: South Africa, 23/02/2000.CRC/C/15/Add.122, Paragraph 37.

⁷³ Bosch D, Budlender D and Tshabalala S, *Towards a National Child Labour Action Programme for South Africa: Discussion Document*, Department of Labour, October 2002, p 14, accessed from http://www.labour.gov.za/useful_docs/doc_display.jsp?id=9504 on 5 October 2007 (hereinafter CLPA Discussion Document).

‘multi-sectoral strategy embracing many elements’.⁷⁴ Cullen notes that some of the elements include: encouraging ILO constituents and other partners to begin dialogue and create alliances; determine the nature and extent of the child labour problem; assist in national policies to counter it; set up mechanisms to provide in-country ownership and operation of a national programme of action; and to support direct action aimed at preventing child labour or withdrawing children from work.⁷⁵ This approach clearly indicates how IPEC’s strategies informed the drafting of Convention 182, particularly in relation to Article 6 and 7 dealing with measures of implementation, as many of the elements of typical Memoranda of Understanding have been included in these Articles when obliging states to adopt national plans of action or adopt time-bound programmes towards the elimination of worst forms of child labour.⁷⁶

In 1997, the Department of Labour facilitated the formation of the Child Labour Inter-Sectoral Group (CLIG), a body consisting of representatives of key government departments, non-governmental organisations and employers’ and employee’s organisations. This body co-ordinated work on child labour and was the sub-committee of the National Programme of Action on the Rights of the Child (NPA) responsible for this area of work. Then, in 1998, the Department facilitated the formulation and adoption of a provisional Child Labour Programme of Action (CLPA),⁷⁷ which identified five primary areas of actions: employment law, educational policy; social security, job creation and social mobilisation and information.⁷⁸

⁷⁴ Cullen H, ‘Child Labor Standards: From Treaties to Labels’, in Weston BH (ed), *Child Labor and Human Rights: Making Children Matter*, Lynne Rienner Publishers: Boulder, 2005, p 103 – 104.

⁷⁵ Cullen, p 104, note 74. See also section 3.2.3.1 in Chapter 3 for a general discussion of IPEC.

⁷⁶ As noted in Chapter 4, Cullen refers to the fact that the ILO’s work cannot be neatly divided into the drafting of Convention 182 and Recommendation 190, on the one hand and IPEC’s work on the other, as both informed the other, Cullen, p 103, note 74.

⁷⁷ The first versions of the Programme of Action were originally called the Child Labour Action Programme. In 2005, the name was changed to Child Labour Programme of Action by the Implementation Committee responsible for co-ordination of the policy, (personal communication with Dawie Bosch, circa February 2006).

⁷⁸ CLPA Discussion Document, p 14, note 73.

The Discussion Document on the CLPA then described the strategy for taking the process forward which included publishing the Discussion Document for public comment in order to enhance the visibility of child labour and its related issues; holding a number of consultative workshops with stakeholders so that the policy can benefit from their experiences, views and expertise; holding a consultation with children on certain key issues through focus group discussions with children who work in family businesses, perform paid work in non-family businesses outside of school hours, do subsistence agricultural work, do cleaning and similar work in schools, fetch fuel or water, and do other unpaid household work in their own households;⁷⁹ and finally producing a government policy paper which would reflect the comprehensive policy approach of the government towards child work and child labour and which would include a National Programme of Action.⁸⁰

The draft South African CLPA was provisionally approved by representatives from various government departments on 4 September 2003, subject to certain amendments and the costing of the various recommended actions steps to be implemented by the key government departments.⁸¹ The process of developing the CLPA was overseen and guided by an inter-sectoral National Steering Committee involving key departments, employers' and workers organisations, NGOs and the community. The National Steering Committee was coordinated and chaired by the Department of Labour.⁸²

⁷⁹ The results of this consultation with children are available on http://childrenfirst.org.za/radda_barnen accessed on 11 October 2007.

⁸⁰ CLPA Discussion Document, p 15, note 73.

⁸¹ The National Child Labour Programme of Action for South Africa, draft 4.10, Department of Labour 2003 (hereinafter 2003 version of CLPA). Copy on file with author. The executive summary noted that, following on from South Africa's ratification of ILO Convention 138 and Convention 182, as well as the inclusion of a clause in the South African Constitution ensuring to children the right not to be subject to exploitative labour, the South African government was involved in a long process of adopting appropriate policies and a national child labour action programme to combat child labour. This involved extensive consultation with the South African public and key stakeholders from government and civil society, as well as with children.

⁸² 2003 version of CLPA, p 3, note 81.

In drafting the CLPA, certain principles were adhered to and these included the prioritisation and identification of the worst forms of child labour for South Africa, the examination of best practices elsewhere, sustainability and the avoidance of duplication.⁸³ CLPA identified a wide range of activities that fall under the mandate of various government departments and agencies, some of which are already contained in existing policy and others that were new and would require expenditure and budgets.⁸⁴ In doing so, Annexure A of CLPA sets out the actual action steps that have to be undertaken by designated stakeholders including the Departments of Justice (DoJ), Social Development (DoSD), Education (DoE), Labour (DoL), Correctional Services (DoCS) and South African Police Service (SAPS) as well as employers and NGOs.

In relation to the use of children in the commission of crime, the 2003 draft of the CLPA identified specific actions steps concerning children who are used by adults in offending. Recommendations 56 and 57 are in point: they propose that where children commit crimes, the diversion of such child offenders away from prison should be the preferred option for children. This action step recognised the current practice in South Africa of promoting the diversion of children away from the criminal justice system under certain circumstances. This practice is not yet contained in a legislative framework and Chapter 6 will describe in more depth the child justice system in South Africa in order to highlight the manner in which the criminal justice system addresses children who are victims of this form of child labour.

The CLPA also recommended that, where appropriate, criminal prosecutions of children should be converted to welfare children's court inquiries, after conviction. This recognised the interplay between children who are offenders and the child protection system, especially where such children are also in need of care due to their personal circumstances. It is an important inclusion in the CLPA, as it adds credence to the fact that children who are used in the commission of offences are also victims of exploitation and may need interventions that go beyond the ones offered in the criminal justice system. As far as adults using children are concerned, the CLPA

⁸³ 2003 version of CLPA, p 3, note 81.

⁸⁴ 2003 version of CLPA, p 3-4, note 81.

proposed that an important element of investigation and prosecution should be locating and prosecuting adults (or sometimes other children) who are using the children to further their own criminal intentions, or who are benefiting from the children's illegal activities. The problems in implementing this action step will be discussed in greater detail in section 7.6 of Chapter 7 and in the concluding chapter, Chapter 8.

The CLPA also identified a range of actions and obligations elements where donor funding and separate projects could assist in initiating kick-starting key actions. Funding for this assistance was obtained through IPEC. The Towards the Elimination of the worst forms of Child Labour (TECL) programme is the programme through which these projects is funded and managed, and it started its operations around mid-2004.⁸⁵

The time-bound element of the CLPA is evident from a perusal of each action step assigned to various departments, as specific deadlines are set by which the actions step should be in place. However, as will be shown in the discussion on the Pilot Programme on the use of children to commit crime in Chapter 7, some of the time-frames set were ill-advised, not carefully considered, and are in all likelihood impossible to meet. For instance, action step 56, which deals with the investigation and prosecution of adults who use children or benefit from children's illegal activities has a time-frame of one year for implementation. It is unclear what must happen within this time-frame of a year: is it that all adults using children must be investigated and prosecuted or is it that measures must be put in place to investigate and prosecute adults? Whatever the meaning, ultimately the drafters were unaware of the complexities of the criminal law in achieving the prosecution of adults on account of finding an appropriate offence with which to charge them and also ensuring that sufficient evidence exists for charges to be formulated. This will be borne out in the discussion in Chapter 7. This draft of the CLPA seems to give credence to the concerns expressed in Chapter 4 regarding the elimination of the worst forms of child labour in relation to time-bound programmes, namely that eliminating conduct that is

⁸⁵ A more detailed description of the TECL programme in South Africa appears in section 7.1 of Chapter 7.

of a criminal nature against a deadline is highly problematic and in all likelihood, unattainable.

The 2003 version of the CLPA was considered by the Committee of Experts on the Application of Conventions and Recommendations, with particular emphasis on Articles 6 and 7 of Convention 182. Mostly, the Committee merely noted the contents of the CLPA and did not comment thereon, implying that they were satisfied with the contents.⁸⁶ However, the Committee did request South Africa to provide further information on the activities and levels of coordination of the DOL, the DOE and the DSD in eliminating child labour through education, and on any specific measures taken by these departments to give effect to Article 7(2)(a)-(e) to prevent the potential occurrence of the worst forms of child labour and assist the removal and rehabilitation of children from the worst forms of child labour. In addition, the Committee also requested the Government to indicate the measures taken to take into account the special situation of girls, according to Article 7(2)(e).

In 2007 the CLPA underwent an extensive re-drafting process to take account of developments since its adoption in 2003. The updated plan builds on lessons learned in pilot projects, research and policy development. The revised document is intended to inform the 2nd phase of implementation, 2008-2012.⁸⁷ The CLPA-2 has been considered at the Implementation Committee of the CLPA, and was finally adopted by this body on 27 September 2007. Importantly, for the first time, the deadline for the overall elimination of the worst forms of child labour in South Africa is set, namely 2015.⁸⁸ In addition, CLPA 2 also states that five-year scope of the plan acknowledges that change cannot happen overnight, but that definite timelines are needed to achieve its aims, namely the eradication of worst forms of child labour. In this respect, one can see the impact of Convention 182 obligations relating to 'eliminate'; 'immediate' and 'time-bound' on the development of the Programme of

⁸⁶ CEACR: Individual Direct Request concerning Convention No. 182, Worst Forms of Child Labour, 1999 South Africa (ratification: 2000), submitted: 2004, document no. (ilolex): 092004ZAF182, accessed at www.ilo.org/ilolex/ on 11 October 2007.

⁸⁷ The National Child Labour Programme for South Africa: Phase 2: 2008 – 2012, version 4.4, Department of Labour, June 2007 (CLPA 2) accessed at <http://www.child-labour.org.za/south-africa/national-plan-on-child-labour/> on 11 October 2007.

⁸⁸ CLPA 2, p 3, note 87.

Action. Again, as expressed previously, the setting of such a deadline as 2015 may be misguided given the complications of eradicating organised criminal activity that may also contribute to the worst forms of child labour, such as trafficking, pornography and the use of children in the commission of crime (see the discussion in section 7.6 and 7.8 of Chapter 7 on this point).

Nonetheless, the broad principles on which the 2003 version of the CLPA were drafted remain the same in CLPA 2, as do the key elements of the Programme of Action. What has changed is the content of the action steps, as the updated version has drawn from lessons learned in the implementation of pilot projects, research and policy development.

For instance, the original four action steps in relation to the use of children in illicit activities has now increased to thirteen, namely action steps 51 - 63. They are based on lessons learned in the CUBAC Pilot Programme, discussed in more detail in section 7.6 of Chapter 7, but include: the introduction of a specific offence relating to the use of children in the commission of crime; the development of policy and procedures to protect children placed at risk because of their involvement with adults who have used them for crime; the development of a new comprehensive inter-sectoral and primary crime prevention strategy for children in conflict with the law; the use of diversion as the preferred option, where appropriate, when children have been used in illicit activities; the development of guidelines or protocols for dealing with children used in the commission of crime, specific to each department's activities and mandate; the collection of statistics to be incorporated into the present Integrated Justice System initiative dedicated to the collection of criminal justice data and analysis; and training on the use of children in the commission of offences will be integrated in departmental training initiatives.⁸⁹

In terms of the CLPA 2, most of these action steps should be completed by 2009. But if one examines the nature of the actions steps, they focus more on putting systems in place to manage the issue of children used to commit crime than they do on eliminating the use of children to commit crime by a particular date. Therefore they can perhaps be achievable, subject of course to the various departments actually

⁸⁹ CLPA 2, p 46 – 48, note 87.

implementing them. If the departments neglect to do so, they can legitimately be criticised for failure to perform, rather than failure to achieve the unachievable. Of significance is the fact that the action step requiring the investigation and prosecution of adults using children to commit crime has been excluded, thereby marking a shift from a typically ‘law enforcement’ approach to a more prevention-orientated approach.⁹⁰

Of significance in both versions of the CLPA is the great emphasis on a multi-sectoral approach, with various government departments being obliged (and agreeing) to undertake a wide range of action steps to address various aspects of child labour, from prohibition, to education, health and general prevention measures. In addition, many of the action steps require undertakings by more than one government department, with the result that the CLPA creates an inter-departmental policy framework to address child labour.

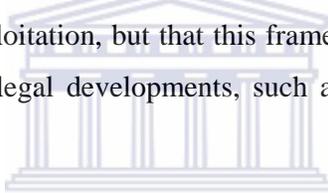
5.5 Conclusion

South Africa now has, via the Children’s Act 38 of 2005 and the Children’s Amendment Bill 19F of 2006, a clear legal framework in relation to child labour, even though it is still developing through the development of regulations. It is guided by constitutional principles that can be argued to be progressive, protective and yet flexible, which have regard to the realities of children working in South Africa as well as children who are victims of serious economic exploitation. The constitutional protections are then supported by provisions in the Basic Conditions of Employment Act as well as the Children’s Act and the Films and Publications Act, which taken together prohibit work by children under 15 years, forced labour, worst forms of child labour such as the use of children in the commission of crime, child trafficking and child pornography. The Sexual Offences Bill will also add value to the legal

⁹⁰ A key strength of the CUBAC Pilot Programme, discussed in section 7.6 of Chapter 7, was that it ‘tested’ the action steps of the 2003 version of CLPA. In other words, it attempted to operationalise the steps and integrate them in the daily practice of the criminal justice system. However, the outcome of the Pilot Programme illustrated how complex and difficult it is to place such a strong emphasis on investigating and prosecuting adults who use children, and that other activities might achieve better results in addressing the use of children in the commission of crime – such as prevention, training, and setting systems in place for criminal justice officials.

framework with its provisions on commercial sexual exploitation, as will, hopefully, the Child Justice Bill, which will be discussed in the next chapter. In addition, South Africa has been involved in a long process of developing a comprehensive national policy on child labour in the form of the CLPA.

This framework has obviously been informed by international legal developments in child rights and child labour. It is contended though that what is significant is that the initial process of constitutionally enshrining labour protections for children began at a time when South Africa had not yet acceded to any of the major child rights Conventions. Again, while the 2003 version of the CLPA and CLPA 2 have obviously been influenced by Convention 182 in their development, the actual process of drafting a Programme of Action was initiated by collaboration with IPEC somewhat earlier rather than as a response to an international obligation. Therefore it can be argued that South Africa, on her own accord, did initiate a legal framework to protect children from economic exploitation, but that this framework was only informed and influenced by international legal developments, such as Convention 182, at a later stage.



Nonetheless, South Africa's ratification of Conventions 138 and 182 are equally significant as the ratifications indicate a commitment to international standards and recognition of the significance of those standards themselves. Adherence to these international legal standards then becomes part of the overall strategy to combat child labour in South Africa and their influence can be seen in law reform efforts and the ongoing refinement of the CLPA.

It can be concluded, in sum, that Convention 182 has measurably influenced the legislative and policy framework of South Africa, especially in light of the recent passing of the Children's Amendment Bill and the ongoing development of South Africa's National Programme of Action on child labour. However, as noted above, whether the influence of Convention 182 will ultimately be significant, in practice, remains to be seen through the implementation of the Child Labour Programme of Action, especially in relation to the goal of eliminating worst forms of child labour, which is intrinsically linked to a time-bound programme. The significance of Convention 182 in relation to the use of children in the commission of crime will be

interrogated in Chapter 7 through an examination of a programme developed and carried out under the auspices of IPEC.



Chapter 6

The instrumental use of children in the commission of crime – a meeting point for child justice and worst forms of child labour

Up to this point the thesis has concentrated on child labour, with a particular focus on Convention 182. It has examined the international legal framework as well as the constitutional and domestic law on child labour in South Africa with some analysis of how Convention 182, and Convention 138 to a lesser degree, has impacted on the development of South African law in this field. Particular reference has been made to the use of a child for illicit activities as a worst form of child labour, as this conduct has been chosen to be the example against which the significance of Convention 182 in South Africa will be partially measured. The remaining chapters will now focus specifically on the use of children in the commission of crime as a worst form of child labour, within the country specific context of South Africa.

This chapter will examine how the issue first emerged in the international arena and the various means used to highlight the phenomenon from the framework of a human and child rights discourse. It will then interrogate the law, policy and practice of child justice in South Africa,¹ with a particular focus on the Child Justice Bill 49 of 2002 as the preeminent mechanism which could provide suitable and appropriate assistance for children used in the commission of crime.

The reason for the examination of the criminal justice system pertaining to children is on account of the fact that the use of children in the commission of crime covers two different child rights issues – on the one hand, child justice and children in conflict with the law and on the other, the worst forms of child labour and the economic exploitation of children. While the other worst forms of child labour set out in Article 3 of Convention

¹ See Chapter 1 for an explanation of why I use the term ‘child justice’ instead of the more internationally popular ‘juvenile justice’.

182 clearly render children engaged therein victims of exploitation, the status of ‘victim’ in the case of children used in illicit activities is less readily apparent due to the fact that such children may be perpetrators as well as victims. Although their use in the commission of crime is a form of exploitation, this does not render them exempt from criminal liability. The use or coercion of a child to commit crime would only be an exculpatory factor if it negates the elements of the offence committed, for example intention. So, for instance, if a child has been threatened, hurt or placed under duress in order to coerce him or her to commit a crime, and the circumstances are such that they constitute a justification ground such as self-defence, then the child would not ordinarily be criminally liable. However, if the child was offered a reward or payment for the commission of a crime and then committed the offence, this would not negate criminal liability and thus the child would be considered a perpetrator, while also a victim on account of the exploitation.

From a child rights perspective, children in conflict with the law are also subjects of the rights discourse and the key principles of the UNCRC apply to them as equally as children who do not commit crime. The best interest of the child principle, the right to non-discrimination, survival and development and participation are as important for children accused of committing crimes as those who are not. Likewise, the UNCRC has two Articles dedicated to child justice, namely Article 37 and Article 40. However, most of the rights contained herein relate to procedural mechanisms for dealing with children who have committed offences to safeguard them in the criminal justice system. In fact, Article 40 (1) refers to the need for children who commit crime to be held accountable and for the reinforcement of their respect for the fundamental rights and freedoms of others, thereby illustrating the responsibilities and not just the rights of children.² While children in conflict with the law are rights bearers and considered in need of protection

² Article 40(1) reads: ‘States Parties recognise the right of every child alleged as, accused of, or recognised as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society’.

from the negative effects of an adult criminal justice system, they remain perpetrators and are not seen as traditional ‘victims’, although Article 40 does stress a restorative approach to such children, with a strong emphasis on intervening in their lives to effect change.

But children used in the commission of crime are not simply perpetrators. They are also victims of exploitation, and therefore are entitled to specific interventions beyond those ordinarily designed for children in conflict with the law. By virtue of the recognition of this dual status, Convention 182 requires measures to be taken in relation to children who are victim of this worst form of child labour. The questions that then arise are whether these special measures are already present in the child justice system that will inevitably deal with these children or whether they still need to be incorporated therein; and whether the child justice system has the capacity to recognise the dual status of these children and how would the interplay between victim and perpetrator be manifested in practice?

This chapter, as well as the following ones, will shed some light on this and also illustrate whether Convention 182 has influenced the treatment and management of children used in the commission of crime in South Africa. In turn, the examination will also demonstrate whether Convention 182 represents a development of any significance in addressing serious forms of economic exploitation, particularly in light of the efforts to practically implement its provisions in South Africa.

6.1 The international recognition of the use of children in the commission of crime

Other than the identification of the use of children in illicit activities as a worst form of child labour in Convention 182, there have been various references to the phenomenon in some United Nations General Assembly Resolutions, as well as other international guidelines for the treatment of children. However, given its inclusion in a list of serious children’s rights violations that have a sound history within the international human rights framework, such a child trafficking, child prostitution, forced labour and slavery, it

is somewhat surprising that there are few references to the issue prior to Article 33 of the UNCRC on the use of children in the drug trade. On the other hand, it is encouraging that even though the issue had not received as wide attention as some of the other worst forms of child labour, the international community nevertheless acknowledged the seriousness of this form of exploitation by its inclusion in Convention 182. However, as mentioned in sections 4.4 and 4.5 of Chapter 4 and discussed in Chapter 7, it is questionable whether the Convention 182 was the appropriate vehicle to address this type of exploitation. The implementation of the Pilot Programme on the use of children in the commission of crime in South Africa has shown, amongst others, that the objectives of the Convention are not easily attainable in this case and that there is an uneasiness in regarding children who have been used in the commission of offences as victims, not of exploitation, but of a worst form of *child labour* (emphasis added).

6.1.1 United Nations General Assembly Resolutions and other statements on the issue

The first reference to children being used by adults to commit crime is made in the United Nations General Assembly (GA) Resolution 43/121 of 8 December 1988 on the use of children in the illicit traffic in narcotic drugs and rehabilitation of 'drug addicted minors'. This followed two previous General Assembly Resolutions on the international campaign against drug abuse and the illicit traffic in drugs.³ These General Assembly Resolutions were issued at the height of the United States 'War on Drugs'.⁴ The

³ GA/RES/41/127 of 4 December 1986 and GA/RES/42/113 of 7 December 1987, the former specifically linking drug trafficking with transnational criminal organisations. It is noteworthy that all three of these Resolutions pre-dated the UNCRC, which was the first binding international instrument in which this issue was included.

⁴ A useful but non-scholarly source on the US 'War on Drugs' can be found at <http://www.pbs.org/wgbh/pages/frontline/shows/drugs/cron/> (accessed on 15 October 2007), which is a webpage of the US television journalism show *Frontline*. The webpage provides an informative time-line of events that illustrate the long history of the United States campaign against drugs. It shows that, while media attention was concentrated on the 'War on Drugs' in the mid-to-late 1980's thanks to Nancy Reagan's 'Just Say No' campaign and various well-publicised drug investigations and arrests, the concerted effort to combat drug use and trafficking started in earnest in the late 1960's and was followed by various

influence of this particular focus on children used in the drug trade can be seen from its inclusion in Article 33 of the UNCRC, which somewhat narrowly limits the issue of the instrumental use of children to involving them in the production and distribution of narcotic drugs and psychotropic substances.

General Assembly Resolution 43/121 recognised that drug dealing organisations make use of children in the illicit production and trafficking of drugs⁵ and condemned such actions, urging States to join together to establish national and international programmes to protect children from involvement in illicit production and trafficking,⁶ as well calling on States to protect them from consuming drugs. Although a non-binding instrument, it also called on States to promote the adoption of laws to provide for suitably severe punishment of drug trafficking crimes that involve children, thereby illustrating the favouring of a law-enforcement approach akin to the ‘tough on crime’ laws adopted by the United States.⁷

Resolution 43/121 was followed by the much broader General Assembly Resolution 45/115 of 14 December 1990 on the instrumental use of children in criminal activities.

influential developments such as: the adoption of the Comprehensive Drug Abuse, Prevention and Control Act in 1970, which also included the Controlled Substances Act that established five categories ("schedules") for regulating drugs based on their medicinal value and potential for addiction; the pronouncement by US President Nixon that drug abuse was ‘public enemy number one in the United States’ in 1971 and the accompanying establishment of the Special Action Office for Drug Abuse Prevention ; in 1973 the establishment of the Drug Enforcement Agency by President Nixon as a ‘super agency’ to handle all aspects of the drug problem; the rise of the Columbian Medellin Cartel in the early 1980’s which was a group of drug traffickers that cooperated in the manufacturing, distribution and marketing of cocaine; the adoption, by US President Reagan of the Anti-Drug Abuse Act of 1986, which appropriated \$1.7 billion to fight the drug crisis - \$97 million of which was allocated to build new prisons, \$200 million for drug education and \$241 million for treatment and, as the Act’s most consequential result, the creation of mandatory minimum sentences for drug offences; and in 1989 President George Bush established the new Office of National Drug Control Policy.

⁵ Paragraph 3 of the Preamble.

⁶ Paragraph 2 of the Resolution.

⁷ Paragraph 4 of the Resolution.

This Resolution recognised that, within the traditional forms of child exploitation, the use of children in criminal activities has become an increasingly grave phenomenon, which represents a violation of social norms and a deprivation of the right of children to proper development, education and upbringing, and which prejudices their future.⁸ The terminology is interesting, as it places the phenomenon within the context of exploitation and recognises the impact of this form of exploitation on the child's development and education – terms which resonate in the phrasing of, and obligations created by, Convention 182.

The Resolution's preamble recognises that there are categories of children, such as those that are runaway, vagrant, wayward or 'street' children, who are targets for exploitation that includes seduction into drug trafficking and abuse, prostitution, pornography, theft, burglary, begging and homicide for reward.⁹ However, it is argued that the risk of children being used to commit crime is not just attendant on runaway, vagrant or 'street' children, although their vulnerability certainly increases the risk. The following chapter will illustrate the findings of a limited study in South Africa, which indicates some of the characteristics of other children who are at risk of becoming victims of such exploitation, such as, amongst others, children living in poverty, children addicted to drugs, and children whose parents or families are involved in crime

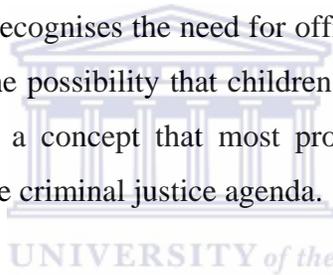
The General Assembly accordingly requested States to take measures to formulate programmes to deal with the problem and to take effective action through various actions. These included undertaking research and a systematic analysis of the problem; developing training and awareness-raising activities; taking measures in combating criminality with a view to ensuring that appropriate sanctions are applied against adults who are the instigators and authors of crimes, rather than against the children involved; and developing comprehensive policies, programmes and effective preventive and

⁸ Paragraph 7 of the Preamble.

⁹ Paragraph 8 of the Preamble.

remedial measures in order to eliminate the involvement and exploitation of children by adults in criminal activities.¹⁰

Some interesting observations can be made in relation to Paragraph 1 of the Resolution.¹¹ First, there is a balance struck between law-enforcement measures and the need for prevention, signaling the recognition that the phenomenon cannot be addressed through a single-minded, ‘tough-on-crime’ approach. Second, however, and prescient of Convention 182, the use of the word ‘eliminate’ appears in relation to ending children’s exploitation by adults in criminal activities, illustrating the persistent belief that such conduct can be eradicated in practice. Third, unlike Convention 182, the Resolution specifically refers to the use of children at the hands of adults, possibly ignoring the option that children could be used by older children or even younger children to commit crime. Finally, the Resolution recognises the need for officials within the criminal justice system to become attuned to the possibility that children are also victims of exploitation as well as being perpetrators, a concept that most probably hitherto had not been a consideration placed high on the criminal justice agenda.



The Commission on Narcotic Drugs that falls under the auspices of the UN Economic and Social Council has addressed the issue of youth and drugs in three specific reports to the Council.¹² In only one of the reports is there reference to children used in the illicit production and trafficking of drugs – and even in this instance there are only two oblique statements relating to this issue.¹³

¹⁰ Paragraph 1 (a) –(d) of the Resolution.

¹¹ The remaining Paragraphs of the Resolution relate mainly to requests for the Secretary General and other UN agencies to address the phenomenon, through, amongst others, studies on the situation and implementation of the Resolution, inter-agency collaboration and ongoing reviews of the issue.

¹² E/CN.7/1999/8 of 11 January 1999 (Youth and drugs: a global overview); E/CN.7/2001/4 of 6 December 2000 (World situation with regard to drug abuse, with particular reference to children and youth) and E/CN.7/2002/3 of 21 December 2001 (Prevention of the recreational and leisure use of drugs among young people).

¹³ E/CN.7/2001/4 of 6 December 2000 at p 5 and p 23.

Similarly, a small, yet clear, reference to the issue was made by the Commission of Human Rights under the auspices of the Office of the High Commissioner for Human Rights in its Resolution on *Human Rights in the administration of justice, in particular of children and juveniles in detention*, when, in the Preamble, deep concern ‘at the severity and brutality with which children and juveniles are used as instruments in criminal activities’ was expressed.¹⁴ Prior to this Resolution, an expert group meeting on children and juveniles in detention regarding the application of human rights standards was held in Vienna from 30 October - 4 November 1994. The report of the Secretary General on the meeting to the Commission on Human Rights dealt specifically with child exploitation, children as instruments and victims of crime and the instrumental use of juveniles for criminal activities.¹⁵

The participants at the Expert Meeting agreed that it was important to distinguish between the instrumental use of children in criminal activities, as in the case of child prostitution or the sale of children for the purpose of adoption, and the instrumental use of children for criminal activities, as in the case of drug trafficking or theft, as the response to the two types of exploitation would be very different, but emphasising that the ‘salient element’ for both still remained the misuse of the child and the ensuing victimisation and traumatisation.¹⁶

It was also noted that the distinction became particularly relevant in responding to the instrumental use of children for criminal activities, where the child is being exploited precisely because of his or her age and because he or she was not criminally liable.

¹⁴ 1995/41 at its 53rd meeting on 3 March 1995, see chap X. E/CN.4/1995/17, Paragraph 11 of the Preamble. The Human Rights Commission is now called the Human Right Council.

¹⁵ *Question of the human rights of all persons subjected to any form of detention or imprisonment: Expert group meeting on children and juveniles in detention: application of human rights standards* (Vienna, 30 October - 4 November 1994), Report of the Secretary-General, Commission on Human Rights: United Nations Economic and Social Council, E/CN.4/1995/100, 16 December 1994, accessed at <http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/7f10c0e933e194af802566a600524ae8?Opendocument> on 15 November 2007 (hereinafter Expert Meeting Report).

¹⁶ Expert Meeting Report, Paragraph 18, note 15.

However, unfortunately, the discussion did not appear to encompass specific responses for children who were used in the commission of offences and who were above the minimum age of criminal capacity and therefore criminally liable. This issue will receive more attention in section 6.4.2 of this chapter when the Child Justice Bill 49 of 2002 is discussed.

In addition, referring to General Assembly Resolution 45/115, it was observed that all situations in which a juvenile engages in a criminal activity through coercion, instigation or enticement by an adult who profits from the juvenile's acts, would fall within the scope of the Resolution, thereby providing further content to the scope of the document.¹⁷

The meeting also discussed other issues such as juvenile detention and standards for the deprivation of liberty of children before concluding with a long list of recommendations. Specific recommendations were made regarding the instrumental use of children in the commission of crime. These included: the need for systematic research into the causes and effects of the phenomenon of the instrumental use of children in and for criminal activities;¹⁸ the need for training of law enforcement and other justice personnel, as well as policy makers;¹⁹ that states should give greater attention to the development of educational programmes to increase the accessibility of children, especially disadvantaged children, to educational facilities, including non-formal and part-time education;²⁰ and that states should establish qualitative and quantitative indicators to monitor the exploitation of children and their instrumental use in and for criminal activities.²¹ As will be shown in section 7.6 of Chapter 7, many of these find resonance in the components of the Pilot Programme on the use of children in the commission of crime in South Africa, thereby illustrating the relative ease with which the issue can be assimilated into the child justice sector.

¹⁷ Expert Meeting Report, Paragraph 24, note 15.

¹⁸ Expert Meeting Report, Paragraph 32, note 15.

¹⁹ Expert Meeting Report, Paragraph 33, note 15.

²⁰ Expert Meeting Report, Paragraph 37, note 15.

²¹ Expert Meeting Report, Paragraph 39, note 15.

Finally, the UNCRC also makes reference to the use of children; however, as mentioned, it is limited to children's involvement in the illicit drug trade.²² Therefore prior to Convention 182, there was no binding international legal instrument that dealt with children used in the commission of crime generally, only children used in the manufacture and trafficking of narcotic drugs and psychotropic substances was addressed in a limited fashion.

6.1.2 International Guidelines

Specifically referring to GA Resolution 45/ 115, the International Association of Prosecutors and the International Centre for Criminal Law Reform and Criminal Justice Policy released *Model Guidelines for the effective Prosecution of Crimes against Children* in 2001.²³ Under the section dealing with pre-trial decisions, the guidelines deal with children used in the commission of crime in Paragraph 11:

'[c]hildren who engage in criminal activities through coercion by others who profit by their acts should be considered victims of exploitation rather than perpetrators of crime. Prosecutors should treat these children as victims and should actively pursue charges against the adults involved.'

The explanation for this particular Guideline provided in the draft version of the Guidelines notes that it deals with situations where children are engaged in criminal activity through coercion, instigation or enticement by adults who profit by their acts.

²² For a full discussion of this provision see section 3.2.1.1 in Chapter 3 of the thesis.

²³ Prepared by the International Centre for Criminal Law Reform and Criminal Justice Policy for use in a Workshop at the Sixth Annual Meeting of the International Association of Prosecutors - Sydney, Australia, 2 - 7 September 2001, entitled *The Prosecutor in the New Millennium*. The annotated draft guidelines can be obtained from <http://www.icclr.law.ubc.ca/Publications/Reports/modelguidelines-2001.pdf> accessed on 16 October 2007. The final version of the guidelines can be obtained from <http://www.icclr.law.ubc.ca/Publications/Reports/Children2.PDF> accessed on 16 October 2007.

The explanatory note for the final version of the Guidelines emphasises the need to make justice personnel sensitive to situations of social risk that cause children to be used by adults and older children to commit crime. In addition, it requires that appropriate sanctions should be applied against adults who are the instigators of crimes, rather than against the child perpetrators who are victims of criminality by virtue of their being exposed to crime.

The recent *Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime* also deal with the instrumental use of children in the commission of crime.²⁴ This document contains good practice guidelines based on relevant international and regional norms, standards and principles and provides a practical framework to assist in the review of national law and policy, the design and implementation of law and policy, and to guide professionals working with child victims and witnesses. The Guidelines deal specifically with children used in the commission of crime in two sections. The first reference states as follows: '[c]ognisant that children who are victims and witnesses may suffer additional hardship if mistakenly viewed as offenders when they are in fact victims and witnesses'.²⁵

The second reference provides a definition of child victims and witnesses and states that the terms: 'denote[s] children and adolescents, under the age of 18, who are victims of

²⁴ The unofficial version of these Guidelines was released by The UN Commission on Crime Prevention and Criminal Justice at its 14th session (23-27 May 2005). The final version was adopted as Resolution 2005/20 by the United Nations Economic and Social Council on 22 July 2005. The Guidelines can be obtained from <http://www.un.org/docs/ecosoc/documents/2005/resolutions/Resolution%202005-20.pdf> , accessed on 16 October 2007. See also Kassan D, 'UN Guidelines on child victims and witnesses of crime', *Article 40*, Vol. 7, No. 2, August 2005, p 1-3 and Mezmur B, 'Victims of our time: Recent developments in the international "legal" framework surrounding child victims and witnesses', a paper presented at the First International Conference in Africa on Child Sexual Abuse, Nairobi, Kenya, 24-26th September 2007 (copy on file with the author).

²⁵ Paragraph 7(e), note 24.

crime or witnesses to crime regardless of their role in the offence or in the prosecution of the alleged offender or groups of offenders'.²⁶

The Guidelines continue to provide important insights into the management and treatment of child victims and witnesses. Some of the provisions include guidelines on how to make children more willing to disclose victimisation²⁷ and what to do when the safety of a child victim is at risk.²⁸ As will be seen in the discussion on the Pilot Programme designed to address the use of children in the commission of crime in section 7.6 of Chapter 7, these two considerations are extremely important in relation to investigating and prosecuting adults for using children to commit crime. Children often fear for their safety and therefore refuse to disclose having been used by adults in the commission of a criminal offence. Unfortunately, beyond actually highlighting these concerns, the text of the Guidelines does not provide concrete assistance on how to overcome these obstacles. Finally, while of general relevance, there is an important Guideline that highlights the importance of a multi-disciplinary and comprehensive approach to child victims, which envisages interventions beyond the ordinary law enforcement approach. This is of particular use as it provides further content to the measures that Articles 6 and 7 of Convention 182 require states to undertake.²⁹

²⁶ Paragraph 9(a), note 24.

²⁷ Paragraph 7(i), note 24, which states: '[c]onsidering that improved responses to child victims and witnesses of crime can make children and their families more willing to disclose instances of victimisation and supportive of the justice process'.

²⁸ Paragraph 32, note 24, which states: '[w]here the safety of a child victim or witness may be at risk, appropriate measures should be taken to require the reporting of those safety risks to appropriate authorities and to protect the child from such risk before, during and after the justice process.'

²⁹ Paragraph 43, note 24, which states: '[p]rofessionals should make every effort to adopt an interdisciplinary and co-operative approach in aiding children by familiarising themselves with the wide array of available services, such as victim support, advocacy, economic assistance, counselling, education, health, legal and social services. This approach may include protocols for the different stages of the justice process to encourage co-operation among entities that provide services to child victims and witnesses, as well as other forms of multidisciplinary work that includes police, prosecutor, medical, social services and psychological personnel working in the same location.' See also the discussion in section 7.6 of Chapter 7 on the Pilot Programme to address the instrumental use of children in the commission of crime – the

In 2006 the United Nations Office on Drugs and Crime (UNODC) released an assessor toolkit on juvenile justice.³⁰ This is a wide-reaching, comprehensive and definitive tool for child justice role-players, especially assessors, to determine and recommend interventions that are child-centred and based on the best interests of individual children. The toolkit makes specific reference to General Assembly Resolution 45/115 of 14 December 1990, thereby identifying the need for child justice assessors (for instance, probation officers who undertake investigations into the circumstances of the child accused and make attendant recommendations for the disposition of the case and other interventions) to determine whether children have been influenced or manipulated by adults in the commission of the offence with which they are charged, in order to determine the most appropriate recommendation for further action.

In all of the above instances, the issue of children being used in the commission of crime is dealt with within the confines of the criminal law and the criminal justice system, with no mention being made of it also constituting a worst form of child labour. It is therefore clear that the traditional approach to children used by adults to commit crime has been still a criminal justice one by default, although, importantly, the vulnerability of child offenders to adult manipulation was being increasingly recognised. It is worthy of note that the most recent Guidelines, issued in 2005 and 2006, still fail to place the instrumental use of children within context of child labour, rather keeping it exclusively within the purview of the criminal justice system. This is perhaps an indication of the failure of Convention 182 to make inroads into other child rights sectors even where there is an intersection of issues. The impact of this will be discussed in Chapter 7 (section

various components of the programme illustrate how such a multi-disciplinary approach can work in practice through involving police, prosecutors, probation officers, diversion service providers and educators.

³⁰ Cross-Cutting Issues: Juvenile Justice: Criminal Justice Assessment Toolkit, UNODC, Vienna, 2006 available at http://www.unodc.org/pdf/criminal_justice/JUVENILE_JUSTICE.pdf accessed on 16 October 2007. See also Sloth-Nielsen J, 'Assessor toolkit for child justice', *Article 40*, Vol. 8, No. 3, December 2006, p 14 – 15.

7.7), when an attempt to obtain jurisprudential recognition of the use of children to commit crime as a worst form of child labour is examined.

6.2 Understanding the concept of the use, procuring or offering of children for illicit activities

While Article 3 of Convention 182 specifies what the worst forms of child labour are, it does not define the conduct that is identified. While definitions for the other worst forms of child labour can be found in other international instruments, as discussed in section 4.4 of Chapter 4, there is no point of reference available for the use, procuring or offering of a child for illicit activities.³¹

Nonetheless, it is contended that the terms used are quite self-explanatory. The term ‘use’ implies not only the fact that a child could be an instrument to effect a specific result, but also has been regarded as having been ‘taken advantage of’³² and ‘the state of being employed or used’, ‘to use for one’s own purposes’ or ‘to exploit’ also conveys this idea.³³ The term ‘procure’ means to ‘bring about, especially by unscrupulous and indirect means’, ‘to get by special effort; obtain or acquire’ and specifically ‘to obtain (a person) for the purpose of prostitution’.³⁴ Finally, the term ‘offer’ means technically ‘to put before another for offer or rejection’ or also ‘to provide’ or ‘to make available’.³⁵

The overall effect of these terms, in the particular context, is that they signal conduct by which children are made use of, obtained to do something, recruited or provided to another, by other person(s), for a particular purpose, one that has negative connotations. However, it is notable that the more formal legal terms such as ‘coerced’ or ‘instigated’

³¹ A perusal of the writings of the ILO Committee of Experts on the Application of Conventions and Recommendations as well as the preparatory documents for the drafting of Convention 182 do not reveal any definition considered for the worst form of child labour identified in Article 3(c).

³² *Cambridge University Press Dictionary* accessed at <http://dictionary.cambridge.org/> on 16 October 2007.

³³ Dictionary.com accessed at <http://dictionary.reference.com/> accessed on 16 October 2007.

³⁴ Dictionary.com, note 33.

³⁵ Dictionary.com, note 33.

are not used – possibly to ensure a wider understanding of the nature of the conduct that is involved.

The use of the word ‘illicit’ reinforces the impression left by the other terms as it has two related meanings – firstly ‘not legally permitted or authorised; unlicensed; unlawful’ and secondly ‘disapproved of or not permitted for moral or ethical reasons’.³⁶ The use of this term therefore appears to extend beyond activities that are formally illegal and includes conduct that is against public opinion or social *mores*. This is interesting, as the usual perception of this worst form of child labour is that it is generally linked to children being used for criminal activities and not lawful, yet shady, actions.

What Article 3(c) of Convention 182 is silent on is the ‘who’ – in other words, the person effecting the use or procuring or offering. As noted in the previous section, there has been a tendency to identify such persons as ‘adults’, but it has probably been left open to allow for a range of possible perpetrators such as adults or even other children. In addition, from the limited study with children on the issue of the instrumental use of children to commit crime discussed in section 7.4.3 of Chapter 7, it is clear that perpetrators of this worst form of child labour can range from criminals, to neighbours, to siblings and even parents.³⁷

Another dimension to the elements of the definition relates to the ‘how’ – in other words, how is the use, procuring or offering effected?³⁸ Is it merely transactional, with money changing hands or is it more subtle, affected through careful manipulation? Again, the

³⁶ Dictionary.com, [note 33](#).

³⁷ See generally, Sloth-Nielsen J, ‘The Interface between Child Protection, Child Justice and Child Labour via Convention 182 on the Elimination of the Worst Forms of Child Labour’ in Meuwese S, Detrick S and Jansen S et al (eds), *100 Years of Child Protection*, Wolf Legal Publishers, The Netherlands, p 205-220 and Sloth-Nielsen J, ‘Let not the sins of the fathers (and their brothers and uncles and tjommmies...) Exploring the child labour/juvenile justice intersection’, paper presented at the 4th World Congress on the Rights of Children and Youth, Cape Town, March 2005.

³⁸ The problems posed by the ‘who’ and the ‘how’ were raised in personal correspondence between William Myers and the author on 19 and 26 September 2007.

study discussed in section 7.4.3 of Chapter 7 reveals both direct and indirect use of children. The former constitutes recruiting children to manufacture or sell drugs, effect burglaries or conduct assassinations, while the latter can occur by providing children with an outlet or means to sell stolen property or by turning a blind-eye to their criminal actions and participating in the rewards, thereby sending a tacit message that such conduct is acceptable and encouraged.

The difficulty created by the very broad ambit of Article 3(c) is related to the obligation created by Convention 182 to prohibit this worst form of child labour. This necessarily entails ensuring that the criminal law prohibition is comprehensive enough to give effect to the obligation. If the conduct involved in using a child to commit crime is set against too broad or indeterminate standards, then there may be problems in any attempt to set the elements of the criminal offence that prohibits such conduct. For example, even where there may be clear proof or indication that a child was recruited and used to commit an offence, what elements must be present to hold the perpetrator of the use accountable? The real difficulty is what constitutes 'use' when indirect means, such as manipulation, are utilised to get children to commit crime. In so far as Convention 182 and Recommendation 190 provide no concrete guidance on this issue, it can be argued that they are less effective.

Overall, given the long history of international legal standards on issues such as slavery, forced labour, trafficking, armed conflict, the issue of the use of children in the commission of crime generally, as a form of exploitation of the child is relatively new, with the international community only beginning to articulate concern about it in the late 1980's. In addition, there seems to be little research or scientific interrogation of the phenomenon, whether from a legal, sociological or labour/economic point of view. As mentioned above, although it is significant that it has now attained recognition in an international treaty, the fact that it was included in what is regarded as a *child labour* standard results in some disquiet as to whether this was the most appropriate means of addressing the issue.

6.3 Child justice

As has been suggested, the instrumental use of children to commit crime is inextricably linked to child justice. Therefore, in order to examine whether Convention 182 has had any significance in addressing children used in the commission of offences as a worst form of child labour, an examination of the child justice system in which children who are victims of this type of exploitation find themselves is necessary. The purpose of such an examination is to determine whether the measures as set out in Articles 6 and 7 of Convention 182 can be assimilated in a child justice system, specifically the one in South Africa.

6.3.1 Child justice and international law

First, however, an examination of the international legal framework regarding child justice is merited. While there is a long history of developments in child justice before the UNCRC,³⁹ the Convention and related international instruments provide the seminal international framework within which children in conflict with the law should be managed. At a more general level, human rights instruments such as the ICCPR and ICESCR, which are legally binding on all states which have ratified or acceded to them

³⁹ For a history of juvenile justice developments and theory see, amongst others, Platt AM, *The Child Savers: The Invention of Delinquency*, University of Chicago Press: Chicago and London, 1969; Krisberg B, *Juvenile Justice: Redeeming Our Children*, Sage Publications: Thousand Oaks, London New Dehli, 2005, p 19 – 59; Trepanier J, ‘Children’s Rights in Juvenile Justice: A Historical Glance’, in Alen A, Bosly M, De Bie M, Vande Lanotte J, Ang F, Delens-Ravier I, Delplace M, Herman C, Reynaert D, Staelens V, Steel R and Verheyde M (eds), *The UN Children’s Rights Convention: theory meets practice*, intersentia: Antwerpen-Oxford, 2007, p 509 – 530 at 509 – 517; Sloth-Nielsen J, *The Role of International law in Juvenile Justice Reform in South Africa*, unpublished LLD dissertation, University of the Western Cape, 2001, p 51 – 116; Skelton A., *The Influence of the Theory and Practice of Restorative Justice in South Africa with Special Reference to Child Justice*, unpublished LLD dissertation, University of Pretoria, 2006, p 255-289 and Van Bueren G, *The International Law on the Rights of the Child*, Martinus Nijhoff Publishers: The Netherlands, 1995, p 169 – 175 for an examination of the administration of juvenile justice in international law, and the aims of a juvenile justice system.

contain references to the treatment of children in conflict with the law especially children who are deprived of their liberty.⁴⁰

The broad principles contained in the above-mentioned human rights treaties are given more detail through a number of principles, minimum rules and standards which deal specifically with children in conflict with the law. Prominent in this regard are the UN Standard Minimum Rules on the Administration of Juvenile Justice (Beijing Rules)⁴¹ and the UN Rules for the Protection of Juveniles Deprived of their Liberty (UN JDL Rules), adopted in 1990.

By Resolution 45/113 of 14 December 1990, the United Nations General Assembly adopted the UN JDL Rules.⁴² Section 3 of the Fundamental Perspectives set out in the Rules sets out the purpose thereof, namely:

[t]he Rules are intended to establish minimum standards accepted by the United Nations for the protection of juveniles deprived of their liberty in all forms, consistent with human rights and fundamental freedoms, and with a view to

⁴⁰ See Detrick S, *A Commentary on the United Nations Convention on the Rights of the Child*, Kluwer Law International: The Hague, 1999, p 676 – 682 for a discussion on international instruments such as the ICCPR in relation to children in conflict with the law.

⁴¹ The Beijing Rules were adopted by the General Assembly of the United Nations in 1985. The commentary on the Fundamental Perspectives of the Rules states that they refer to a comprehensive social policy and aim at promoting juvenile welfare to the greatest possible extent. Rule 3 makes the Rules applicable not only to proceedings involving juvenile offenders but also juvenile welfare and care proceedings, and so they are applicable to the child justice and child protection systems in South Africa: Rule 3.2 provides that; '[e]fforts shall be made to extend the principles embodied in the Rules to all juveniles who are dealt with in welfare and care proceedings.' The Rules deal with a wide range of standards including informing a child's family of his arrest or apprehension (rule 10); training and specialisation of police (rule 12) and that children should be detained as a matter of last resort and the shortest appropriate period of time (rule 19). For a discussion of the Beijing Rules, see Van Bueren G, 'Article 40: Child Criminal Justice', in Alen A, Vande Lanotte J, Verhellen E, Ang F, Berghmans E and Verheyde M (eds), *A Commentary on the United Nations Convention on the Rights of the Child*, Martinus Nijhoff Publishers: Leiden, 2006, p 4-5.

⁴² See Van Bueren, p 170 – 171, note 39, for a discussion of the Rules.

counteracting the detrimental effects of all types of detention and to fostering integration in society.’

This is elaborated on further by section 5, which states: ‘[t]he Rules are designed to serve as convenient standards of reference and to provide encouragement and guidance to professionals involved in the management of the juvenile justice system’. Thus, the Rules do not have the same force of law as the provisions of the South African Constitution or the international obligations that South Africa has incurred on account of her ratification of the UNCRC, which is an international treaty agreement. Rather, the Rules should guide the application of the rights contained in both documents.

In addition, the Rules encourage states to incorporate the provisions contained therein into domestic laws.⁴³ The Rules define a juvenile as every person under the age of 18 years.⁴⁴ They do not set a minimum age of detention, leaving this up to the national laws of each country. Deprivation of liberty is defined as follows: ‘[t]he deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting, from which that person is not permitted to leave at will, by order of any judicial, administrative or other public authority.’⁴⁵ Therefore, these Rules are not limited in their application to children detained for being in trouble with the law, but extend to all children placed in institutional care, including through child welfare and protection systems.⁴⁶

⁴³ Rule 7: some of the standards they contain relate to juveniles under arrest or awaiting trial; the admission, registration, movement and transfer of children in detention, and the education, vocational training and work of children detained in institutions.

⁴⁴ Rule 11(a).

⁴⁵ Rule 11(b).

⁴⁶ For a discussion of the applicability of these standards in South African law and practice regarding children detained in prisons, see Odongo G and Gallinetti J, ‘The Treatment of Children in South African Prisons - A Report on the Applicable Domestic and International Minimum Standards’, *Civil Society Prison Reform Initiative Research Paper No. 11*, Community Law Centre, 2005.

In addition, in 1990 the UN Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines)⁴⁷ were adopted and are aimed at, amongst others, emphasising the need for and importance of progressive delinquency prevention policies and the systematic study and the elaboration of measures towards such prevention policies.⁴⁸ In so far as Verhellen and Cappelaere note that the Guidelines deal with almost every area of social policy, namely – the family, school and community, the Guidelines find resonance in the prevention focus of Convention 182 and Recommendation 190, which also recognise the importance of these factors in addressing worst forms of child labour.⁴⁹

6.3.1.1 The UNCRC and child justice

Van Bueren notes that the UNCRC was being drafted at the time that the Beijing Rules were adopted in 1985 and therefore the drafters had the opportunity of using these standards to inform the content of the provisions dealing with child justice; however it was only during the second reading of the UNCRC that the principal Article on the administration of juvenile justice, Article 40, was significantly revised.⁵⁰

⁴⁷ In addition to providing a framework for the prevention of children becoming involved in crime, the Guidelines also contain relevant standards to children in conflict with the law especially children deprived of their liberty. Guideline 46 states that institutionalisation should be a measure of last resort and for the shortest possible period of time and that the best interests of the child is of paramount importance; Guideline 54 states that no child or young person should be subjected to harsh or degrading correction or punishment at home, in schools or other institutions and Guideline 57 recommends the establishment of an independent ombudsman to ensure the rights status and interests of children as well as supervising the implementation of the JDL Rules, the Riyadh Guidelines and the Beijing Rules.

⁴⁸ Paragraph 5. For a detailed discussion on the Guidelines, see Verhellen E and Cappelaere G, 'United Nations Guidelines for the prevention of Juvenile Delinquency: Prevention of juvenile delinquency or promotion of a society which respects children too?', *The International Journal of Children's Rights*, Vol. 4, No. 1, 1996, p 57 – 67 where the authors argue that the Guidelines demonstrate recent developments in the social and judicial approach to children so that children are seen less as objects than as 'fully-fledged human beings with own capacities who should be valued and protected.' See also Van Bueren, p 194 – 197, note 39, for a discussion on the Guidelines.

⁴⁹ See in particular Article 7 (2) of Convention 182 and Paragraph 2 of Recommendation 190.

⁵⁰ Van Bueren, p 171, note 39.

The deprivation of a child's liberty and the administration of juvenile justice are dealt with in Article 37 and Article 40 of the UNCRC respectively, with the latter being more relevant to the present discussion.⁵¹ Articles 40 (1) – (4) provide a concise yet comprehensive framework within which states are obliged to fashion a child justice system. The provision covers issues such as non-discrimination; the child's right to dignity and worth as well as the right to privacy; the need for children respect the human rights and fundamental freedoms of others; the need to take the age of the child and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society into account;⁵² the presumption of innocence; the child's right to be informed of charges against him or her; the right to legal representation; the right to a speedy and fair trial by an impartial authority or judicial body; the right to have decisions subject to review or appeal; the need for the establishment of a specialised criminal justice system for children in conflict with the law, the establishment of a minimum age of criminal capacity and the need for creating alternative dispositions to institutional care in a manner appropriate to children's well-being and proportionate both to their circumstances and the offence.⁵³

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The wide range of issues and rights contained in the provision not only create procedural protections and safeguards for all children in conflict with the law, but also recognise that

⁵¹ Article 37 is also relevant to children who have been used in the commission of crime and who have been arrested and detained, but provides more substantive rights regarding protection from torture, cruel inhuman and degrading punishment and standards for the sentencing of children to a custodial setting, than establishing a framework for the criminal justice system and its management of children who come into conflict with the law. For a more detailed discussion on this provision see Detrick, p 619 – 644, note 40, and Van Bueren, p 206 – 231, note 39.

⁵² Importantly, Van Bueren notes that this requirement in Article 40 cannot be achieved where a state adopts a policy which is characterised as being of general deterrence and punitive in focus: Van Bueren, p 183, note 39. This observation should be borne in mind in the discussion later in this chapter, on the possible 'tough-on-crime approach' changes to be effected to the South African Child Justice Bill by the South African parliament.

⁵³ See generally Van Bueren, p 11-31, note 41, for a detailed discussion of the scope of Articles 40 (1) – (4).

each child is an individual and should be treated and managed accordingly within the criminal justice system. This is an important consideration especially for children who have been used for illicit activities, as their individual circumstances, together with those surrounding the commission of the offence, inform the manner in which they are dealt with in the criminal justice system, be it by the police or judicial officers. In particular, the need to make use of alternative dispositions to institutional care is an obligation which also, to an extent, finds expression in Article 7 (2) (b) of Convention 182, which requires the removal of victims of worst forms of child labour from the circumstances in which they find themselves, as well as their rehabilitation⁵⁴ and social integration. Paragraph 2(b) of Recommendation 190 fleshes Article 7(2)(b) out by including measures to address their educational, physical and psychological needs. These obligations are partly translated into South African policy on worst forms of child labour through the actions steps included in the CLPA requiring that children who have been used in the commission of crime are considered for diversion if appropriate.⁵⁵ Whether, however, these international obligations and the policy undertaking in CLPA find resonance in the South African child justice system is an issue that will be discussed in the remainder of this chapter, the importance of which now becomes clearly visible.

In sum, Van Bueren observes that the recent developments in international law relating to child justice (she also questions the usage of the term ‘juvenile justice’, describing it as being judgmental) have merged what were once the ‘punishment and rehabilitation

⁵⁴ Van Bueren notes that in the drafting of the UNCRC, the term ‘reintegration’ was preferred to ‘rehabilitation’ on account of the fact that there may be a risk that states abuse the notion of rehabilitation ‘as an undesirable form of social control’. She notes further that it was also because the concept of rehabilitation implies that responsibility rests solely with an individual who can be removed from society for treatment and, once restored, released. Whereas, on the other hand, the concept of reintegration considers the social environment of children rather than the idea that the difficulties that children face are individual. Van Bueren, p 173, note 39. See also Detrick, p 683, note 40 and for a more general discussion on rehabilitation and restorative justice Skelton, p 43-67, p 68-82 and p 101-105, note 39.

⁵⁵ The 2003 CLPA and CLPA 2 are discussed in section 5.4 of Chapter 5.

functions of juvenile justice with the service provision and protection functions of child welfare'.⁵⁶

Yet she also argues that while much of the new international law on child justice is progressive and child-centred, much of its content is contained only in recommendations and guidelines.⁵⁷ This point, made in 1995, is even more accurate today as the definitive guide to implementing effective child justice systems has just been released by the UN Committee on the Rights of the Child in the form of General Comment No. 10 (2007): Children's Rights in Juvenile Justice.⁵⁸ The purpose of General Comment No. 10 is to elaborate more extensively on the nature of the state's and other duty-bearer's obligations with respect to the rights contained in Article 37 and Article 40 of the UNCRC and their implementation.⁵⁹ In particular, General Comment No. 10 furnishes supplementary content to the various obligations contained in Article 40, making it quite clear what states are required to do to ensure that they comply with their international obligations. But it goes further too – clearly mandating a comprehensive child justice policy in which prevention is given pride of place and in which monitoring child justice practice and the collection of accurate data is standard practice.⁶⁰

⁵⁶ Van Bueren, p 199, note 39.

⁵⁷ Van Bueren, p 199, note 39.

⁵⁸ Prior to the release of the General Comment, the Committee on the Rights of the Child held a Theme Day on the administration of juvenile justice in 1995. The outcome of the Theme Day was to provide guidance, for instance, on effective implementation of the provisions of Article 40 and the value of international co-operation. For general discussion of the Theme Day see Detrick S, 'The Theme Day of the Committee on the Rights of the Child on the administration of juvenile justice', *The International Journal of Children's Rights*, Vol. 4, No. 1, 1996, p 95 – 98.

⁵⁹ For a general discussion on General Comment No. 10 see Sloth-Nielsen J, 'A new vision for child justice in international law', *Article 40*, Vol. 9, No. 1, 2007, p 1-4. It should also be noted that although non-binding, UN General Comments might have interpretative value for courts. In *Government of the RSA and others v Grootboom and others* 2001(1) SA 46 (CC) at para 29 *et seq*, the Constitutional Court relied on General Comments of this sort in interpreting the Bill of Rights.

⁶⁰ In dealing with a comprehensive child justice policy, I would argue that General Comment No. 10 has gone a long way in addressing the concerns expressed by Van Bueren that the UN Committee on the Rights of the Child has not yet adequately responded to the unease of certain governments who feel that their

The overall effect of the various non-binding instruments, not to mention Article 40 and other key provisions of the UNCRC, is an especially detailed and meticulously thought-through area within the children's rights spectrum, which provides state and other actors with a comprehensive blueprint for action. In fact, it could be asserted that if one has regard to the exhaustive and in-depth treatment that Article 40 has received through General Comment No. 10, as well as General Comment No. 5 in a more general sense,⁶¹ the over-arching international framework for children in conflict with the law, which obviously includes children used in the commission of crime, is of a much higher caliber and more sophisticated than that contained in Convention 182 and Recommendation 190 for the instrumental use of children in crime.

With the exception of the recent General Comment No. 10, this rich history of international law and instruments on child justice provided a core set of standards, which informed the law reform process that resulted in the South African Child Justice Bill 49 of 2002.⁶² It must be said that the provisions of the UNCRC, taken together with the carefully considered and detailed standards contained in the other child justice instruments, constitute a comprehensive guiding framework for any child justice system. It is also argued that there is ample room within a child justice framework that is based on this solid foundation of international standards, irrespective of the obligations contained in Convention 182, for specific measures to be taken to assist and intervene in the lives of children who have been used in the commission of crime.

In order to illustrate the last point, I now turn to an examination of the domestic legal framework for children in conflict with the law in South Africa, specifically examining

resources are so scarce that they are unable to provide universal education or health care to children, not to mention a separate child justice system. See Van Bueren, p 2, note 41.

⁶¹ General Comment No. 5 (2003), General Measures of Implementation of the Convention on the Rights of the Child, CRC/GC/2003/5, 27 November 2003.

⁶² See, for example, the South African Law Commission, *Juvenile Justice Discussion Paper 79*, Project 106, 1998 (hereinafter Discussion Paper) and the South African Law Commission *Report on Juvenile Justice*, Project 106, 2000 (hereinafter Juvenile Justice Report).

mechanisms and procedures within the existing criminal law system and the proposed child justice system.

6.4 Child justice and children used in the commission of crime in South Africa

It has been contended that the child justice movement in South Africa emerged in the early 1990s and was focused on a number of issues, with the detention of children and the need for law reform being the two most prominent and inter-linked.⁶³ Key child rights academics have observed that the law reform process was initiated by non-governmental organisations in the early 1990's through their launching advocacy campaigns to focus attention on children who were being detained for allegedly committing ordinary criminal offences (rather than for offences that were political in nature and linked to the struggle against apartheid, as was previously the case).⁶⁴ Most of the attention had been previously concentrated on children who were political detainees, possibly at the expense of children, who were arrested, detained and dealt with in the adult criminal justice system on account of being charged with offences such as theft. Nevertheless, the demise of apartheid ushered in heightened awareness for the plight of all child detainees.

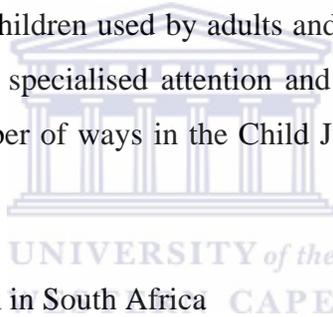
Apart from the law reform process to be discussed shortly, the child justice movement has also created a platform, in the absence of a legally separate criminal justice system for children,⁶⁵ for a range of child justice related issues to emerge and develop within the

⁶³ Sloth-Nielsen, J, 'The Juvenile Justice Law Reform Process in South Africa: Can a Children's Rights Approach Carry the Day?' *Quinnipiac Law Review*, Vol. 18, No. 3, 1999, p 470.

⁶⁴ These campaigns included the 'Release a Child for Christmas Campaign' and the 'No Child Should Be Caged' campaign as well as the efforts of the Community Law Centre, which contracted university students to intervene informally in the criminal courts and provide assistance to arrested children, in the form of trying to secure their release from custody awaiting trial. See generally Sloth-Nielsen, p 470-471, note 63, and Skelton A, 'The South African Child Justice Bill: Transition as Opportunity', in Jensen E and Jepson J (eds), *Juvenile Law Violators, Human Rights and the Development of New Juvenile Justice Systems*, Hart Publishing: Oxford, 2006 p 65 – 82.

⁶⁵ The Child Justice Bill 49 of 2002, which will be discussed in section 6.4.2 of this chapter is still not enacted, despite being introduced to the South African parliament in 2002. However, on the eve of

field of criminal justice. One result of the intensive efforts focused on child justice over the last two decades has been the recognition that certain groups of child offenders, within the greater category of children who come into conflict with the law, need special management and interventions. For South Africa, this realisation first manifested itself in relation to young sex offenders. Over the last ten years specific programmes have been developed especially by civil society service providers in order to create meaningful and content driven interventions aimed at reducing re-offending and these have been used in the context of both diversion and alternative sentences.⁶⁶ These interventions were welcomed by child justice non-governmental organisations, criminal justice role-players and even, eventually, the victim's lobby as being viable alternatives that actually seek to prevent re-offending and further violence against women and children. What has followed is the recognition of the needs of children who are repeat offenders, children in organised armed conflict and children used by adults and other older children to commit crime as children who require specialised attention and interventions. This recognition has played itself out in a number of ways in the Child Justice Bill, as will be discussed below.



6.4.1 The child justice system in South Africa

parliamentary recess for 2007, the South African Cabinet of Ministers approved the re-tabling of the Child Justice Bill in the third week of November 2007. However, no version other than Bill 49 of 2002 is available at the time of writing this thesis.

⁶⁶ See generally Wood C, 'Diversion in South Africa: A review of policy and practice 1990-2003', *Occasional Paper 79*, Institute for Security Studies, 2003; Steyn F, *Review of South African Innovations in Diversion and Reintegration of Youth at Risk*, Open Society Foundation for South Africa, 2005, as well as Gallinetti J, 'Diversion', in Sloth-Nielsen J and Gallinetti J (eds), *Child Justice in Africa: A Guide to Good Practice*, Community Law Centre, 2004, p 66 – 73 for a discussion of the programmes developed by Childline KZN in KwaZulu-Natal; the Teddy Bear Clinic in Gauteng and SAYSTOP in the Western and Eastern Cape and Editor, 'Managing and treating young sex offenders: What action for government and civil society?', *Article 40*, Vol. 5, No. 4, 2003, p 4-6, for a discussion on the available programmes and the roles and responsibilities of government and service providers in relation to this category of young offenders.

At present, children who are accused of crimes in South Africa are governed by the same legislation as adults who enter the criminal justice system. The Criminal Procedure Act 51 of 1977 sets out the procedural system that governs the prosecution of all persons who come into conflict with the law.⁶⁷ There are, however, only a few provisions that take into account the fact that an offender is also a child for the purposes of the criminal justice process.

One example is section 153 of the Criminal Procedure Act, which sets out numerous circumstances where the court may decide that criminal proceedings take place behind closed doors or *in camera*.⁶⁸ This is an exception to the general rule contained in section 152, which provides that, except where provided in the Act or any other law, any criminal proceedings against an accused must take place in open court, meaning that the public are entitled to observe the proceedings. However, Section 153(4) mandates the presiding officer, in situations where the accused is under 18 years of age, not to allow anyone into the court unless it is the accused's legal representative, parent, care-giver or guardian, an authorised person or a person whose presence is necessary for the proceedings. The presiding officer may also order that no person under 18 years of age sit in on criminal proceedings unless that person is a witness or is authorised to be present by the court.

Sentencing is a further instance where the Criminal Procedure Act allows for different approaches to children accused of committing crimes. Any court in which a person under the age of 18 years is convicted, may, instead of imposing punishment upon him/her for that offence, amongst other dispositions, order that he/she be placed under the supervision of a probation officer or a correctional official;⁶⁹ order that he/she be placed

⁶⁷ Generally see Du Toit E, De Jager F, Paizes A, Skeen A, Van Der Merwe S, *Commentary on the Criminal Procedure Act*, Juta and Co. Ltd: Lansdowne, 2006.

⁶⁸ These include where it is in the interests of State security, good order, public morals or the administration of justice; where it appears that a witness could be harmed if he or she testifies and where a witness under 18 years, the court can order that no person be present in court except the child's parent or guardian and those persons whose presence is necessary for the proceedings.

⁶⁹ Section 290(1)(a).

in the custody of any suitable person designated in the order;⁷⁰ or order that he/she be sent to a reform school as defined in section 1 of the Child Care Act 74 of 1983.⁷¹

Finally, in recognition of the fact that social circumstances may be the cause of a child becoming involved in crime, a court may refer a child (who is under the age of 18 years) accused of committing a crime to the children's court if it appears to the court at the trial that such child is a child in need of care as referred to in section 14(4) of the Child Care Act.⁷²

However this system of justice for children accused of committing crimes does not have regard to children's rights or the best interests of the child and is not compliant with the provisions of Article 40 of the UNCRC, which essentially requires ratifying states to create a separate legal framework for children in trouble with the law.⁷³ Given that the legislation is not compliant with the obligations contained in the UNCRC regarding child justice, there are also no specific provisions in the Criminal Procedure Act that can give proper effect to the requirements contained in Article 7 of Convention 182 in order to intervene in the lives of children used to commit crime as a worst form of child labour.

⁷⁰ Section 290(1)(b).

⁷¹ Section 290(1)(d). A reform school is defined in section 1 of the Child Care Act 74 of 1983 as a school maintained for the reception, care and training of children sent thereto in terms of the Criminal Procedure Act 51 of 1977 or transferred thereto under the Child Care Act. It is also important to note that in terms of Section 290(3), where the convicted person is over the age of 18 years but under the age of 21 years old, the court may, instead of imposing punishment upon him/her for that offence, order that he/she be placed under the supervision of a probation officer or a correctional official or that he/she be sent to a reform school. Thus the Act distinguishes between persons under 18 years of age and persons between 18 and 21 years of age, probably on account of the fact that until recently, when the Children's Act 38 of 2005 set the age of majority as 18 years of age, it used to be 21 years of age.

⁷² Section 254 of the Criminal Procedure Act. The children's court will then decide whether the child is a child in need of care and make an order regarding the disposition of the case in the welfare system rather than the criminal justice system.

⁷³ See generally Sloth-Nielsen, note 39 above.

Yet, there are some provisions that can assist children used in the commission of crime when it comes to their sentencing, once convicted. Generally, the sentencing provisions in the Criminal Procedure Act do provide a framework that allows for the innovative disposition of cases without resorting to custodial sentences. This framework applies equally to adults and children, and has progressively been used by courts to bring alternative sentencing to life in South Africa.⁷⁴ For example, section 297 of the Criminal Procedure Act allows for postponed and suspended sentences to be imposed on convicted persons and these can be accompanied by conditions that incorporate referrals to treatment or skills development programmes,⁷⁵ or restorative justice interventions.⁷⁶ Similarly sections 276(1)(h) and (i) allow for the imposition of correctional supervision as a sentence, which also allows for offenders to escape custodial sentences by submitting to strict supervision often coupled with an intervention such as community service and attendance at offender programmes. So, a child who has been used, procured or offered by an adult to commit crime and convicted of the offence committed, could theoretically receive a postponed or suspended sentence coupled with referral to a programme where

⁷⁴ For a discussion on alternative sentencing in South Africa see Skelton A, 'Alternative Sentencing: An overview of the legal framework and practice in South Africa', unpublished paper presented at a series of training workshops for magistrates on alternative sentencing for the Department of Justice in 2006 (copy on file with the author) and Muntingh L, 'Alternative sentencing in South Africa: an update', in Maepa T(ed), *Beyond Retribution, Prospects for Restorative Justice in South Africa: Monograph 111*, Institute for Security Studies, 2005. An example of a court decision which applied an alternative sentence for a child in a serious matter where a custodial sentence would have been imposed in the past, was *DPP Kwa-Zulu Natal v P* 2006(1) SACR 243 (SCA), in which a young girl charged with conspiracy to commit murder was ultimately sentenced to a suspended sentence of imprisonment coupled with various conditions. See also, specifically in relation to children, Muntingh L, 'Alternative Sentencing' in Sloth-Nielsen J and Gallinetti J (eds), *Child Justice in Africa: A Guide to Good Practice*, Community Law Centre, 2004, p 86-94.

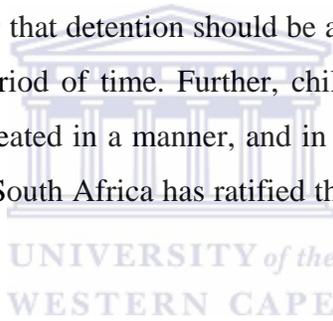
⁷⁵ On treatment and life skills programmes and similar interventions for children in a South African context, see Dawes A and Van Der Merwe A, *The Development of Minimum Standards for Diversion Programmes in the Child Justice System*, Human Sciences Research Council: Cape Town, 2005 and Fine, N, *Through the Walls: Transforming Institutional Thinking*, Community Law Centre, University of the Western Cape, 1996.

⁷⁶ The concept of restorative justice involves a balancing of rights and responsibilities, with its purpose being to identify responsibilities, meet needs and promote healing. See generally Skelton, note 39 above, for a definitive discussion on restorative justice and child justice in South Africa.

he or she would receive, amongst others, counseling, assistance and guidance on how to extricate him or herself from criminal conduct, as well techniques to assist the child in resisting the influence of others to commit crime.⁷⁷

6.4.2 The Child Justice Bill 49 of 2002

As noted in Chapter 5, in 1995, South Africa ratified the UNCRC, thereby binding herself to realise the rights contained therein for the children of South Africa. In 1996, South Africa adopted the final Constitution, which in section 28, sets out certain principles applicable to children in trouble with the law. For instance, section 28(2) requires that the best interests of the child be of paramount importance in every decision taken in relation to a child,⁷⁸ and section 28 (1) (g) sets out clear principles relating to the detention of children, including that detention should be a measure of last resort and used for the shortest appropriate period of time. Further, children should be kept separately from adults in detention and treated in a manner, and in conditions, that take account of the child's age.⁷⁹ In addition, South Africa has ratified the African Charter on the Rights



⁷⁷ A programme session aimed at children who have been used to commit crime was developed as part of the Pilot Programme discussed in section 7.5 and 7.6 of Chapter 7. This would be the type of intervention which would form a component of such a sentence.

⁷⁸ This principle has been adopted by South African courts on numerous occasions in handing down sentences for children, for example in *S v B* 2006 (1) SACR 311 (SCA) at paragraph 20.

⁷⁹ Generally section 35 of the Constitution deals with the rights of accused persons, including the rights of children in trouble with the law, and enshrines rights such as the presumption of innocence, the right to a fair and speedy trial and the right to legal representation, including legal representation at state expense if substantial injustice would otherwise occur. For a general commentary on the rights of accused persons under the Constitution see Steytler N, *Constitutional Criminal Procedure: A commentary on the Constitution of the Republic of South Africa 1996*, Butterworths: Durban, 1998. For a commentary on section 28(1)(g) see generally Sloth-Nielsen J, 'Children', in Cheadle M, Davis D, Haysom N (eds), *South African Constitutional Law: The Bill of Rights*, Lexis Nexis Butterworths: Durban, 2005, p 23-19 – 23-24 and Currie I and De Waal J, *The Bill of Rights Handbook*, Juta: Lansdowne, 2005, p 616.

and Welfare of the Child, and Article 17 thereof requires ratifying states to take measures to protect children in the criminal justice system.⁸⁰

Apart from these advances in the international arena, certain developments were occurring in South Africa on a policy level, in particular the establishment of the Inter-Ministerial Committee on Youth at Risk (IMC), which was established in 1995 to deal with the situation of children in custody in prison but which set itself the goal of the development of proposals for the transformation of the entire child and youth care system for 'at risk' children.⁸¹ The work of the IMC was a significant factor in the development

⁸⁰ Although it should be noted that the latter provision is not as extensive as the provisions found in the UNCRC relating to child justice: Gose, M, *The African Charter on the Rights and Welfare of the Child*, Community Law Centre, 2002, p 67-76. On the African Charter on the Rights and Welfare of the Child, see generally, Viljoen F, 'Supra-national human rights instruments for the protection of children in Africa: the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child', *Comparative and International Law Journal of Southern Africa*, Vol. 31, 1998, p 199 - 212; Viljoen F, 'The African Charter on the rights and Welfare of the Child', in Davel CJ (ed), *Introduction to Child Law in South Africa*, Juta and Co. Ltd: Kenwyn, 2000, p 214 – 231; Chirwa D, The merits and demerits of the African Charter on the Rights and Welfare of the Child, *The International Journal of Children's Rights*, Vol. 10, No. 2, 2002, p 157 - 177 and Olowu D, Protecting Children's Rights in Africa: A Critique of the African Charter on the Rights and Welfare of the Child in *The International Journal of Children's Rights*, Vol. 10, No. 2, 2002, p 127 - 136.

⁸¹ See generally, Sloth-Nielsen J, p 174 and 189, note 39, and Sloth-Nielsen, p 473-476, note 63. To summarise, the author explains that preceding the appointment of the IMC a crisis had ensued in the child justice system. In 1994 an amendment to section 29 of the Correctional Services Act 8 of 1959 had put a blanket ban on pre-trial detention in prison of any person under 18 years. Apart from a few limited concessions, this first amendment was intended to prohibit pre-trial detention in prison of all children under the age of eighteen years, irrespective of the offence with which the child had been charged or prior criminal history. More humane welfare institutions such as places of safety were therefore envisaged for children who required secure care whilst awaiting trial. After the amendment was promulgated in 1995, subsequent chaos ensued due to the sudden promulgation of this amendment coupled with lack of planning and provisioning. A huge number of children were released into the society for a lack of adequate places of safety and other alternatives and because of the unpreparedness of staff at welfare institutions. A few children who had committed serious and violent crimes took advantage of this chaotic situation and there ensued a cycle of arrests (second and further arrests) and release without the completion of the resulting criminal proceedings. The government was forced to backtrack in light of these developments against a

of law reform to deal with children in trouble with the law in that it measurably and substantially contributed to the incorporation of assessment, diversion, secure care and probation in the theory, practice, policy and fiscal planning of child justice.⁸² Sloth-Nielsen describes the work of the IMC resulting in child justice practice being deeply enriched through a more multi-modal and diverse range of service delivery interventions.⁸³

Recognising these international obligations and constitutional obligations, as well as following on developments such as the appointment and ensuing work of the IMC on youth at risk, in 1996 the then Minister of Justice, Dullah Omar, appointed a Project Committee of the South African Law Reform Commission (SALRC) to investigate juvenile justice.⁸⁴ After four years of work including the publishing of an Issue Paper⁸⁵

fervent public backlash. This led to a second amendment to the Correctional Services Act in 1996, which remains applicable to this day (having been left untouched by the new Correctional Services Act (1998)). This second amendment provided for limited circumstances when children over 14 years of age, but under 18 years can be detained in prisons while awaiting trial. It also resulted in the IMC being established to investigate the situation of children in detention. The second amendment resulted in the gradual diminishing of numbers of children awaiting trial detained in places of safety in South Africa and a considerable increase, between 1996 and 2001, in the number of these children detained in prisons. However it appears that the trend was reversed as in 2006, it was shown that the number of children awaiting trial in prison had decreased by more than half from 2 764 to 1238 on 31 December 2005, see Nevill C and Dissel A, 'Reversing the trends', *Article 40*, Vol. 8, No. 1, 2006, p 11-15 and Dissel A, 'Children in detention pending trial and sentence', in Gallinetti J, Kassan D and Ehlers L (eds), *Child Justice in South Africa: Children's Rights under Construction Conference Report*, Open Society Foundation for South Africa and the Child Justice Alliance, 2006, p 113 – 121.

⁸² Sloth-Nielsen J, "'A short history of time': Charting the contribution of social development delivery to enhance child justice 1996 – 2006", in Gallinetti J, Kassan D and Ehlers L (eds), *Child Justice in South Africa: Children's Rights under Construction Conference Report*, Open Society Foundation for South Africa and the Child Justice Alliance, 2006, p 17 – 27.

⁸³ Sloth Nielsen, p 27, note 82.

⁸⁴ Project 106: Juvenile Justice. At the time the Committee was appointed, the Commission was known as the South African Law Commission.

⁸⁵ South African Law Commission, *Issue Paper 9, Juvenile Justice*, Project 106, 1997 (hereinafter Issue Paper).

and Discussion Paper,⁸⁶ and a full costing of the proposed legislation,⁸⁷ the Project Committee released its Report and draft Child Justice Bill.⁸⁸

The Bill, while retaining most procedural features of the present South African criminal justice process, introduces a number of new concepts and procedures, some of which are used presently in practice but are not provided for in legislation. On account of the fact that practice in the child justice system at present is not mirrored by legislation, uncertainty and inconsistency are constant dangers that need to be addressed by clear legislative norms.⁸⁹

The Bill is aimed at protecting the rights of children accused of committing crimes as well as regulating the system in which a child is dealt with and ensuring that the roles and responsibilities of all those involved in the process are clearly defined in order to provide effective implementation. The Bill recognises the fact that children do commit serious offences and that they must be held accountable for their actions and take responsibility for the human rights and fundamental freedoms of others.⁹⁰ The influence of restorative justice on the ethos of the Bill is also evident from the objects of the Bill through references to the promotion of *ubuntu* in the child justice system by, amongst others, fostering the child's sense of dignity and self worth, supporting reconciliation by means

⁸⁶ Discussion Paper, note 62.

⁸⁷ See generally, Barberton C and Stuart J, 'Costing the Implementation of the Child Justice Bill', *Research Monograph 14*, Applied Fiscal Research Centre, University of Cape Town, 1999 and Sloth – Nielsen J, 'The Business of Child Justice', Burchell J and Erasmus A (eds), *Criminal Justice in a New Society*, Juta: Landsdown, 2003.

⁸⁸ Juvenile Justice Report, note 62. For a full overview of the various stages, proposals and recommendations of the Project Committee see Sloth-Nielsen J, 'Child Justice and Law Reform', in Davel CJ (ed), *Introduction to Child Law in South Africa*, Juta and Co.: Kenwyn, p 383-461.

⁸⁹ See Gallinetti J, 'What happened to the Child Justice Bill?', *SA Crime Quarterly*, Vol. 17, 2006, p 7-12.

⁹⁰ Clause 2 of the Bill states that the objects of the Bill include protecting the rights of children as contained in section 28(1)(g) and (h) of the Constitution; reinforcing children's respect for human rights and the fundamental freedoms of others by holding children accountable for their actions and safeguarding the interests of victims and the community; and promote co-operation between all government departments and other organisations and agencies involved in implementing an effective child justice system.

of a restorative justice approach.⁹¹ This is an important aspect of the Bill as it demonstrates a conscious decision on the part of the original drafters (and subsequently the Department of Justice which introduced the Bill to parliament in essentially the same form as that produced by the SALRC) to move away from a ‘tough on crime approach’ to criminal justice legislation, which had slowly been creeping into South African law through various amendments to the criminal procedural framework as well as substantive criminal law.⁹² However, as will briefly be discussed later in section 6.4.3.2, in recent years there seems to be a reversal of this original approach to concentrate on an individualised approach to children in favour of a law-enforcement model.

Generally the proposed legislation contained in the SALRC version of the Bill dealt with issues such as police powers and duties, arrest and procedures for bringing children before court.⁹³ It also created a child justice court, which is a court at district court level that would deal with all matters pertaining to children in conflict with the law.⁹⁴ No longer would children appear in courts ordinarily designated for adults, rather they would have a court staffed by a magistrate and prosecutor trained in child justice. Furthermore

⁹¹ For a detailed discussion of restorative justice and the Child Justice Bill see Skelton, p 408 – 425, note 39 and Skelton, p 69 -70, note 64, where she argues that the Bill is both pragmatic and cognisant of the realities of the crime endemic in South Africa, while also being committed to children’s rights.

⁹² See for example the Criminal Law Amendment Act 105 of 1997 introducing minimum sentences into South African Law and the Prevention of Organised Crime Act 121 of 1998, which introduced a range of new offences relating to organised crime. For a discussion on how the ‘tough on crime’ approach has been applied to children in the criminal justice system see Skelton, p 71-76, note 64 and Ehlers L, ‘Child Justice: Comparing the South African child justice reform process and experiences of juvenile justice reform in the United States of America’, *Open Society Foundation for South Africa Monograph 1*, 2006, p 4-5 and 9-13

⁹³ Generally see Issue Paper, p 27 – 33, note 85; Discussion Paper, p 115-135, note 62 and Juvenile Justice Report, p 37 – 55, note 62. For a commentary on these provisions see Sloth-Nielsen, p 229 – 236, note 39. Sloth-Nielsen’s LLD thesis and chapter in Davel’s *An Introduction to Child law in South Africa* (2000), note 88 above, constitute the most detailed description and commentary of the Bill’s provisions and the law reform process and therefore are relied on heavily in this chapter.

⁹⁴ See the Issue Paper, p 42 – 49, note 85; Discussion Paper, p 193 – 213, note 62, and Juvenile Justice Report p 130 – 149, note 62. For a commentary on these provisions see Sloth-Nielsen, p 436 – 442, note 88 and Sloth-Nielsen, p 284-332, note 39.

the Bill regulated the detention and release of children, providing definite guidelines for the exercise of judicial discretion in detaining children in prison while awaiting trial.⁹⁵ In addition, to create child specialised lawyering, the Bill required the accreditation of legal representatives who wish to act in child justice matters.⁹⁶ More importantly, there were a number of provisions in the Child Justice Bill that significantly changed the present state of South African child justice law and these related to, amongst others, the minimum age of criminal capacity, the proposed preliminary inquiry, assessment, diversion and sentencing. It is these aspects of the Bill that would be of significance for children used in the commission of crime as they constituted mechanisms which would assist South Africa in complying with some of the obligations on states set in Article 7 of Convention 182. However, before discussing these general procedural aspects of the Bill, there are two particular provisions that have direct applicability for children used in the commission of crime.

Significantly, the SALRC had proposed that a statutory offence be created to hold persons liable for using a child to commit an offence. Clause 117(3) of the Bill proposed by the SALRC in 2000 stated: '[a]ny adult who incites, persuades, induces or encourages a child to commit an offence is, in addition to any other offence for which such adult may be charged, guilty of an offence and is liable upon conviction to a fine or to imprisonment not exceeding two years.' This was intended to hold the adult liable in addition to any other charge he or she may be found guilty of, in other words, should the adult have used a child in the commission of, for instance, a robbery – in addition to being found guilty and sentenced for, for example conspiracy or incitement to commit the robbery, the adult could also be found guilty and sentenced for using the child in the commission of the offence. The Report on Juvenile Justice gave the reason for the inclusion of such a clause

⁹⁵ See the Issue Paper, p 27-33, note 85; Discussion Paper p 133-134, and p 170-174, note 62; and Juvenile Justice Report 56 – 76, note 62. See also Sloth-Nielsen, p 402-411, note 88 and Sloth-Nielsen, p 158-214, note 39.

⁹⁶ See the Issue Paper, p 17-21, note 85; Discussion Paper, p 266-281, note 62; and Juvenile Justice Report p 175 – 192, note 62. For a discussion on legal representation see Sloth-Nielsen, p 456 – 461, note 88, and Sloth-Nielsen, p 416 – 448, note 39.

as being premised on the concern that specialised child justice legislation may create the impression that adults can use children with impunity in the commission of offences, especially given the proposed increased minimum age of criminal capacity, which might lead adults to seek out children below that age as instruments in the commission of crime; therefore such a clause was deemed to be an important addition to the substantive criminal law.⁹⁷ It is evident, that although this proposal fulfilled the obligations imposed by Convention 182 to prohibit and criminalise worst forms of child labour, in this case the instrumental use of children to commit crime, the Convention itself had no influence in the inclusion of such a prohibition in the Child Justice Bill simply because the SALRC drafted the clause before the Convention was adopted.⁹⁸ However, by the time the Bill was introduced to the South African parliament,⁹⁹ this provision had been changed substantially. The amended clause will be discussed in greater detail below in section 6.4.3.1.

Another provision contained in the Child Justice Bill that impacts on the use of children in the commission of crime was that which pertains to separation and joinder of trials. Clause 57 (1) of Bill 49 of 2002 provided that where a child and a person other than a child are alleged to have committed the same offence, they are to be tried separately unless it is in the interest of justice to join the trials. The question of whether to separate or join the trials of a child and adult co-accused was discussed in some detail in the Issue

⁹⁷ Paragraph 10.32 of the Juvenile Justice Report, note 62.

⁹⁸ Likewise, although not constituting a prohibition on the use of children to commit crime, Article 53 of the Law on the Protection of Minors of the People's Republic of China (1991) states that '[w]hoever instigates a minor to break law or commit criminal offences shall be given heavier punishment according to law. Whoever lures, instigates or forces a minor to take or inject drugs or engage in prostitution shall be given heavier punishment according to law', (translated copy provided to author by UNICEF Innocenti Research Centre). This provision was included in Chinese law long before Convention 182 was even conceptualised.

⁹⁹ After the SALRC had finalised the Juvenile Justice Report and draft Child Justice Bill, it was handed to the Department of Justice and Constitutional Development. The State Law Advisors were then tasked with ensuring the Bill was constitutionally compliant and ready for tabling in parliament, and in the execution of this task they effected certain changes to the Bill.

Paper, where it was noted that estimates have shown that as many as 30% of all juvenile cases involve co-accused, many of whom are adults.¹⁰⁰ The Discussion Paper makes reference to the fact that it may not have been advisable to make a blanket provision to separate trials, as the evidentiary risks may result in the adult accused being able to divert responsibility onto the child and this may increase the risk of instrumentalisation of children to commit crimes with or on behalf of adults.¹⁰¹ The SALRC recommended that a separation of trials should occur in all cases involving children who are co-accused with adults, creating a presumption of separation. However, it was proposed that any person (child, adult or prosecution) may bring an application for joinder of the trials, which application should be argued before the court in which the adult is to be tried prior to the commencement of the trial. It was further proposed that a court may order a joinder of trials where it is shown by the applicant (i.e. a prosecutor or accused's legal representative) on a balance of probabilities that a separation of trials will not be in the interests of justice. This was the approach ultimately adopted in the Report on Juvenile Justice¹⁰² and the SALRC draft Bill and resulted in clause 57 of Bill 49 of 2002.¹⁰³ Its benefit for children used in the commission of crime is that they can be tried in a forum separate to that of a co-accused who used them, possibly allowing them the freedom to disclose to the court that they were used in the commission of crime (the discussion in section 7.7 of Chapter 7 on the Pilot Programme for children used in the commission of crime shows that children are often scared or intimidated and therefore do not reveal they were used or influenced to commit an offence).

¹⁰⁰ Paragraph 8.15 of the Issue Paper, note 85. The SALRC observed that in Canada, the juvenile justice system does not try adults, who are tried in conventional criminal courts, thus creating an obligatory separation of trials. The SALRC noted that the difficulty with this approach was that trials have to be duplicated, and successful prosecution becomes more difficult due to evidentiary problems (one accused can shift blame to the other, who is being tried in another forum). However, the advantage was the maintenance of a completely separate juvenile justice system, and avoidance of "criminal contamination" by adults.

¹⁰¹ Paragraph 10.39 of the Discussion Paper, note 62.

¹⁰² Paragraph 9.10 of the Juvenile Justice Report, note 62.

¹⁰³ For a discussion on separation and joinder in the Bill, see Sloth-Nielsen, p 322-323, note 39.

The following discussion focuses on the procedural mechanisms contained in the Bill that, apart from creating a rights-based approach to all children in conflict with the law, have relevance for children used in the commission of crime as a worst form of child labour as well as constituting measures that can be argued to meet the requirements set in Article 7 of Convention 182. At this stage it should be noted that the Bill was introduced to the South African parliament in 2002, was debated by the Portfolio Committee on Justice and Constitutional Development in 2003 but since parliament went on recess for the 2004 elections, it has not served before the Portfolio Committee again. The parliamentary process of the Bill will be discussed in section 6.4.3 below.

6.4.2.1 Age of criminal capacity

The age of criminal capacity is presently regulated by South African common law. A child below the age of 7 years is irrebuttably presumed to be *doli incapax*, a child between the ages of 7 and 14 years is rebuttably presumed to be *doli incapax* and a child older than 14 years is regarded as having full criminal capacity.¹⁰⁴

The Child Justice Bill proposed raising the minimum age of criminal capacity from 7 years of age to 10 years of age. In terms of clause 5(1) of the Child Justice Bill, a child who, at the time of the alleged commission of the offence, is below the age of 10 years cannot be prosecuted. Clause 5(2) of the Bill stipulated that a child between the ages of 10 and 14 years at the time of the alleged commission of the offence was to be presumed not to have criminal capacity unless it was subsequently proved beyond a reasonable doubt that the child had such capacity at the time of the alleged commission of the offence. Children older than 14 years would continue to have full criminal capacity. Essentially, this means that the *doli capax/ doli incapax* presumptions are retained while it is just the minimum age that has changed. The rationale for this can be found in the SALRC Juvenile Justice Report,¹⁰⁵ where it is reasoned that the presumptions create a

¹⁰⁴ See for instance Snyman CR, *Criminal Law*, 4th Edition, Butterworths: Durban, 2002 p 176 -179 and Burchell J, *Principles of Criminal Law*, 3rd Edition, Juta and Co. Ltd: Cape Town, 2005, p 364-369.

¹⁰⁵ Paragraph 3.10 – 3.11 of the Juvenile Justice Report, note 62.

“protective mantle” to immediately cover children aged 10 years of age to children aged 13 years of age as each child’s level of maturity and development differs.¹⁰⁶

However, recently the decision to set the minimum age at 10 years has been the subject of criticism. In its Concluding Observations on South Africa’s Initial Country Report to the Committee on the Rights of the Child (at the time of writing no further reports from South Africa had been deliberated upon by the Committee due to inordinately late reporting by the country), the Committee noted that South Africa had drafted legislation to increase the legal minimum age for criminal responsibility from 7 to 10 years, yet it remained concerned that a legal minimum age of 10 years was still a relatively low age for criminal responsibility.¹⁰⁷ It has also been said that from a perusal of the many recommendations of the Committee on the Rights of the Child to States Parties it can be seen that in all instances where the minimum age for criminal responsibility was below 12 years of age, the Committee recommended an increase in the age and therefore it can be concluded that the *de facto* acceptable lowest minimum age is 12 years and the Committee favours a minimum age higher than that.¹⁰⁸ In addition, General Comment

¹⁰⁶ The drafting process on age and criminal capacity can be seen in the Issue Paper p 7 – 16, note 85; Chapter 6 of the Discussion Paper, note 62; and Juvenile Justice Report p 21 – 36, note 62. For a full discussion on age and criminal capacity see Sloth-Nielsen, p 393 – 397, note 88 and Sloth-Nielsen, p 117 – 157, note 39. She discusses the fact that at the time of the drafting of the Child Justice Bill, the UN Committee on the Rights of the Child had consistently criticised countries that had a minimum age of criminal capacity of under 10 years of age. This was one of the influencing factors that led the SALRC to set the new age at 10 years. Sloth-Nielsen notes that the other influencing factors were moral, political and practical considerations: the moral debate centered on differing views of children’s culpability versus a belief that children are capable of deliberate evil; the political debate encompassed concerns that if the minimum age was set too high adults would use children to commit offences knowing they would not be held accountable and the practical considerations related to the scarcity of experts on child development in South Africa and the high costs of requiring proper proof of cognitive and conative development in each individual case.

¹⁰⁷ Concluding Observations of the Committee on the Rights of the Child: South Africa. 3/02/2000.CRC/C/15/Add.122, Paragraph 17.

¹⁰⁸ Doek J, ‘Child justice trends and concerns with a reflection on South Africa’, Gallinetti J, Kassan D and Ehlers L (eds), *Child Justice in South Africa: Children’s Rights Under Construction Conference Report*,

No. 10 of the Committee on the Rights of the Child has criticised countries that have two ‘minimum ages’ after the fashion of South Africa’s proposed irrebutable presumption of no criminal liability below 10 years of age and a rebuttable presumption of no criminal liability from 10 years of age to 14 years of age.¹⁰⁹

As far as children used to commit crime is concerned, as alluded to above, there is a danger that a higher minimum age of criminal responsibility would motivate the most unscrupulous criminals to use children under the minimum age as a tool to commit crime, knowing that the children would not be held liable.¹¹⁰ However, a counter-argument could be that criminally-minded adults do not actually care whether the children they use are caught or not, and that the choice of children as an ‘implement’ to commit crime already illustrates their callousness towards children, and is indicative of a reckless disregard for children’s well-being.¹¹¹ That such adults might be concerned whether or

Open Society Foundation for South Africa and the Child Justice Alliance, 2006, p 13. He concludes by stating that the minimum age for criminal responsibility of 10 years as contained in the Child Justice Bill does not meet this standard. Paragraph 16 of the Committee on the Rights of the Child General Comment No. 10 notes that the Committee has recommended that states not set a minimum age of criminal responsibility too low and to increase a low minimum age of criminal responsibility to an internationally acceptable level. It notes that the Committee considers an age below 12 years not to be internationally acceptable and that states ‘are recommended to increase their lower [minimum age of criminal responsibility] to the age of 12 years as the absolute minimum age and to continue to increase it to a higher age level.’

¹⁰⁹ Paragraph 16 of General Comment No. 10 states: ‘[t]he system of two minimum ages is often not only confusing but leaves much to the discretion of the court/judge and may result in discriminatory practices’.

¹¹⁰ This means that under the 1 South African law relating to conspiracy and incitement (discussed in section 7.3.1.1 of Chapter 7) the adult perpetrator will also not be liable because if a child lacks *de jure* criminal accountability, then no ‘crime’ has been committed. It is doubtful whether the new prohibition contained in the Children’s Amendment Bill 19F of 2006 will change this situation, unless a further provision is enacted creating separate liability for the adult regarding the use of the child in the commission of an offence than his or her liability regarding the principal offence.

¹¹¹ This is borne out by some of the findings from a study on the perceptions of children on the use of children in the commission of crime, Frank C and Muntingh L, *Children Used by Adults to Commit Crime (CUBAC): Children’s Perceptions*, ILO, 2005. The authors note that children may be engaged in crime

not a child could be charged with the commission of the offence seems slightly incongruous.

However, the minimum age of criminal capacity also raises some theoretical quandaries regarding children used in the commission of crime. In the case of South Africa, children between 10 years and 14 years are rebuttably presumed to lack criminal capacity. Does this mean that having been used to commit crime may play a role in the determination of whether they had criminal capacity or not, given the wide range of child development factors that come into play with such a question? The reason arises on account of the fact that, for children over 14 years, such influence or use would not, in terms of the law, affect their criminal liability at all.¹¹²

The use of children to commit crime also has implications for general criminal liability. If a child has been threatened or coerced through violence or placed under duress to commit a crime to such an extent that he or she may successfully rely on a justification ground of duress or self-defence - perhaps the most serious form of being used to commit crime - then his or her acquittal removes him or her from the scope of the criminal justice system entirely. This means that all the criminal justice interventions available to children in the system, such as diversion and alternative sentences and their attendant interventions or even referral to children's court proceedings in terms of the Criminal Procedure Act,¹¹³

with very limited risks to the adults involved – there may be remote possibility that a child at some stage might give evidence against the adult in court, but there are no other direct risks for the adult.

¹¹² See Sloth-Nielsen, note 37, p 20 -21 where she argues : '[h]ow logically justifiable is it, in the light of the above legal principle, to ignore the presumption of criminal capacity that commences when a child reaches 14 years of age, and (absent direct coercion) and 'write off' the child's wrongful actions, as it were, because the criminal act was committed with a motive supplied by an adult – for example, a share of the profits, continued access to illegal drugs and so forth. While such an approach may be able to be squared, philosophically speaking, when a child is of tender age and is presumed to lack reason, it is far more difficult to refuse to accord some portion of moral turpitude to a teenager nearing the end of his or her childhood.'

¹¹³ Of course a children's court inquiry can be opened for a child at any stage in terms of the Child Care Act 74 of 1983, but the criminal court magistrate in such an instance cannot use the Criminal Procedure Act,

are no longer available to that particular child. There is no legal mechanism generally available for children who are found not guilty of committing an offence and the likelihood is that children used in the commission of crime, who are arguably extremely vulnerable, are thrown back to the mercy of those who used them in the first place. This, it is argued, is a significant gap in the criminal justice system at present and also could be perpetuated under the Child Justice Bill, as children who have been exploited in the commission of crime and acquitted because of the exploitation, have no avenue of assistance open to them.

6.4.2.2 Preliminary inquiry

The Child Justice Bill creates a wholly new procedure to facilitate the management of children in conflict with the law, namely, the preliminary inquiry.¹¹⁴ This inquiry has a number of objectives, listed in clause 25(3) of the Bill, which include establishing whether a child can be diverted and, if so, identifying a suitable diversion option; determining the release or detention of a child and establishing whether the child should be referred to the Children's Court to be dealt with in terms of the Child Care Act 74 of 1983 (or the Children's Act 38 of 2005 once fully promulgated). The proposed preliminary inquiry has been described as 'a proposal of a mandatory pre-trial inquisitorial investigation, assessment and discussion of the child, the case and the circumstances to see whether diversion was possible and, if so, which specific diversion option the child should undertake; whether release was possible and whether the accused was under 18 years of age'.¹¹⁵

which is the piece of legislation giving him or her jurisdiction in the matter, as the child has been acquitted and no longer falls under the application of that Act.

¹¹⁴ See the Discussion Paper, p 165-192, note 62 and Juvenile Justice Report, p 108-129, note 62. For a detailed discussion of the procedure see Sloth-Nielsen, p 429-435, note 88 and Sloth-Nielsen, p 304-318, note 39.

¹¹⁵ Sloth-Nielsen J, 'Paperweight or powertool: a critical appraisal of the potential of the proposed preliminary inquiry procedure', *Article 40*, Vol. 6, No. 2, 2004 p 3-5.

The inquiry involves a designated inquiry magistrate, the prosecutor, the child and his/her parent or appropriate adult, the probation officer and any other person subpoenaed or requested to attend. The inquiry must take place within 48 hours of the arrest of the child, thereby ensuring that delays are avoided. There is provision for a postponement of the inquiry for a further 48 hours to complete an assessment or obtain further information. A final 48-hour postponement is only permitted if it will enhance the prospects of diversion.¹¹⁶

Although the prosecutor remains *dominus litis*, in terms of clause 25 and 26, it is proposed that the inquiry be chaired by the magistrate. This provision introduces an interesting inquisitorial aspect to the normal accusatorial procedure used in South African courts. The active involvement of the magistrate in the preliminary inquiry elicited criticism during the consultations undertaken by the SALRC; however, the Commission concluded that the magistrate is the most appropriate person to chair the inquiry as prosecutors are generally not experienced in conducting inquiries and the procedure involves the making of decisions specific to judicial officers.¹¹⁷

While benefiting children in conflict with the law generally, this procedure would be an ideal mechanism through which the use of a child in the commission of crime can be discussed and decisions made regarding further action for a child victim of such

¹¹⁶ The SALRC noted that there were concerns that matters cannot be dealt with in these time periods, but was of the view that the time restrictions will place an onus on the role-players to ensure that the due process requirements of section 35 of the Constitution are satisfied. Furthermore, where it is clear that the matter is complicated and cannot be resolved within the stipulated time periods, then the inquiry can be closed and the matter can proceed in the normal course (par. 8.40 of the Juvenile Justice Report, note 62).

¹¹⁷ Paragraph 8.30 of the Juvenile Justice Report, note 62. A further concern that has been noted relates to the fact that a magistrate who convenes a preliminary inquiry might have compromised his or her impartiality by hearing certain information before the institution of charges and would then be precluded from presiding over the subsequent trial in that matter. However, after consulting widely on this issue, the SALRC concluded that the inquiry magistrate would only have to recuse himself or herself if he or she had indeed heard information prejudicial to the impartial determination of the case, and that this would not be a regular occurrence (paragraph 8.27 of the Juvenile Justice Report, note 62).

exploitation. This criminal justice process was designed as a result of the provisions in Article 40 of the UNCRC requiring states to design separate laws and procedures for children in conflict with the law. It is submitted that this is another example of how the broad measures envisaged by Convention 182 to provide direct assistance to victims of worst forms of child labour can find resonance in specific and targeted measures devised by child justice practitioners and policy-makers to give effect to the need to adopt an individualised approach to child offenders.

6.4.2.3 Assessment

Assessment services in South Africa were pioneered by the provincial Western Cape Department of Social Services in 1994, but were substantially enhanced through the work of the IMC, which ensured that assessment services were based on the concept of developmental assessment, focusing on the child's strengths and abilities rather than only the circumstances of the offence and history of the child's family.¹¹⁸ It is submitted that these services too, are crucial for children used in the commission of crime as a worst form of child labour, as it is through assessment that it is possible to identify that the child has been a victim of instrumental use in the commission of an offence, identify interventions, if necessary, and recommend diversion, where appropriate. As a mechanism to give effect to the obligations required in Article 7 of Convention 182, assessment is therefore eminently suitable.

Assessment has been assimilated into South African law through the Probation Services Amendment Act 35 of 2002,¹¹⁹ which defines it as 'a process of developmental assessment or evaluation of a person, the family circumstances of the person, the nature

¹¹⁸ Sloth Nielsen, p 218-221, note 39, and Sloth-Nielsen, p 19, note 82. She notes that with this as a foundation, the provincial departments of social development started appointing staff, including probation officers, to undertake pre-trial investigations required for the assessment phase to have benefit for children accused of committing crime and although these benefits mainly related to more informed decisions about pre-trial detention or release, diversion decisions were also furthered through the intervention of social workers performing this task.

¹¹⁹ This amended the principal Act, namely the Probation Services Act 116 of 1991.

and circumstances surrounding the alleged commission of an offence, its impact upon the victim, the attitude of the alleged offender in relation to the offence and any other relevant factor'.¹²⁰ In addition, section 4(1) of the principal Act was amended to ensure that the duty of performing assessments and the related issue of reception of accused persons and their referral form part of the core mandate of probation services.¹²¹ However, the department responsible for the implementation of this law is the Department of Social Development and hence, the Act is considered a social development sectoral law as opposed to a criminal justice law. It is not binding on courts and criminal justice role-players, besides probation officers, are not enjoined to implement its provisions. Therefore, until assessment is identified as a core component of criminal justice practice through a legislative framework that requires criminal justice role-players, such as magistrates and prosecutors, to consider and apply it, it remains arguably on the fringe of the child justice legal system (although entrenched in practice). In addition, the Probation Services Amendment Act is also not child-centred; on the face of it, it applies equally to adults and children and therefore the assessment of children still needs a 'home' in South African criminal justice legislation.

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Therefore, it is contended that although assessment and diversion services have developed into standard child justice practice and are generally regarded as crucial components of a child justice system, thereby also adding value to interventions with children used in the commission of crime, they are not part of South African domestic criminal procedural law. It is precisely lacunae of this nature that the Child Justice Bill is intended to address.

¹²⁰ Section 1.

¹²¹ Kassan explains that probation officers are generally social workers appointed specifically to render probation services and in fulfilling their duties they take on various roles including investigators, supervisors, crime 'preventers' and planners and implementers of programmes as well as conveners and mediators in restorative justice initiatives, Kassan D, 'Probation Officers as Roleplayers', in Sloth-Nielsen J and Gallinetti J (eds), *Child Justice in Africa: A Guide to Good Practice*, Community Centre, 2004, p 130-131. See also Martin G, *Juvenile Justice: Process and Systems*, Sage Publications: Thousand Oaks, London, New Dehli, 2005, p 263 for a brief discussion of the origins of probation.

In terms of clause 19 of the Child Justice Bill 49 of 2002, a probation officer who receives a notification from a police official that a child has been arrested, served with a summons or issued with a written notice must assess the child before the child appears at the preliminary inquiry. An assessment is conducted by a probation officer and it is intended to serve a number of purposes, namely, estimating the age of a child, establishing the prospects for diversion, establishing whether a child is a child in need of care, making recommendations relating to the release or detention of a child and determining steps to be taken in relation to children below 10 years of age.¹²² The result of the assessment is a set of recommendations submitted to the preliminary inquiry magistrate regarding the abovementioned issues. This procedure will be invaluable in determining which children can be dealt with outside of the criminal justice system either through diversion or by referral to the children's court procedure, and then ensuring that they realise that opportunity.¹²³

It must be born in mind that the assessment procedure in terms of the Child Justice Bill forms part of an integrated system designed for the efficient management of the cases of children who come into conflict with the law. The assessment procedure will play a crucial role to ensure that the benefits of diversion and the preliminary inquiry procedure are achieved. This will be accomplished by evaluating the child, his/her family life and the circumstances surrounding the commission of the offence in order to produce a report containing motivated recommendations on how the matter should proceed. In the absence of criminal justice legislation that entrenches the practice of assessment in criminal procedure, South African courts have made clear pronouncements calling for legislative reform to include standard assessment procedures.¹²⁴

¹²² Clause 23(7).

¹²³ For a general discussion of assessment see Sloth Nielsen, p 411 – 417, note 88, and Sloth-Nielsen, p 218 – 241, note 39. See also the Issue Paper, paragraph 6.18 and paragraph 7.13(c), note 85; Discussion Paper, p 136 – 164, note 62; and Juvenile Justice Report p 77 – 91, note 62.

¹²⁴ In *S v J and others* 2002 (2) SACR 312 (C), Van Heerden J (as she then was) found the 'developmental assessment process' to be unnecessarily complex stating: '[t]o my mind, this highlights the importance of legislation clarifying the approach to the assessment of young people in conflict with the law, as also the proper training of probation officers in this regard.' See also Skelton A, 'A decade of case law in child

As noted previously, this procedure will play a vital role in ensuring that children in the commission of crime as a worst form of child labour benefit from the direct assistance and services that are envisaged in Article 7 of Convention 182. While Convention 182 has had no impact on the drafting of the Child Justice Bill nor upon the assimilation of assessment services into South African child justice practice, the outcomes of assessment mirror the outcomes intended by Article 7. This, however, is no chance result. The measures intended by Article 7 are general in nature and apply to all situations of children in special need and at risk; likewise, the provisions in the Child Justice Bill apropos children in conflict with the law generally in order to ensure that it is as comprehensive as possible.

6.4.2.4 Diversion

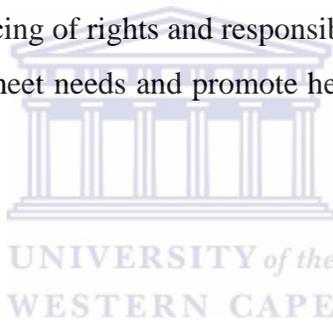
One example of a particularly innovative initiative to bring about change in the criminal justice system as it pertains to children was the introduction of diversion programmes. As far as the effectiveness of managing juvenile offenders is concerned, it has been said that a purely punitive approach discounts advances made in the area of treatment.¹²⁵ According to Lipsey, 'it is no longer constructive for researchers, practitioners, and policy makers to argue about whether delinquency treatment and rehabilitative approaches work. As a generality, treatment clearly works. We must get on with the

justice' Gallinetti J, Kassan D and Ehlers L (eds), *Child Justice in South Africa: Children's Rights Under Construction Conference Report*, Open Society Foundation for South Africa and the Child Justice Alliance, 2006, p 65 – 75 for a discussion on how South African courts have taken up the challenge of creating a wealth of child -rights oriented legal precedents in the absence of legislation, which she argues, goes a long way towards bringing South African law into compliance with the UNCRC.

¹²⁵ Kempf-Leonard K and Tracy PE, 'The Gender Effect among Serious, Violent and Chronic Juvenile Offenders', in Muraskin R (ed), *It's a Crime*, Prentice Hall: New Jersey, 2000, p 472

business of developing and identifying the treatment models that will be most effective and providing them to the juveniles that will benefit'.¹²⁶

The introduction of diversion services in South Africa was pioneered by the National Institute for Crime Prevention and the Rehabilitation of Offenders (NICRO).¹²⁷ NICRO has been widely regarded as the leader of diversion programmes in South Africa and by 1993 it was offering three diversion programmes for children in conflict with the law. Its four most widely used diversion options for children in conflict with the law are the Youth Empowerment Scheme (YES programme), pre-trial community service, the Journey programme and family group conferencing. Diversion involves the referral of cases, where there exists a suitable amount of evidence to prosecute, away from the formal criminal court procedures and it can be closely linked to the concept of restorative justice, which involves a balancing of rights and responsibilities and the purpose of which is to identify responsibilities, meet needs and promote healing.¹²⁸ Over the years a range



¹²⁶ Lipsey M, 'Juvenile delinquency treatment: A meta-analytic inquiry in the variability of effects', in Cook TA, Cooper H, Cordray DS, Hartman H, Hedges LV, Light RJ, Louis TA and Mosleller F (eds), *Serious and Violent Juvenile Offenders*, Sage Publications: Thousand Oaks, 1992, p 85

¹²⁷ Sloth-Nielsen, p 471, note 63.

¹²⁸ On diversion in South Africa, see generally Shapiro R, 'Diversion from the criminal justice system and appropriate sentencing for the youth', in Glanz L (ed), *Preventing Juvenile Offending in South Africa: Workshop proceedings*, Human Sciences Research Council: Pretoria, 1994, p 89-95; Muntingh L, (ed) *Perspectives on Diversion*, NICRO National Office, Cape Town, 1995; Skelton A, 'Juvenile Justice Reform: Children's Rights and Responsibilities versus Crime Control', in Davel CJ (ed), *Children's Rights in Transitional Society*, Protea Book House: Menlopark, 1999, p 88 - 106. On restorative justice in South Africa, see Skelton, note 39 above, Skelton A and Batley M, *Charting progress, mapping the future: restorative justice in South Africa*, Restorative Justice Centre and Institute for Security Studies, 2006; Gallinetti J, Redpath J and Sloth-Nielsen J, 'Race, Class and Restorative Justice in South Africa: Achilles Heel, Glass Ceiling or Crowning Glory', *South African Journal of Criminal Justice*, Vol. 17, No. 1, 2004, p 17 - 42 and Tshehla B, 'The restorative justice bug bites the South African criminal justice system', *South African Journal of Criminal Justice*, Vol. 17, No. 1, 2004, p 1 - 16.

of other diversion programmes have developed and different service providers offer diversion programmes in various areas of South Africa.¹²⁹

By 2007, diversion had clearly established itself as a feature of the criminal justice system in South Africa. The South African National Prosecuting Authority has developed policies on diversion and as part of its restorative justice programme promotes the use of diversion where it is appropriate.¹³⁰ In addition the Probation Service Act 116 of 1991 as

¹²⁹ For a discussion of other diversion services that have emerged since the early 1990's see, amongst others, Wood, note 66; Steyn; note 66; Modiboa E, 'Phone Ellen', *Article 40*, Vol. 4, No. 2, 2002, p 4-5; Dissel A, 'Following the Morning Star: an integrated young offender programme', *Article 40*, Vol. 6, No. 4, 2004, p 10-11; Fivaz E, 'New project brings hope', *Article 40*, Vol. 7, No. 2, 2005, p 4; Botha R, 'National Youth Development Outreach: Providing innovation intervention', *Article 40*, Vol. 8, No. 3, 2006, p 1-3 and Pinnock D and Naidoo T, 'Restoring self respect through rituals in wild places', *Article 40*, Vol. 8, No. 3, 2006, p 18-19. In addition the following websites offer information on diversion services: www.rjc.co.za and www.khulisaservices.co.za, accessed on 17 November 2007.

¹³⁰ For a discussion on the National Prosecuting Authority's approach to diversion see Tserere M, 'Development of Diversion within the National Prosecuting Authority' in Gallinetti J, Kassan D and Ehlers L (eds), *Child Justice in South Africa: Children's Rights Under Construction Conference Report*, Open Society Foundation for South Africa and the Child Justice Alliance, 2006, p 37-46. The author notes between July 1999 and December 2005, the National Prosecuting Authority had diverted 115 582 matters. However, a major shortcoming of the data collected was that it did not indicate the nature of the matters diverted nor whether the accused was an adult or a child and therefore it is impossible to know for certain how many children have been diverted over the last few years, although the policy has leaned towards diverting children so it is likely that the majority of the diversions are for cases involving children. Likewise there is no central register for cases referred to diversion programmes. A study in 2001 revealed that NICRO diverted a total of 56 248 persons through its programmes from 1996 to 2001, see Muntingh L (ed) *Children in conflict with the law: A compendium of child justice statistics 1995-2001*, *Child Justice Alliance*, 2001 available at www.childjustice.org.za. In addition, a recent study has indicated that the period April 2005 to March 2006 a total of 21 975 diversion cases were referred to NICRO, but again there is no differentiation between adults and children, see Muntingh, L, *A Quantitative Overview of Children in the Criminal Justice System*, Child Justice Alliance, 2007. It is clear from all these figures that there is a pressing need for proper statistics on diversion, disaggregated by age, gender and so forth, to be kept. From the perspective of Convention 182, the need for proper data on children in the criminal justice system, especially those who have been used in the commission of crime, is critical considering the obligation on states, set out in Article 5, to establish or designate appropriate mechanisms to monitor the implementation

amended by Act 35 of 2002, clearly allows for restorative justice practices to be recommended by probation officers who assess children in trouble with the law (although because this is not a criminal justice law, it does not bind the criminal courts to use restorative justice practices).¹³¹

One can clearly see the benefits of diversion for children who have been used in the commission of crime. The crucial function played by diversion services for children used in the commission of crime has been acknowledged by the CLPA, both in the 2003 version and CLPA 2, through the inclusion of an 'action step' requiring that the diversion of children used in the commission of crime must be considered where appropriate.

The concept of diversion has received judicial approval in South African law, for example, in *S v Z en Vier Ander Sake* 1999 (1) SACR 427 (ECD) the Court laid down a general guideline that as a starting point, as opposed to proceeding with a prosecution, a Court should enquire whether a child accused should be enrolled in a diversion programme if this is appropriate in the circumstances.¹³²

Diversion occurs in South Africa based on the common law principle that a prosecutor is *dominus litis* and has the discretion to prosecute or not to prosecute a particular matter, and therefore can decide whether a child can be diverted instead of being prosecuted.¹³³ This discretion is guided by policy developed by the National Prosecuting Authority in

of the provisions of the Convention. In this regard see the work done by UNICEF and the United Nations Office on Drugs and Crime in the development of indicators for measuring the effectiveness of juvenile justice systems: *Manual for the Measurement of juvenile justice indicators*, United Nations Office on Drugs and Crime and United Nations Children's Fund: Vienna and New York, 2006.

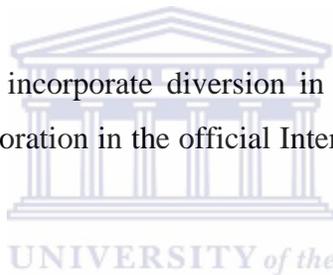
¹³¹ For example, section 1 of the Act provides definitions of diversion, diversion programmes, family group conferencing and restorative justice.

¹³² For a detailed discussion of this case see Madotyeni Z, 'Setting sentencing standards', *Article 40*, Vol. 1, No. 2, 1999 as well as Skelton, p 67 and 72, note 124, and Sloth-Nielsen, p 23-20, note 79.

¹³³ Prosecutorial discretion is provided for in section 179 (2) of the Constitution and section 20(1) of the National Prosecuting Authority Act 32 of 1998, which seeks to give effect to section 179 of the Constitution.

relation to diversion, but diversion does not have a framework established in law that provides legal certainty regarding its application. Until this occurs, interventions in the form of diversion services remain subject to non-binding policy and the absence of legal provisions regulating the provision of diversion services has given rise to the unequal and indiscriminate use of diversion in South African courts.¹³⁴ General Comment No. 10 makes it quite clear that diversion should be provided for in law. So too, Article 7 (2)(b) of Convention 182, although broader and not specifically aimed at children in conflict with the law, would require measures aimed at removing children from situations constituting worst forms of child labour and rehabilitating and reintegrating them into society. Although Convention 182 is vague as to what these measures might constitute, they can, in the context of criminal law, be compared with diversion in the context of children used in the commission of crime.

In South Africa, the move to incorporate diversion in the new child justice law was primarily initiated by its incorporation in the official Interim Policy Recommendations of the IMC.¹³⁵



The Child Justice Bill 49 of 2002 originally proposed various forms of diversion in a three-tiered structure, with level one options being the least onerous and level three the

¹³⁴ See, for example, *S v D* 1997 (2) SACR 673, where four children were arrested for possession of dagga, and pleaded guilty within a couple of hours of their arrest. The matter was taken on review on the basis that an almost identical matter at the same court had been diverted a few weeks prior to this one. Although the Court found that diversion was regularly being used in the province in question for this type of offence, the court stuck to the view that the prosecutor was *dominus litis*, and that he therefore had the right to proceed with criminal charges. In *M v The Senior Public Prosecutor, Randburg and Another* (unreported, case no. 3284/2000, Witwatersrand Local Division) a decision to prosecute a girl on a shoplifting charge was taken on review when her co-accused was diverted. The Court examined the exercise of prosecutorial discretion and found that there was no evidence that the prosecutor had applied his or her mind to the possibility of diversion (“not to prosecute”), and in the absence of such evidence, the Court found that discretion had not been properly exercised. See also Skelton, p 72-73, note 124.

¹³⁵ Inter-Ministerial Committee on Young People at Risk, *Interim Recommendations on the Transformation of the Child and Youth Care System*, Department of Welfare and Population Development 1996, p 40-47.

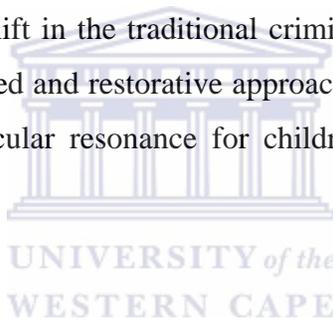
most onerous.¹³⁶ Importantly, clause 44 provided that a child could be considered for diversion if he or she, amongst others, voluntarily acknowledges responsibility for the offence, understands his or her right to remain silent and has not been unduly influenced to acknowledge responsibility and there is sufficient evidence to prosecute. Notably, there was no restriction on diversion based on the nature of the offence, therefore diversion would have been an option even in very serious matters, and a decision would have been made whether diversion was appropriate on a case to case basis, rather than excluding the possibility completely in any instance. Again, as diversion is intended to meet the individual needs of a child and as diversion services are not as readily available in rural areas as they are in urban areas, clause 39(3) of the Bill allowed the inquiry magistrate to develop an individual diversion option which meets the purposes of and standards applicable to diversion in the Bill. This last-mentioned provision allowed for flexibility and the utilisation of existing community resources where formal diversion programmes are lacking.

As diversion will be used as a means of referring children away from the formal criminal justice system it is of great importance that diversion is properly regulated, as there will be an expectation from the justice system as well as society that the diversion options are an alternative to prosecution that hold children properly accountable for their actions. Consequently, clause 45 of the Bill set out certain criteria and minimum standards applicable to diversion programmes to ensure due process protections, the avoidance of harmful or exploitative practices and the inclusion of restorative justice elements, as well

¹³⁶ See generally clause 47 of the Bill which provides that level one diversion options include, for instance, the issue of a verbal or written apology, the issue of a positive peer association order and the issue of a compulsory school attendance order; level two diversion options include compulsory attendance at a specified centre or place or a specified vocational or educational purpose, community service and referral to appear at a family group conference or a victim-offender mediation; and finally level three diversion options apply to children over the age of 14 years in cases where a court upon conviction of the child for the offence in question is likely to impose a sentence of imprisonment for a period not exceeding six months, and include referral to a programme which does not exceed six months and which has a residential element. This structure was not favourably received by the Portfolio Committee on Justice and Constitutional Development during the parliamentary debates on the Bill, see section 6.4.3.2.

as ensuring the development of the child's understanding of the impact of his or her behaviour on others. The clause also allowed for minimum standards to be drafted in regulations to the Bill once enacted.¹³⁷

The significance of diversion and the important role it can play in assisting child victims of exploitation was recognised by the drafters of the South African Child Labour Programme of Action when they included the need to consider diversion for children used to commit crime as an action step in both the 2003 version and CLPA 2. This signals a formal acknowledgement by the Department of Labour (and other departments that have committed themselves to action under the CLPA) of the interface between the child justice system and the issue of children used to commit crime as a worst form of child labour. The provision of a legal framework for diversion in the Child Justice Bill marks an important mindset-shift in the traditional criminal justice system away from a punitive to a more individualised and restorative approach. Its benefits are immeasurable and its import will find particular resonance for children used in the commission of crime.



6.4.2.5 Sentencing

The Criminal Procedure Act contains a wide range of sentencing options to be used in matters pertaining to children. As noted above, these options provide for alternative sentences and have been put to good use in this regard.¹³⁸ However, the SALRC decided

¹³⁷ The process of drafting minimum standards has been completed even though the Bill is not enacted. It was an initiative of the Department of Social Development and at time of writing, the minimum standards had not yet been launched by the Department but had been by NICRO. A copy is on file with the author. See also Muntingh L and Ehlers L, 'The development of minimum standards for diversion programmes', in Gallinetti J, Kassan D and Ehlers L (eds), *Child Justice in South Africa: Children's Rights Under Construction Conference Report*, Open Society Foundation for South Africa and the Child Justice Alliance, 2006 p 51-64 as well as Muntingh L, 'Minimum standards for diversion programmes', *Article 40*, Vol. 7, No. 4, 2005, p 4-6.

¹³⁸ See for instance *DPP Kwa-Zulu Natal v P*, discussed in note 74 above, where the Court fashioned a sentence that was detailed and comprehensive, (and quite harsh given its myriad of components), linked to

to re-appraise the sentencing of child offenders as it recognised the impact of the concept of restorative justice on the criminal justice system, the effect of our Constitution on the traditional aims of punishment and the shift in the international approach to the sentencing of children from rehabilitation to reintegration into society.¹³⁹ The Child Justice Bill therefore attempts to supplement the existing sentencing scheme in the Criminal Procedure Act, by firstly confirming the standards contained in the UNCRC regarding, for instance, life imprisonment,¹⁴⁰ and secondly by explicitly injecting a restorative justice element into the sentencing framework for children.

Even in the structure of the Bill it is evident that the Child Justice Bill was constructed in such a way as to encourage the use of alternative sentences and allow for the imprisonment of children as a last resort and for the shortest period of time. The Bill first provided for community-based sentences, then restorative sentences followed by correctional supervision, and then only and sentences with a residential or custodial component, including imprisonment. The community-based sentences involve being placed under a supervision or guidance order which may also include specialised interventions, counseling and therapy,¹⁴¹ while the restorative justice sentences formally introduce family group conferences and victim offender mediation into the sentencing arena.¹⁴² The Bill also contains restrictions on imprisonment as a sentence in that it

a suspended sentence of imprisonment. By suspending the sentence and requiring house arrest, attendance of a NICRO programme, community service and therapy, amongst others, the court was acknowledging, on one hand, the seriousness of the offence, but allowing for a disposition of the matter in a way that avoided a custodial sentence.

¹³⁹ Paragraph 10.1 of the Juvenile Justice Report, note 62. See generally the Issue paper, p 50 – 63, note 85; Discussion Paper, p 214 – 254, note 62; and the Juvenile Justice Report, p 150-174, note 62. For a commentary on the proposals and the Bill, see Sloth-Nielsen, p 446-456, note 88; Sloth-Nielsen, p 364-415, note 39 and generally, Skelton, p 63 – 82, note 39 for a description of the shift from a punitive approach to offending to a more restorative one.

¹⁴⁰ Clause 72(1) prohibits the imposition of life imprisonment without parole as a sentence.

¹⁴¹ Clause 64.

¹⁴² Clause 65.

prohibits the imposition of a sentence of imprisonment on a child younger than 14 years of age.¹⁴³

In sum, the sentencing framework proposed in the Child Justice Bill encompassed an individualised approach to sentencing clearly supporting the notion that the best interests of the child are a paramount consideration in sentencing and that imprisonment should be as a last resort. But it also went further by providing sentencing options steeped in restorative justice and aimed at ensuring that children are reintegrated back in their communities. This carefully considered framework is obviously eminently suitable for children used in the commission of crime as it provides appropriate options for children who require direct assistance and social reintegration as required by Article 7 of Convention 182.

Of further significance to children in conflict with the law, including those used in the commission of offences is the requirement, in clause 62, that a pre-sentence report, compiled by a probation officer, must be submitted to court prior to a child being sentenced. As with assessment, this is a valuable tool to determine the needs of a child in relation to what would be the most suitable and appropriate sentence given his or her circumstances, best interests as well as the circumstances of the offence and interests of society. The importance of such report has been evidenced by consistent findings by South African courts that a presiding officer should require a pre-sentence report before sentencing a child to imprisonment (even if the sentence is a suspended period of imprisonment).¹⁴⁴

¹⁴³ Clause 69.

¹⁴⁴ See for instance, *Petersen and another v S* 2001 (2) All SA 349 (A); *S v Buys en 'n ander* 2002 (JOL) 9662 (C); *S v Lugwali and another* 2001 (JOL) 7696 (Ck); *S v Mabala and another* 1999 (JOL) 5111 (T); *S v Tafeni and another* 2001 (JOL) 8251 (Tk); *S v Masibi* 2005 (JOL) 15159 (T); *S v Bhoqwana and another* 2004 (JOL) 12833 (Tk), *S v S* 2001 (2) SACR 321 TPD; *S v Van Rooyen* (unreported Cape High Court decision, 5413/01); *R v B* (unreported Cape High Court decision, 0982/02). For a discussion of these and other cases, see Skelton, p 66-68, note 124. See also, Sloth-Nielsen J, 'Children's rights in the South African Courts: An overview since ratification of the UN Convention on the Rights of the Child' *The International Journal of Children's Rights*, Vol. 10, No 2, 2002, p 31 for a discussion of the issue.

To summarise, the Child Justice Bill is a preeminent example of legislation, much emulated on the African continent,¹⁴⁵ that gives not only effect to the rights contained in the UNCRC, but in a carefully considered and practical way envisages a legal system which is child-centred, individualised and yet respectful of the interests of society and the rule of law. It creates a balance between the need for a criminal justice system and the inherent rights of children to be treated separately, while acknowledging their special needs. The fact that this system is so carefully crafted to meet the needs of all children in conflict with the law, necessarily means that children used in the commission of crime will benefit from it as well. Indeed, the measures and interventions contained in the Bill are complementary to those envisaged in Convention 182 for victims of worst forms of child labour, but it is notable, that they form part of a system not initially influenced by the Convention at all.



6.4.3 A changing Child Justice Bill

The carefully crafted Child Justice Bill of the SALRC is, however, continually evolving, and unfortunately, as will be shown below, not in a positive way.

6.4.3.1 The Child Justice Bill as tabled in parliament

The SALRC handed its Juvenile Justice Report and draft Child Justice Bill to the Department of Justice in 2000. Thereafter, the Child Justice Bill was introduced into Parliament in August 2002 as Bill 49 of 2002. However, what is important to note is that the Bill was no longer in the form that was originally released by the SALRC.¹⁴⁶ But, although the Bill had changed in respect of certain details, the substance essentially

¹⁴⁵ See for example, the law reform processes and resultant draft laws in Swaziland, Somaliland, Lesotho and the finalised legislation of Nigeria and the Gambia.

¹⁴⁶ For a detailed discussion of the changes see Gallinetti J, *Submission on the Child Justice Bill*, Child Justice Alliance, 2002 available on www.childjustice.org.za, accessed on 25 October 2007; and Gallinetti, p 7-12, note 89.

remained the same. While the Department of Justice had effected various amendments, the essential core elements of the Bill, namely assessment, diversion, the preliminary inquiry and alternative sentences remained.¹⁴⁷

The changes that were effected made the reading of the Bill somewhat more difficult and laborious and some of the definitions and explanations that the SALRC had included in the original Bill had been removed or altered. While most of the changes were cosmetic and not substantive, it was still unsettling that the Bill now was possibly more difficult to comprehend as a whole.

An important change to the Bill had direct consequences for children used in the commission of offences. Clause 117(3) of the SALRC draft Bill had created a statutory offence for any adult who ‘incites, persuades, induces or encourages’ a child to commit an offence. However, once it had been tabled before parliament, clause 84 (3) of Bill 49 of 2002 read:

[a]ny court convicting an adult of inciting, conspiring with or being an accomplice of a child in the commission of a crime or an offence must regard the fact of the child’s involvement as an aggravating factor in sentencing the adult concerned.’

The effect of this change was to remove the substantive offence and instead merely make the use of a child in the commission of an offence through a conviction for conspiracy or incitement an aggravating circumstance in sentencing. Although no explicit reason was given for the change, it is evident that the Department of Justice’s legal advisors were of the opinion that the common law offences of incitement, conspiracy or accomplice were sufficient to cover situations where children were used in the commission of an offence and thought it superfluous to create an additional offence. However, I would argue that the utilisation of the existing criminal law offences does not give full recognition to the

¹⁴⁷ Unfortunately, the contents of a chapter on monitoring child justice were removed, and the Bill now provided that monitoring would be included in the regulations to the Bill, once passed.

phenomenon of the instrumental use of children and that a separate offence is indeed needed. The reason for this is that the offences of incitement and conspiracy do not easily indicate the true nature of the instrumental use of children in the commission of crime, namely, the exploitation of children. In addition, if a child is below the minimum age of criminal liability this would allow the perpetrator to escape liability (see the discussion in section 7.3.1.1 of Chapter 7), whereas a specific offence would allow the adult to be found guilty of the use of a child, separate from the principal offence committed by the child.

It is perhaps here that Convention 182 has had the most impact, through the fact that it requires specific offences to be created to criminalise the various worst forms of child labour. The influence has already been seen in the fact that CLPA 2 calls for a separate offence and the Children's Amendment Bill 19F of 2006 has created a separate offence for the use of children in the commission of crime as discussed in section 5.3.3.1 of Chapter 5.

Thus, while the child justice reforms initiated the move to criminalise the use of children in the commission of crime, this has reached fruition through a parallel law reform process, and one which seems to have been influenced more readily by Convention 182 if one has regard to the similarities between the wording of the offence in clause 141 of the Children's Amendment Bill 19F of 2006 and the wording of Article 3 of Convention 182.

6.4.3.2 The parliamentary debates

In 2003 the Portfolio Committee on Justice and Constitutional Development held public hearings and was briefed by government departments and civil society on Bill 49 of 2002. During the debates that took place before the Portfolio Committee in 2003, the contents of the Bill were discussed and proposals were made to change various aspects of the Bill. Although the ethos of the Bill remained the same in that the processes of assessment, diversion, the preliminary inquiry and alternative sentencing remained intact,

the overall child rights nature of the Bill that focused on the individual child offender was whittled away by the Portfolio Committee.¹⁴⁸

The result was that at the end of 2003, the Bill was not yet finalised but was far more punitive in nature and did not allow for many of its provisions to apply to children charged with serious scheduled offences. One example of the new nature of the Bill is that it would appear that the benefits of diversion, which were potentially available to all children charged with any crime under Bill 49 of 2002, were now only available to children charged with less serious and petty crimes¹⁴⁹. Likewise, children charged with serious offences would not be assessed by a probation officer and would not appear before a preliminary inquiry – processes that were put in place in order to manage a range of issues from age determination, to placement of the child in order to ensure the child is detained as a matter of last resort and for the shortest possible period of time.

The implications of these changes for children used in the commission of crime are as dire as for children in conflict with the law generally. Children who are used, for instance as assassins or to commit armed robberies,¹⁵⁰ will no longer benefit from the procedures put in place by the original Child Justice Bill or the practice that has emerged in the absence of legislation

¹⁴⁸ While no new official version of the Bill exists, the author was present at all of the Portfolio Committee debates and kept personal notes of the changes to the Bill. For other discussions on the potential changes to the Bill as debated in parliament see Skelton, p 453-470, note 39; Ehlers, p 6-14, note 92; and Skelton, p 71-76, note 64.

¹⁴⁹ In addition the Justice Portfolio Committee proposed that the three-tier structure for diversion, proposed by the SALRC, be replaced with a two-tier structure and that the periods for diversion programmes where a court upon conviction of the child for the offence in question would be likely to impose a sentence of imprisonment, be increased substantially, for example, to four years for a programme with a residential component. These changes, however, are not yet final.

¹⁵⁰ Chapter 7 discusses the various offences for which children are used in the commission of crime and this includes murder and armed robbery. See section 7.4.5 on children in armed violence; section 7.4.3 on the studies on children's perceptions on their use by adults in the commission of crime; and section 7.7, which discusses the matter of *S v Mfazwe and 4 others*.

In addition, the possible new punitive nature of the Bill can also be seen by the probable retrogressive step of allowing children under the age of 14 years to be held in prison awaiting trial if charged with serious scheduled offences and if there are no alternative facilities within a reasonable distance from court. Section 29 of the Correctional Services Act of 1959 (the only section of that legislation not repealed by the new Correctional Services Act 111 of 1998) provides that only children above the age of 14 years may be kept in prison awaiting trial, irrespective of the offence for which they are charged. Should the Portfolio Committee persist in its proposed amendments for the Bill, it will bring our new and emerging child justice system perilously close to systems that treat serious child offenders in the same manner as adults. Thus there may well be a reversal of the individualised approach adopted by child law reformers to a stricter law enforcement or 'tough on crime' approach, a criminal justice technique denounced by the UN Committee on the Rights of the Child.¹⁵¹ It is argued that an overall punitive approach, especially towards child offenders, is not desirable except in necessary cases, where the circumstances of the offender and offence are such that imprisonment as a sentence is the only resort for a sentencing court. I would argue that most child rights and child justice scholars would argue that a restorative justice approach to child offenders is preferable and should be prioritised.¹⁵²

¹⁵¹ Doek J "Child justice trends and concerns with a reflection on South Africa", in Gallinetti J, Kassan D and Ehlers L (eds), *Child Justice in South Africa: Children's Rights Under Construction Conference Report*, Open Society Foundation for South Africa and the Child Justice Alliance, 2006, p 12. See also Paragraph 32 of General Comment No. 10 where the Committee on the Rights of the Child calls for a rights based approach to the social problem of 'juvenile delinquency' rather than a 'tougher approach' signaled by laws such as 'three strikes and you're out' rule and the 'zero tolerance' approach to crime. See also Waller I, 'Invest Now in Kids or Pay Later for the Last Resort: Misspent Youth, Crime and Kids Behind Bars', in Meuwese S, Detrick S and Jansen S (eds), *100 Years of Child Protection*, Wolf Legal Publishers: The Netherlands, 2007, p 253-245, where the author discusses deterrence measures which are 'tough on crime' as an example of what not to do in relation to children at risk.

¹⁵² In November 2007 the South African Cabinet of Ministers approved the re-tabling of the Child Justice Bill. However, at time of writing no new official version of the Bill was available and so it remains to be seen whether these changes are included in a new version of the Bill or will eventually be enacted. For a report on the approval of the Bill see Mkhwanazi S, 'Child Bill Approved: Juveniles to get new deal', *The Daily News*, 23 November 2007.

Skelton suggests that the debate on the Child Justice Bill in parliament has resulted in the emergence of certain trends toward law-making in the criminal justice sphere.¹⁵³ First, she argues that, apart from taking a ‘tough on crime’ approach, the move to propose pre-trial incarceration of children under 14 years of age in prisons illustrates a policy decision by the law-makers to focus on practical issues such as budgeting and implementation.¹⁵⁴ The reason she provides is that politicians fear that there will not be sufficient appropriate alternative secure facilities to accommodate such children. Second, she notes the Portfolio Committee’s tendency to emphasise tight regulation rather than looser discretion. The debates in parliament at the time illustrated that the law-makers did not want to leave decisions solely in the hands of prosecutors and magistrates. An example of this can be seen from the move to limit the possibility of diversion to certain cases and exclude diversion, for example, in the case of murder or armed robbery.¹⁵⁵ Finally, she refers to the Justice Portfolio Committee’s tendency to focus on the exceptional cases and shape the law to cater for the extra-ordinary. She cites the fact that numerous hypothetical examples have been raised by politicians to justify taking a more punitive approach towards children, even to the extent that the circumstances of the Jamie Bulger case in England was raised by a Committee member to advocate for ensuring that imprisonment remain a sentencing option for young children, in the face of proposals in the original Bill that had prohibited the imposition of imprisonment on children under 14 years of age.

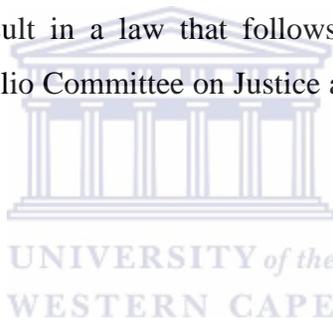
¹⁵³ Skelton, p 453-470, note 39 and Skelton, p 71-76, note 64.

¹⁵⁴ See generally Sloth-Nielsen, note 87 above

¹⁵⁵ Skelton uses various examples to motivate her argument that regulation is trumping discretion. She refers to the move to exclude 16 and 17 year olds from some of the provisions of the Bill, for example from diversion when charged with certain offences, and also to make mandatory minimum sentences applicable to children 16 years and older. In a recent development the Portfolio Committee on Justice and Constitutional Development has adopted a General Law Amendment Bill (Bill 15 of 2007) to the Criminal Procedure Act on minimum sentences, which, in any event, makes mandatory minimum sentences applicable to 16-and 17-year old children. As far as I can determine at the time of writing it has not been passed by the National Assembly of parliament.

Agreeing with Skelton's assessment, I would argue that the Portfolio Committee's approach to child justice law reform is alarmist, fueled by the popular press and not based on any evidence other than the public's perception of crime and children committing crime in South Africa. I believe that the following quote typifies the debates that occurred within the Portfolio Committee in 2003: '[p]ublic discussion of crime, especially where young offenders are concerned, tends to be emotive and characterised more than its fair share of historical myopia'.¹⁵⁶

Yet, it should still be stressed that these were the parliamentary debates and no final decision has been made on the contents of the Bill. However, despite a hiatus regarding any developments since after the parliamentary debates in 2003, its recent approval by the Cabinet of Ministers signals definite movement. Whether the anticipated parliamentary debates will result in a law that follows the SALRC approach, or the approach adopted by the Portfolio Committee on Justice and Constitutional Development in 2003, remains to be seen.



6.5 Conclusion

What clearly emanates from the brief overview of the Child Justice Bill and framework for children in South Africa is that there are rich and valuable mechanisms for safeguarding the rights of children who come into conflict with the law as well as ensuring that appropriate responses are developed for each individual child, obviously including children who are used in the commission of crime. What is also evident is that, on the face of it, Convention 182 has not influenced the development of the child justice system in South Africa at all. The Convention did not feature in any of the law reform documents, meetings and debates in Parliament. What has developed has been primarily based on the contents of the UNCRC and the standards contained in other international child justice instruments. So while child justice practice and the Child Justice Bill illustrate South Africa's compliance with the obligations contained in Convention 182, they were not designed or put in place to meet these obligations.

¹⁵⁶ Hagell A and Newburn T, *persistant young offenders*, Policy Studies Institute: London, 1994, p 4.

Yet, I would argue that the aspect in which Convention 182 has most impact is to draw attention to the need to take measures to assist children used in the commission of *all* illicit activities and not just the narrow construct of children used in the manufacture and trafficking of narcotic drugs and psychotropic substances, which is an unfortunate shortcoming of the UNCRC (although it could be argued that Article 32 and 36 of the UNCRC, which deal with general forms of economic exploitation could cover children used in all criminal activities). However, whether Convention 182 was the most appropriate treaty to include the use of children to commit crime as an issue for concern remains, I would argue, questionable.



Chapter 7

The implementation of measures in South Africa to address the use, procuring or offering of a child in the commission of crime

Whereas the preceding chapters have attempted to contextualise and analyse the international legal framework on child labour, particularly Convention 182 and its influence on South African law, this chapter will attempt to measure the impact of Convention 182 in South Africa by examining a pilot programme on the instrumental use of children to commit crime as a worst form of child labour. The description of the research that preceded the pilot programme and implementation of the programme itself is somewhat of a departure from the legal focus of this thesis. However I believe that this digression is necessary, as such an approach can provide concrete means to gauge the significance of Convention 182, and thereby contribute to the ongoing assessment and evaluation regarding its effectiveness.

7.1 Background and introduction to the TECL programme

In Southern Africa, the ILO and IPEC has a strong presence through the Towards the Elimination of the worst forms of Child Labour (TECL) programme located within the IPEC office in South Africa. TECL is running programmes aimed at eliminating the worst forms of child labour in South Africa, Botswana, Namibia, Swaziland and Lesotho (the latter four known as the BLNS countries).¹

¹The TECL project document, *Supporting the Time-Bound Programme to eliminate the Worst Forms of Child Labour in South Africa's Child Labour Action Programme and laying the basis for concerted action against Worst Forms of Child Labour in Botswana, Lesotho, Namibia and Swaziland*, Annexures 1-4, TECL, ILO, May 2005, sets out the strategies for South Africa and Botswana, Lesotho, Namibia and Swaziland (copy on file with the author). In Botswana, Lesotho, Namibia and Swaziland comprehensive time-bound strategies focusing on child labour, such as the Child Labour Action Programme in South Africa, required by Article 6 and 7 of Convention 182 have not yet been developed. For that reason the focus of the TECL programme in these four countries is on laying the foundations for action against the worst forms of child labour as well as combating child labour more generally, through a focus on contributing to knowledge on the worst forms of child labour and the drafting of a country action plan (or framework for such a plan) to address these.

In contrast to the slower pace of development in Botswana, Lesotho, Namibia and Swaziland, the overall TECL programme design for South Africa identifies four key programme elements for implementing and supplementing the South African national programme of action, which had already been drafted (discussed in more detail in section 5.4 of Chapter 5). The first relates to data collection, including collecting of information on the extent of the given problems related to child labour and its worst forms. The second programme element relates to the design and testing of models by way of pilot projects on certain identified issues, the implementation thereof and thereafter the facilitation of information-sharing on the outcomes and possible replication of such projects. Third, TECL aims to concentrate on the environment within which child labour is to be addressed in South Africa, through the facilitation of networks and joint action as well as raising government and public awareness on the issue of child labour and its worst forms. Finally, TECL aims to assist in the design of appropriate policies and the making of recommendations in this regard, enabling the implementation of such policies and enforcement of laws.²

In the ultimate assessment of the significance of Convention 182 in South Africa, it is important to note that TECL at the outset assumed the role of facilitator and not implementer. The project document clearly states that ongoing implementation will be the responsibility of relevant government departments and the relevant stakeholders, and on account of the fact that the key responsibilities for the programme in South

² Country Annexure for South Africa of the TECL project document, note 1. The Annexure lists the various activities that ultimately constitute these four key elements. In addition to the pilot projects that are discussed in greater detail in this chapter (in relation to children used by adults to commit crime more specifically) other activities include the development of policy, research projects and awareness raising. The policy development activities include the drafting of regulations for hazardous work for 15 – 17 year olds and drafting regulations to widen the definition of employment to cover all forms of child labour that need to be prohibited in terms of the ILO Conventions 138 and 182. The research projects include a good practice study on work being done on child labour and a national survey on child labour. Finally the awareness raising activities include an overall national awareness campaign on child labour generally and specific awareness raising activities aimed at the general public on worst forms of child labour, more particularly child trafficking, child sexual exploitation and children used by adults to commit crime.

Africa come from the CLPA, they are *jointly* assumed by government and TECL, with TECL being a facilitator and catalyst and final decisions being taken by government.³ Thus the South African government is seen as being ultimately responsible for the effective implementation of the CLPA as part of its obligations under Conventions 138 and 182, and TECL only a technical assistance project seeking to facilitate the implementation of responsibilities under the CLPA.

At this point, I would again emphasise the fact that the drafting of the CLPA was initiated as a result of a Memorandum of Understanding between IPEC and South Africa in 1996, long before the adoption of Conventions 182 and the ratification of Conventions 138 and 182 by South Africa. Likewise, the influence of IPEC is clearly indicated by the active involvement of the TECL programme in South Africa. I would suggest that, although Convention 182 has obviously informed the actions of the South African government as well as the final draft of the 2003 CLPA and CLPA 2, ultimately South Africa has been more influenced by the work of IPEC and TECL in the implementation of Convention 182 than had she been left to implement the Convention alone. I would argue that South Africa is a prime example of the manner in which IPEC (in this case through TECL) is having a major influence in getting countries to comply with their obligations under the Conventions 138 and 182.⁴

The pilot projects referred to above are aimed at testing, on a substantial scale, methodologies regarding three of the most intolerable kinds of child labour, listed explicitly in Convention 182 and identified in the CLPA as the priorities for South

³ Country Annexure for South Africa, p 6 – 7, note 1. One of the components to its role as facilitator is the contracting out of pilot programme designs and implementation, with TECL being responsible for overall project management and monitoring.

⁴ See Gallinetti J, 'Worst forms of child labour – a view from out of Africa', in Sloth-Nielsen J (ed), *Essays on children's rights in the context of Africa*, Ashgate Publishing: United Kingdom, forthcoming, where the author argues that while a substantial number of countries have ratified Convention No. 182, where countries have actually adopted time bound measures against one or more worst forms of child labour, this has usually happened in countries where there is an IPEC project that supports such programmes. Again this indicates the interdependency of Convention 182 and IPEC activities.

Africa, namely, commercial sexual exploitation of children, child trafficking and the use of children by adults to commit illegal activities.

There are a number of main outputs regarding these pilot projects. The first relates to the commissioning of ‘rapid assessments’ and ‘baseline studies’ on each worst form of child labour identified. The former is intended to be a quick assessment of the extent of the problem, identifying the relevant stakeholders as well as existing laws, policies and statistics relating to the worst form of child labour in question. The latter is a more intensive research project, which again examines the scope and extent of the problem, but in a particular location. The idea is to assess its suitability for a pilot project and also to collect information for the location in question. These rapid assessments and baseline studies require the collation of qualitative and quantitative information on the magnitude, characteristics, causes and consequences of the selected forms worst forms of child labour. Following these activities would be the identification and design of pilot interventions to address these worst forms of child labour. The final component of the pilot projects would be the implementation of the pilots as identified and designed and writing up the results of the intervention(s).⁵

7.2 Initial stages of the pilot programme addressing the instrumental use of children to commit crime

In 2004 TECL first contracted the Children’s Rights Project of the Community Law Centre,⁶ University of the Western Cape, as service providers to undertake research on children used by adults to commit crime as a worst form of child labour

⁵ Country Annexure for South Africa, p 15, note 1. TECL amended its original plan to run the child trafficking and child sexual exploitation pilot projects separately and combined the two. The reason partly relates to the two issues being closely related as one of the main reasons for children being trafficked is their use in the commercial sex trade. It was thought that combining the two projects would not have any substantive effect on the planned outputs and activities but would allow the pilots to be implemented in more sites than originally intended.

⁶ It should be noted that the author of this thesis is the senior researcher and project co-ordinator of the Children’s Rights Project at the Community Law Centre and was intimately involved in this research and work. The author is also one of the main drafters of all of the publications and reports emanating from this work that are attributed to the Children’s Rights Project.

(CUBAC)⁷ in the form of a rapid assessment. This initial contract was followed by further contracts to undertake a baseline study and ultimately to design and implement a pilot programme to address children used by adults to commit crime. The initial phases of the work involved four main activities. First, a Rapid Assessment (later termed the Situation Analysis) was undertaken - this involved the production of a report on an initial national stakeholder analysis conducted with national and provincial government departments as well as members of civil society, namely, non-governmental organisations, service providers and academics. The Situation Analysis targeted role-players within the criminal justice system, in particular those involved in the administration of child justice. It included qualitative and quantitative research as well as a literature study to determine an initial assessment of the nature, causes and extent of children used by adults to commit crime. A further aim was to identify four potential pilot sites for the following phases of the projects. The Situation Analysis was conducted between December 2004 and February 2005.⁸

⁷ The term ‘children used by adults to commit crime’ and acronym CUBAC were devised by the Community Law Centre. The exact wording of this worst form of child labour in Convention 182 reads “the use, procuring or offering of a child for illicit activities”, however, it was clear from action steps 56 and 57 of the 2003 CLPA that the use of children by adults to commit crime was the main focus of attention and, concomitantly, the activities to address this worst form of child labour were focussed on intervening with the children being used and prosecuting the adults who used such children. Therefore the Community Law Centre placed an emphasis on the use of children by adults, rather than the more general terminology used in Convention 182. In any event, by requiring the prohibition and elimination of worst forms of child labour, Convention 182 also emphasises action to be taken against perpetrators of worst forms of child labour – generally adults, although in certain cases older children are also responsible. Although the project gave prominence to use by adults, it did not exclude use by older children in the research and pilot implementation.

⁸ The research findings are available as a separate report: Children’s Rights Project, Community Law Centre, *Children Used by Adults to Commit Crime (CUBAC): Situation Analysis*, ILO, 2005 (hereinafter referred to as the Situation Analysis). A copy is on file with the author. Although originally titled ‘Rapid Assessment’, TECL changed it to ‘Situation Analysis’ in December 2005. In 2006, a publication summarising the situation analysis and baseline study was produced: Children’s Rights Project, Community Law Centre, University of the Western Cape, *Children Used by Adults to Commit Crime: Situation Analysis and Pilot Design*, ILO, 2006. It is available on www.communitylawcentre.org.za.

Secondly, a Baseline Study was undertaken- this involved further and more detailed qualitative and quantitative research at the four identified potential pilot sites to inform the design of the pilot projects as well as to finalise the ultimate selection of two pilot sites. The Baseline Study commenced in April 2005 and was completed in mid- August 2005. The two pilot sites where the programme was to be implemented in 2006-2007 were decided upon during the Baseline Study, through extensive consultation and research, and after a careful consideration of various factors. The sites selected were Mitchell's Plain in the Western Cape and Mamelodi and Hatfield in Gauteng.⁹

The third main activity consisted of a project design – this involved the actual design of programmes and interventions aimed at addressing measures to prohibit and eliminate children from being used in the commission of crime at the two pilot sites. This project design was incorporated in the Baseline Study report.

Finally, a separate child consultative research study to explore the experiences of children and their perceptions of children being used to commit crime was also conducted. This study was consolidated into a separate publication that contains the information and analysis produced from the research.¹⁰

Following the various recommendations made during the Baseline Study, including the design of programmatic responses for children and direct interventions for government, a detailed project design was drafted that consisted of a specific goal, immediate objectives, outputs and activities that would be implemented at the specific pilot sites. Implementation of the CUBAC Pilot Programme began in April 2006, after

⁹ The research findings are available in a separate report: Children's Rights Project, Community Law Centre, *Children Used by Adults to Commit Crime (CUBAC): Baseline Study*, ILO, 2005 (hereinafter referred to as the Baseline Study). A copy is on file with the author.

¹⁰ Frank C and Muntingh L, *Children Used by Adults to Commit Crime (CUBAC): Children's Perceptions*, ILO, 2005 (hereinafter referred to as the Children's Perceptions research). A copy is on file with the author. In 2006, a publication summarising the research was produced: Children's Rights Project, Community Law Centre, University of the Western Cape, *Children Used by Adults to Commit Crime: Children's Perceptions of their Use by Adults in the Commission of Offences*, ILO, 2006. It is available on www.communitylawcentre.org.za.

an initial period of preparation, and was formally finalised in April 2007, although some activities extended to June 2007.

7.3 The Situation Analysis

The Situation Analysis was aimed at identifying the nature and scope of the instrumental use of children to commit crime in order to provide a credible basis for initiating the work in the Baseline Study, which would centre on more in-depth research regarding programme design and the selection of four potentially suitable pilot sites, from which a final two would be selected, in which to implement the CUBAC Pilot Programme.¹¹

At the completion of the Situation Analysis study, 15 people had been interviewed and 35 questionnaires out of a total of 78 that were distributed had been returned. The study sample, therefore, was relatively small. Compounding this was the fact that TECL required the study to be completed by the end of February 2005, effectively only allowing for a period of 2 months for data collection, collation and the finalisation of the report.¹² Nonetheless, the end product provided a wealth of

¹¹ Service Contract between the International Labour Organisation and the Children's Rights Project, Community Law Centre, University of the Western Cape, Pilot Design Contract for Phase 1, Commitment No.2004-25, December 2004 (hereinafter Service Contract for Phase 1). The contract required the research to address the following: the identification of national, provincial and other relevant stakeholders who might have knowledge of or work in a field or sector that would address or be affected by children used in the commission of crime; a basic literature review to assess the extent to which there is previous research, policy and legislation that would, firstly, be of use in combating the problem and secondly, that would inform this project in the ultimate goal of designing two pilot programmes; a consultation with national stakeholders on issues such as the existence of policy and statistics relating to children used by adults to commit crime; an examination of the prevalence, location and nature of children used by adults to commit crime, through a consultation with national and other relevant stakeholders, with the ultimate aim of identifying 8 potential pilot sites from which 4 would be selected. In addition, the Community Law Centre would be responsible for disseminating information on the 2003 version of the CLPA and the TECL programmes, particularly within the child and criminal justice sector in relation to children used by adults to commit crime.

¹² The study began in December 2004, however because of the December/January holidays, many respondents were not available during the initial stages of the study. However, great assistance was provided by the Inter-Sectoral Committee on Child Justice (ISCCJ), whose members participated in the

information and a sound basis for further research on the issue, particularly in that it identified the gaps existing in the child justice system in relation to the use of children in the commission of crime.

7.3.1 Literature review

One of the valuable outcomes of the Situation Analysis was a comprehensive literature review of law and policy in South Africa to determine existing provisions relating to the use of children in the commission of crime. Firstly, it was established that there were no provisions, besides those in the 2003 version of the CLPA that identified the instrumental use of children in illegal activities as a worst form of child labour. Secondly, only the clause in the Child Justice Bill 49 of 2002 dealing with children used by adults to commit offences was found to have direct relevance to the issue and this (as is discussed in Chapter 6) was not due to any influence from Convention 182, but rather a result of the child justice law reform process, which took place prior to Convention 182. However, the review identified various provisions in law and policy into which the issue of children being used by adults to commit crime could be integrated and in that sense provided the foundation for the design of the Pilot Programme. These provisions have been discussed in detail in Chapter 6 and include the provisions in the Criminal Procedure Act allowing for alternative

study and also directed officials in their departments to participate over this short period. The ISCCJ is a committee comprising of representatives of national government departments that have a responsibility towards the administration of criminal justice as it relates to children. It is chaired by the Department of Justice and Constitutional Development and attended by, amongst others, the departments of Correctional Services, Education and Social Development, the South African Police Service (SAPS), the Legal Aid Board and the National Prosecuting Authority (NPA). The ISCCJ meets on a regular basis to discuss issues relating to children in trouble with the law, such as the numbers of children in prison and the availability of places of safety and secure care centres. It has developed management tools for the administration of child justice such as the *Interim National Protocol on the Management of Children Awaiting Trial* and a draft protocol on children sentenced to reform schools in order to address specific issues that have arisen in the child justice system. For this reason it was deemed crucial that the ISCCJ be informed of and involved in the work on children used in the commission of crime, and they readily participated and contributed to the project.

sentences to imprisonment; the assessment of children who come into conflict with the law and diversion practices.¹³

7.3.1.1 General criminal law provisions

The literature review noted that criminal law provisions relevant to the use of children in the commission of crime are largely uncodified and rest on common law definitions of offences developed in Roman Dutch law.¹⁴ It noted that adult influence would, serve as a factor to be considered in mitigation of the sentence of the child and could also serve to aggravate the sentence received by the adult offender. However, the literature review did not interrogate this issue further, nor did it examine legal precedents that have established this principle and this can be seen as a possible shortcoming of the report as a whole.¹⁵

¹³ The literature review also examined the historical development of child justice policy and legislation in South Africa from 1994 to 2004, including the Criminal Procedure Act 1977 and Correctional Services Act 1998, as well as the Child Care Act 1983 and review of the child protection system resulting in a comprehensive new children's law, namely the Children's Act 38 of 2005. However as these issues are discussed in depth in Chapters 5 and 6, they will not be repeated. See the Situation Analysis p 9-21, note 8.

¹⁴ See Situation Analysis p 22 - 23, note 8. The literature review does note that the criminal liability of a child can be excluded if it is shown that the child lacked the necessary intent to commit an offence, by way of showing that a justification ground was applicable, i.e. duress. This is an important point as children who are forced or threatened with violence to commit an offence by an adult cannot be said to have acted voluntarily in the commission of the offence and should, provided all the elements of the defence of duress are present, be acquitted. This point is also discussed in section 6.4.2.1 in Chapter 6. The child perception research showed that in some instances children are coerced into committing crime through threats of or use of violence and in these instances, even though they have been used by an adult to commit an offence, the children are not themselves liable and should receive protection of the law.

¹⁵ Historically, the South African courts have recognised that, when exercising their sentencing discretion, the presence of adult influence in the commission of an offence may serve as a mitigating factor for a child offender. The relevant case law that established this principle includes authorities such as *S v Shangase* 1972(2) SA 410 (N); *S v Lehnberg* 1975(4) SA 553 (A), *S v Hlongwana* 1975(4) SA 567 (A), *S v Van Rooi* 1972(2) SA 580 (A), *S v Ndimba* 1994(4) SA 626 (D), *S v Malgas* 2001(2) SA 1222 (SCA) in respect of a 22 year old accused, *Sv Nkosi* 2002(1) SA 494 (W). However, these authorities have not gone so far as to recognise the phenomenon of children being used by adults to

The literature review also noted the possibility of a conviction on the grounds of the doctrine of common purpose, or as an accessory after the fact, for an adult instigator who used a child in the commission of an offence, where the actions of the accused adult did not indicate actual participation in the commission of the offence itself, but where such adult aligned himself to the act in question, recruited the child or rendered assistance after the fact.

Finally, the review recognised the applicability of section 18(2) of the Riotous Assemblies Act 17 of 1956, which makes conspiracy to commit a crime an offence.¹⁶ In essence, a prosecution for conspiracy can only succeed if “there is a definite agreement between two persons to commit a crime.”¹⁷ However, the conspirators do not have to know the identity of all the other conspirators, which means that a gang boss whose underlings recruit children for the purposes of committing crime would be liable as a conspirator even though he was unaware of the identity of the children who were actually recruited.¹⁸ Incitement to commit a crime is also punishable under the Riotous Assemblies Act.¹⁹ The inciter would be convicted either as co-perpetrator or as accomplice to the crime. Originally, the inciter needed to exercise persuasion over the actual perpetrator in order for a conviction to occur, however, this view was overturned by the Supreme Court of Appeal in 1996, and it is now immaterial whether the incitement of the actual perpetrator has an element of persuasion to it.²⁰ However, in order for the inciter to be held liable, he or she must consciously seek to influence another to commit a crime, thus if the incitee lacks culpability (e.g. because he or she is below the minimum age of criminal culpability), the inciter cannot be convicted.

commit an offence, and most certainly not as a worst form of child labour (unsurprisingly, given that they date back to 1972 before the concept was established).

¹⁶ Snyman C, *Criminal Law*, 4th Edition, Butterworths: Durban, 2002, p 292.

¹⁷ Snyman , p 292, note 16.

¹⁸ Snyman , p 294, note 16.

¹⁹ Section 18(2), which makes it an offence to ‘incite, instigate, command or procure any other person to commit an offence’.

²⁰ *S v Nkosiyana* 1996 (4) SA 655 (A).

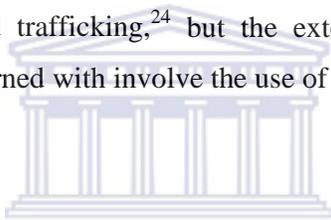
Given the fact that, at the time of writing the Situation Analysis, South Africa still lacked an enacted prohibition on the use of children to commit an offence as envisaged in Convention 182, the discussion in the literature review provided a useful starting point for the design of the Pilot Programme on children used in the commission of crime, particularly on how to operationalise the 2003 CLPA action steps 56 and 57 which required the investigation and prosecution of adults who had used children to commit crime. However, the shortcoming of the general criminal law provisions, also identified in the Pilot Programme implementation, is the fact that they are of *general* application. A conviction obtained against an adult for using a child to commit an offence under the Riotous Assemblies Act firstly would not fulfill the requirements of Convention 182, which mandates ratifying states to criminalise the use of children in the commission of crime. Secondly, a finding that a person contravened section 18 (2) of the Riotous Assemblies Act does not fully acknowledge the exploitative nature of the offence, namely that a child had been used, procured or offered in the commission of an offence. Finally, and for the purposes of Article 5 of Convention 182 that requires the implementation of the provisions of the Convention to be monitored, the existing criminal law provisions do not allow for the capturing of reliable statistics on crimes against children and children used by adults to commit offences, as any conviction for one of the general criminal law provisions does not readily signify that it was an adult (or older child) that had used a child in the commission of an offence – a conviction merely indicates that the perpetrator had conspired to commit an offence or incited another person to commit an offence.

However, apart from the fact that the South African criminal law provisions fell short of the requirements of Convention 182, they also fell short of the general requirements of a comprehensive child justice system, a fact clearly illustrated by the inclusion of a separate offence for the instrumental use of a child in the commission of crime in the South African Law Reform Commission version of the Child Justice Bill.

7.3.1.2 State responses to organised crime

The literature review contained in the Situation Analysis gives a brief overview of gangs, particularly in the Western Cape and notes that there is not much recent text

published on the subject.²¹ The review therefore relies quite heavily on a report commissioned by the Western Cape Office of the Investigating Directorate: Organised Crime and Public Safety (IDOC) of the National Directorate of Public Prosecutions in 2001.²² What emerged from interviews with study respondents and the Redpath report is that gang activity, especially in the Western Cape, has recently evolved in two ways.²³ First, the smaller Cape Town street gangs were subsumed and became the front for increasingly centralised and powerful organised syndicates, with tentacles in all areas of criminal activity, from drugs and prostitution, collection of protection monies and racketeering, to housebreaking and fencing of stolen goods. Second, after the opening of South Africa's borders in 1994, the influx of an international criminal element was initiated and resulted in organised crime activities being undertaken by Nigerians, Russians, Moroccans, Peruvians and Chinese. The literature review asserts that it is regarded as more or less an established fact that these gangs use children in prostitution and trafficking,²⁴ but the extent to which other criminal activities that they are concerned with involve the use of children is not clear.



²¹ Situation Analysis, p 9, note 8. The review notes that most of the writing on gangs dates back to the 1980's. For example, the work of Pinnock (Pinnock D, *The Brotherhoods: street gangs and state control in Cape Town*, David Phillip: Cape Town, 1984). Recently, Andre Standing of the Institute for Security Studies has done some work on gangs, but mainly examining the phenomenon within a criminological context and examining State and police responses in a particular area of the Western Cape province, see Standing A, *Organised Crime: A study from the Cape Flats*, Institute for Security Studies, 2006 available at www.iss.co.za accessed on 4 November 2007.

²² Redpath J, 'The Hydra phenomenon, rural sitting ducks, and other recent trends around organised crime in the Western Cape', (unpublished research study commissioned by the Western Cape Office of the Investigating Directorate: Organised Crime and Public Safety (IDOC) of the National Directorate of Public Prosecutions (NDPP), 2001. The study, based on interviews with police at local stations, identified an increase in youth crime for the following reasons: absent, disinterested or alcoholic parents; a perception that children can get away with crime without legal consequences; use and influence of children by older criminals; school indiscipline; involvement in gangs; poverty and hunger.

²³ Situation Analysis, p 23 – 24, note 8.

²⁴ The study undertaken by Frank and Muntingh with children to ascertain their experiences of use by adults in the commission of crime clearly shows that gangs involve children in illegal activities and are a dominant factor in children becoming involved in crime at the hands of adults, see note 10 above.

In response to the reported increase in organised crime, South Africa enacted the Prevention of Organised Crime Act 121 of 1998 (POCA). The literature review notes that this legislation was enacted to give greater powers to law enforcement agencies to curb organised crime, which from the outset included addressing the criminal activities of gangs. Citing an Institute for Security Studies publication,²⁵ the literature review observed that the first innovation in the new law was provision for civil asset forfeiture of property that is tainted by criminal activity. This provision enables the state to seize goods used in the furtherance of crime and property acquired from the proceeds of crime by way of a civil action, in the absence of a criminal conviction. The validity of the asset forfeiture order is also not affected by the outcome of subsequent criminal proceedings, because a higher standard of proof applies to the state in criminal proceedings (guilt beyond reasonable doubt rather than the civil standard, applicable in asset forfeiture proceedings, which is proof on a balance of probabilities).

More problematic is the provision in POCA relating to the offence of being a member of a gang.²⁶ Criminal gang is defined as:

‘any formal or informal ongoing organisation, association, or group of three or more persons, which has as one of its activities the commission of one or more criminal offences, which has an identifiable name or identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal behaviour’.²⁷

²⁵‘The Asset Forfeiture Unit: performance and priorities’, in *Nedbank/ ISS Crime Index*, Vol. 4 (3), (2000).

²⁶ Section 9(1). The offence carries a penalty of a fine or 6 years imprisonment, but if convicted of being a gang member on school or other educational premises, the penalty increases to 8 years imprisonment.

²⁷ As Snyman points out, much of the conduct covered in section 9(1) and section 9(2), which criminalises gang membership and activities, overlaps with the common law offences of conspiracy and incitement. However, he is of the view that some of the conduct covered is wider than the conduct covered in common law, particularly the provision of section 9(2) which makes it an offence to ‘perform any act which is aimed at causing, bringing about, promoting or contributing towards a pattern of criminal activity.’ Snyman, p 418, note 16.

The Act does not distinguish, however, between adult gang members and child gang members and just as an adult gang member may be prosecuted and convicted of the offence of being a gang member, so too can a child. Given the increased penalties for being found on school premises, this has serious implications for child gang members, even though it would appear that the intention of the drafters was to protect children by including such a provision.²⁸ If children are used by organised criminal entities and recruited to their membership, this places them in the invidious position of being victims of exploitation as well as perpetrators, who may be then dealt with in a harshly punitive manner, with little regard being had to the exploitation aspect of their involvement.

Thus, while POCA appeared on one hand to provide a promising avenue for pursuing criminal masterminds by seizing the proceeds of their crimes, on the other hand it takes a punitive, zero-tolerance approach to child gang members without fully recognising the vulnerabilities of children who may be involved in gangs. Thus it poses potential problems for children who have been used in the commission of crime by organised crime syndicates. The rights-based approach to children who are victims as well as offenders as contained in Convention 182 and the CLPA cannot be fused with the 'law enforcement-style', punitive approach adopted by the legislature through POCA.

7.3.2 Findings from the Situation Analysis

The Situation Analysis provided vital information that informed the next phase of the programme, the Baseline Study, and then the design of the Pilot Programme on the

²⁸ The initial concern regarding POCA and children is intensified if one considers the provisions of section 11 of the Act that deals with the interpretation of what constitutes a member of a criminal gang. Section 11(b) allows for a member of a criminal gang to be identified by a parent or guardian. If the intention of the Act was to protect children, amongst others, from organised crime, then why specifically refer to a parent or guardian unless the intention was to also proceed against child gang members? Compounding this is section 11(c), which provides for a member of a criminal gang to be identified if he or she "resides in or frequents a particular criminal gang's area and adopts their style of dress, their use of hand-signs, language or tattoos and associates with known members of a criminal gang". The latter is section is extremely broad and vague and may result in children being wrongly identified as gang members.

use of children to commit crime. Neither of the two could be undertaken in a vacuum, and the Situation Analysis filled the gaping holes that existed in so far as information on the instrumental use of children in illicit activities was concerned.

In relation to statistics on the instrumental use of children in crime, the majority of the respondents to the Situation Analysis noted that there were no statistical databases available that provided information on children used by adults to commit crime. It was confirmed by numerous respondents that, while each department working in the criminal justice sector collects and collates statistics relating to the specific areas of their work, including statistics on children in trouble with the law (arrested and sentenced), these are not disaggregated to reflect any category that would provide information on the extent of children being used by adults to commit crime. It was concluded, therefore, that at all levels – national, provincial and local – no statistical information on the prevalence of children used in the commission of offences exists.²⁹ This finding indicates that South Africa is certainly not complying with Article 5 of Convention 182, which requires national monitoring mechanisms to be in place.

The investigation into the prevalence and nature of the instrumental use of children in the commission of crime was therefore based on anecdotal information obtained from the study respondents, based on their personal experiences working in the child justice sector. Of the 50 study respondents who furnished information in one form or another, only one respondent had not encountered children used by adults or other children to commit crimes in the course of his or her work.³⁰

²⁹ Situation Analysis, p 32 – 33, note 8. It was found that national statistics are not even available on children who are charged together with adults for a particular offence, as this type of data could have given some indication of the prevalence of children being used in the commission of crime, in that it is highly possible that children charged together with adults would have been influenced by them in some or other way. Even in relation to diversion, which is generally catered for by non-governmental service providers as mentioned previously in section 6.4.2.4 of Chapter 6, diversion statistics and qualitative diversion information are also not uniformly available. Most data that does exist is derived from individual diversion service providers such as NICRO, the Restorative Justice Centre and Khulisa. There is therefore no single diversion database available and the diversion workers that were respondents to the study indicated that there were no statistics in their files that related directly to children being used to commit crime – Situation Analysis, p 39, note 8.

³⁰ Situation Analysis, p 41, note 8.

Generally, respondents identified economic or property offences as the main type of crimes in which children are involved through the instigation of adults.³¹ Most respondents approximated the ages of children affected to be between 11 and 17 years. However, much lower ages were also noted, such as children aged 6, 7 and 8 years. Most respondents noted that it is usually boys that are involved in the commission of crime by adults, but instances of the involvement of girls were also noted.³² In response to a question on the nature of the relationship between the adult and the child who had been used by the adult, the study respondents generally stated that the persons using the child were parents, friends or school/other friends of the child.³³

Most importantly, given the challenges that emerged during the implementation of the Pilot Programme discussed later in this chapter in section 7.6, the study respondents generally noted that children were unwilling to disclose the identity of an adult who had used them or simply refused to do so.³⁴

7.3.3 The identification of possible pilot sites

³¹ Situation Analysis, p 41, note 8. The most common offences cited were theft, housebreaking and breaking into cars. However, drug offences were also referred to quite frequently, as were murder, assault and sexual offences.

³² Situation Analysis, p 41, note 8.

³³ Situation Analysis, p 43, note 8. Mention was also made of persons living in a particular child's neighbourhood and community using the child. This needs to be contrasted with the information received during the child perception research discussed hereunder in section 7.4.3.

³⁴ Situation Analysis, p 45 – 46, note 8. Some of the probation officers who participated in the study noted that children were scared to identify those who had involved them in the commission of crime, and also pointed out that if the children did identify the adult or older child, then it was done in a setting where a relationship of trust had developed between the child and a diversion service provider or child care worker. This finding had great relevance for the design of the Pilot Programme especially in relation to the development of a diversion session as an add-on to existing diversion programmes, the development of a guidelines booklet for criminal justice role-players and instructions or directives for state officials at the pilot sites during the implementation period, see section 7.6 below.

One of the purposes of the Situation Analysis was the identification of eight possible pilot sites for the implementation of the CUBAC Pilot Programme, from which four would be selected for further study in the Baseline Study.³⁵ The Situation Analysis sought to identify physical locations that would be suitable for the Pilot Programme and also identify factors that would make a particular location suitable for the implementation of a CUBAC Pilot Programme.³⁶

There was a plethora of geographical sites recommended by study participants.³⁷ These findings were presented to TECL and a reference group assigned by them and the final list of determining factors was decided as being: levels of good co-operation; prevalence of the 'problem'; presence of committed 'lead' players i.e. child justice role-players; presence of service providers; existing capacity and existing strategies that can be expanded upon to include interventions aimed at children used by adults in the commission of crime.³⁸

In the final consideration of four potential sites for the pilot programme Khayelitsha and Mitchell's Plain in the Western Cape and Westbury and Pretoria in Gauteng were chosen.³⁹ The reasons for this selection included the fact they are all situated in a large urban locations; the fact that they all exhibited priorities for government policy (whether in the sphere of crime prevention or urban renewal initiatives for areas that

³⁵ See the terms of reference in the Service Contract for Phase 1, note 11.

³⁶ Situation Analysis, p 49, note 8. The information was obtained in two ways: a direct question asking for recommended sites and questions within the questionnaire that could assess the suitability of the area in which the particular respondent is located for a programme designed to address the use of children for illegal activities. The initial criteria for selection included whether a particular location was urban or rural; whether there were existing government-driven programmes and strategic efforts to reduce crime; whether a location had crime prevention and dispute resolution networks operating in the area and the availability of experienced non-governmental organisations to do assessments and provide restorative justice services.

³⁷ Situation Analysis, p 51 – 54, note 8.

³⁸ Situation Analysis, p 58, note 8. The eight sites then selected were Khayelitsha, Durban, Port Elizabeth One Stop Child Justice Centre, Mangaung One Stop Child Justice Centre, Pretoria, Johannesburg, Mitchell's Plain, and Westbury. Motivations for each selection were provided.

³⁹ Situation Analysis, p 60 – 61, note 8.

had been neglected during apartheid),⁴⁰ and finally that there was a large non-governmental organisational presence in each area, incorporating various role-players, allowing for the potential of diversification of service delivery.

Overall, the Situation Analysis set the scene for the work that was to follow. Of significance is the fact that all the information obtained, although by no means scientific and objective, was useful simply because it was derived from criminal justice practitioners with experience of children in the criminal justice system. The issue of child labour and its worst forms was not a consideration for the study respondents as they placed their concern regarding the use of children in the commission of crime squarely in the child justice arena. I would argue that this illustrates to a large degree how, in the context of children used in the commission of crime as a worst form of child labour, the issue in South Africa is not so much one that relates to child labour but one that impacts on child rights in general, and the rights of children in conflict with the law in particular.

7.4 Baseline Study

This next phase of the CUBAC programme consisted of two main elements.⁴¹ The first was the identification of the final two pilot sites at which the CUBAC Pilot Programme could be implemented during 2006 – 2007. The second component to the Baseline Study phase was the actual design of this CUBAC Pilot Programme.⁴²

The methodology involved further and more detailed qualitative and quantitative research at the four potential pilot sites identified in the Situation Analysis to inform the design of the pilot projects as well as to finalise the selection of two pilot sites.

⁴⁰ Situation Analysis, p 60 – 61, note 8. The report notes that it was thought that existing government strategies and resources could be harnessed and adapted in the implementation of the CUBAC Pilot Programme, rather than starting from scratch in potentially poorly resourced areas.

⁴¹ Service Contract between the International Labour Organisation and the Children's Rights Project, Community Law Centre, University of the Western Cape: Pilot Design Contract for Phase 2-3. Commitment No. 25294, April 2005. Copy on file with the author.

⁴² For convenience the Baseline Study report refers to both the identification of the pilot sites as well as the actual pilot design.

Therefore, while consisting of two distinct elements, the information obtained for each component of the baseline study, also served to assist in the finalisation of the other component of the study.

In total, 33 interviews were conducted with officials from each site, 70 questionnaires were applied to various study respondents including probation officers, police officials and diversion service providers and 325 quantitative research templates were completed from an examination of court records at the sites.⁴³

Although seemingly quite diffuse, the three differing methodologies for the two components to the baseline study (interviews, questionnaires and the research templates for court records) produced valuable and useful results that assisted in the selection of the two final pilot sites and, at the same time led to the design of a detailed Pilot Programme for implementation at those sites. In fact it has been said that the Situation Analysis and Baseline Study were major strengths of the entire CUBAC programme that ran from 2004 – 2007 on account of the fact that they resulted in the development of the most suitable programme design through solid research, analysis and evaluation.⁴⁴

7.4.1 Findings from the Baseline Study

⁴³ Baseline Study, p 9 – 18, note 9. The interviews were conducted, amongst others, with South African Police Service officials and Commissioners, officials from provincial Departments of Social Development and Education, officials from the National Prosecuting Authority and officials from the Department of Correctional Services. The questionnaires were applied to magistrates, prosecutors, probation officers, police officials and NGO staff in the Western Cape and Gauteng. The quantitative research templates targeted charge sheets, assessment forms, court observations and assessment observations at the following courts: Khayelitsha, Mitchell's Plain, Pretoria and Mamelodi. At the stage that the quantitative study commenced, Westbury had already been discounted as a suitable pilot site and attention had turned to Mamelodi.

⁴⁴ See Sloth-Nielsen J, *Report on the implementation of the ILO/TECL project on Children used by Adults to Commit Offences (CUBAC) as a Worst Form of Child Labour (2004 – 2007): Good Practices and Lessons Learnt*, ILO, 2007. Copy on file with the author. Julia Sloth-Nielsen was involved in the initial work of the Community Law Centre for TECL, but after the completion of the Baseline Study in 2005, was not part of the implementation of the Pilot Programme. Nevertheless, on account of her previous involvement and knowledge of the work undertaken, TECL contracted her to undertake this evaluation of the overall project.

As stated above, these findings informed not only an analysis of the suitability of the four sites for the pilot implementation but also the conceptualisation of what actions and interventions could be the key elements of the CUBAC Pilot Programme to be implemented at the final sites.

A number of recommendations and suggestions came to the fore for the design of the Pilot Programme during the consultation process with the national and provincial stakeholders.⁴⁵ For instance, in the Gauteng area, most participants concurred that Pretoria would be a more suitable site than Westbury and a recommendation was that Mamelodi (a suburb of Pretoria) be the particular site within Pretoria for the implementation of the pilot.⁴⁶ Furthermore, in order to identify children who are used by adults or older children to commit crime, it was recommended that an instruction or directive be drafted to make probation officers aware of issues related to the instrumental use of children in the commission of crime and also to provide them with a list of indicators or triggers that would assist them in identifying children who might have been used by adults in the commission of offences.⁴⁷ Finally, given the fact many respondents were of the opinion that it was often only the children that were charged and prosecuted, even though they had been used by an adult or an older child to commit the crime, an initial suggestion was made to develop an unofficial

⁴⁵ Baseline Study, p 43- 45, note 9.

⁴⁶ This recommendation originally emanated from the provincial Department of Safety and Security. Likewise, during the consultation with police officials, the police in Pretoria suggested that a more fruitful route for the pilot implementation might be to concentrate efforts in Mamelodi. They based this recommendation on the fact that a large number of children coming to school in the central district of Pretoria (and getting involved with committing petty crime) actually came from the Mamelodi area. They were of the opinion that maximum impact would be achieved in an area that actually housed the children who were being used to commit crime; see Baseline Study, p 55, note 9. The probation officers consulted also confirmed that most of the children appearing in court in Pretoria came from the Mamelodi area.

⁴⁷ Members of the ISCCJ recommended that these instructions or directives would be the optimal tool through which departmental co-operation could be guaranteed for the implementation of the pilot programme at the pilot sites. They also suggested that the relevant provincial departments, i.e. Safety and Security, Social Development and the regional office of the Director of Public Prosecutions, would be best placed to issue the instructions or directives. See also Chapter 5 and Chapter 10 of the Baseline Study report, note 9, in this regard.

prosecutorial strategy in relation to the adults. Each of these recommendations was considered valuable in giving effect to the requirements sets by the CLPA to address the issue of children used in the commission of crime and so they were eventually adopted and implemented in the Pilot Programme.

The police respondents emphasised that children very seldom disclose the fact that adults or older children are involved in the commission of the offence, either for fear of their own lives or out of fear for their family being targeted by the adult perpetrators out of revenge.⁴⁸ In addition, the police also provided useful information on the issue of children who are from time to time co-accused with adults. They noted that prosecutors routinely withdraw charges against adult co-accused if the children with whom they are charged admit guilt and that the police are not consulted on whether such withdrawal should take place or not. They suggested that in such instances the adults should be prosecuted and the cases against them should not be withdrawn.⁴⁹

⁴⁸ Baseline Study, p 50, note 9. More problematic were the responses given by the police when asked what they would do if they encountered a child who had been used by an adult in the commission of crime. From their responses it was evident that the officers have difficulty in regarding child offenders as having rights separate to adult offenders and they are not viewed as being a category of offenders who are vulnerable on account of their status as children. This is a matter of great concern as contact with the police generally represents the first contact a child has with the criminal justice system and if police are not sensitised to the specific issues pertaining to children in trouble with the law, this will have a negative impact on the journey of a child through the criminal justice process. In relation to children used in the commission of offences (which is a vulnerable category of children within the more general category of children in conflict with the law) such an attitude would be detrimental to efforts to protect such children and combat the phenomenon. These responses therefore had an impact on the design of the Pilot Programme, as will be seen later in this chapter, in section 7.5 and 7.6, as a guidelines booklet was designed to inform all criminal justice role-players, including the police of the international and domestic child rights legal framework as well as their roles and responsibilities towards children used in the commission of crime: See Children's Right Project, Community Law Centre, University of the Western Cape, *Children Used by Adults to Commit Crime: Guidelines for Role-players in the Criminal Justice System*, ILO, 2006 (hereinafter Guidelines booklet).

⁴⁹ Baseline Study, p 51 – 53, note 9. This too, proved an important finding not only for the design of the pilot programme discussed hereunder, but also for the guideline booklet developed as part of the pilot programme. See Guidelines booklet, p 9 and 11, note 49, where the police are enjoined to

The results from the consultation with the probation officers provided useful impetus for the design of the Pilot Programme. A number of issues were raised and suggestions proffered: firstly, they indicated that a child could disclose that he or she had been used either during the assessment process or when the child is attending a diversion programme and, that such disclosure did not happen frequently, since questioning a child on whether he or she was used by an adult or an older child was not a specified question on their assessment form. The suggestion was made, therefore, to include a section (or questions) on the probation officer's assessment form that would facilitate the identification of children used by adults to commit crime or, alternatively, to compile a national instruction to probation officers including indicators aimed at identifying children who had been used in the commission of crime.⁵⁰ Suggestions as to what these indicators should consist of included: the fact that an older co-accused was also involved in the commission of the offence; the fact that the child is a member of any gang; the involvement of the child in any gang related activities; the fact that the child is a street child (as this is indicative that the child is more vulnerable); the type of offence with which the child is charged, for example, if it is for the sale or possession of drugs, or housebreaking and theft out of motor vehicles as these types of offences could indicate the involvement of organised crime syndicates; whether the child had pre-existing avenues for the disposal of stolen goods that involved adults and whether the child could give any information (e.g. addresses) relative to the acquisition of drugs as this might indicate that the child was familiar with activities relating to dealing in drugs.

Secondly, the probation officers, like the police, noted the reluctance or refusal of children to reveal the identities of the adult perpetrators that initiated their involvement in the offence with which they were charged. The probation officers ascribed this apparent reluctance both due to a fear of reprisals and the need for the

investigate charges against adults who have used children to commit crime and prosecutors encouraged to prosecute the adults.

⁵⁰ Baseline Study, p 65, note 9. Some probation officers felt that direct questions would accomplish the identification of children used by adults to commit crime, while others felt that an indirect approach, which involved the probation officer interpreting indicators for children being used in the commission of offences, would be more appropriate.

children to continue to protect the proceeds of their criminal activities as a source of either money or drugs.⁵¹

Finally, the probation officers agreed that specific diversion programmes for children used in the commission of offences were needed but suggested that instead of having a stand-alone programme, specific content should be added on to existing diversion programmes.⁵² This would ensure that children who were used by adults to commit crime and revealed this could be referred to such programmes, and children who refused to reveal exploitation of this nature might still benefit from the specialised content if referred to a general diversion programme that incorporated a session on children used in the commission of crime.

As will be seen from the findings of the Pilot Programme, the issues that the probation officers highlighted, especially the refusal or reluctance of children to acknowledge they have been used in the commission of crime, have been shown to be crucial to the effective implementation of any measures to eliminate the use of children to commit crime, and concomitantly foreshadow some conclusions concerning the effectiveness of Convention 182 as discussed in Chapter 8.

All of the magistrates interviewed at the sites, with the exception of the Khayelitsha magistrate, confirmed that children who are used by adults to commit crime do appear before them and they have encountered such children in the course of their work.⁵³ Likewise, the prosecutors all confirmed the occurrence of children being used to commit offences in practice and again underscored the general reluctance on the part of children to state whether they had been used by an adult in the commission of crime and even if they did, the prosecutors noted that children very seldom disclosed the actual identity of the adults for fear of their safety.⁵⁴

It was becoming clear that the safety of children would be a key issue in any pilot programme and that linked to this was the potential difficulty of obtaining sufficient

⁵¹ Baseline Study, p 63 – 64, note 9.

⁵² Baseline Study, p 62, note 9.

⁵³ Baseline Study, p 69 – 72, note 9.

⁵⁴ Baseline Study, p 72 – 75, note 9.

evidence to pursue the adult perpetrators. A failure to obtain such evidence would render any prosecution useless, irrespective of whether there was a separate offence for children being used in the commission of crime or whether the general criminal law provisions were employed. The significance of this information was not lost on the Community Law Centre, which included as a risk factor in the pilot design document the refusal of children to disclose they had been used or to give evidence against the adult perpetrators. At this early stage, the possible success of the 2003 CLPA, as far as prosecuting adults was concerned, was already being called into question.

The limited study into court records at each of the proposed pilot sites was also undertaken, principally aimed at determining the extent to which children who are used by adults to admit crime can be identified through a perusal of court records and proceedings, and from there, hopefully, an indication of the nature and scope of the problem in the four sites could be obtained.⁵⁵ However, far from providing information on the instrumental use of children to commit crime, the findings merely give an indication of general child justice practice and trends. For example, the data shows that mainly boys aged between 15 and 18 years commit economic or property offences.⁵⁶ However, the quantitative research did reveal some indirect references to children used in the commission of offences, as some of the records did reflect disclosures by children (either in the assessment process or in a pre-sentence report) that they were influenced by older children or adults to commit the offence.⁵⁷

7.4.2 Selection of two pilot site locations

The selection of the two pilot site locations became somewhat straightforward as is indicated in the discussion on the findings in section 7.4.1 above. It soon appeared that Westbury was not regarded as a suitable site and that Mamelodi was regarded as

⁵⁵ See Service Contract for Pilot Project Design Phase 2-3, note 41.

⁵⁶ For other studies on child justice statistics see Muntingh L (ed), *Children in conflict with the law: A compendium of child justice statistics 1995-2001*, Child Justice Alliance, 2003 and Muntingh, L, *Children in the Criminal Justice System: 2007*, Child Justice Alliance, 2007. Both available on www.childjustice.org.za.

⁵⁷ For a full discussion see Baseline Study, p 98 – 101, note 9.

more appropriate than the greater Pretoria area that was first recommended. In addition, interviews with the police and justice officials in Khayelitsha revealed local challenges in inter-sectoral co-operation that ultimately made the choice of Mitchell's Plain clear-cut.⁵⁸

At the end of the Baseline Study, valuable insights had been provided by all of the study respondents and these greatly assisted in the design of the CUBAC Pilot Programme. The result was a design based on the rich experience and collective wisdom of a wide range of child justice officials and practitioners from across South Africa and from within the pilot sites themselves. It is somewhat ironic that a pilot programme designed to address a worst form of child labour was informed to such a large extent by role-players who had not engaged with the concept of the worst forms of child labour at all, and who had scant knowledge of Convention 182. I would suggest that this, again, is an indication of the fact that Convention 182, at the end of the day, is somewhat inconsequential to the development of knowledge, systems and measures on the instrumental use of children to commit crime and that this category of child offenders could be more than adequately catered for under the umbrella of the UNCRC child justice provisions as well as the other international standards dealing with children in conflict with the law.

7.4.3 Children's Perceptions Research

⁵⁸ For a full discussion on the selection of the two sites see Baseline Study, p 101 – 107, note 9. As the selection of the pilot sites was critical to the Baseline Study, this formed a key point in the workshops held with the provincial and local stakeholders as well as the ISCCJ in July and August 2005. A full briefing on the proposed sites as well as the indicators for site selection was conducted. All of the workshop participants at national, provincial and local level were in agreement with the site selection of Mamelodi and Mitchell's Plain. In addition, although not apparent from the Baseline Study or Pilot Design, Hatfield Community Court was added as a site to complement the Mamelodi site. This came about when the Regional Commissioner of SAPS for the Pretoria area recommended the inclusion of Hatfield during the preparatory period prior to the implementation of the pilot programme. This information appears from personal notes kept by the author. The pilot implementation documents were all adjusted to include Hatfield Community Court as an additional site, with negligible extra expenditure necessary.

Although not specifically part of the Situation Analysis and Baseline Study, a separate research study aimed at eliciting the perceptions of children on the instrumental use of children to commit crime was commissioned by the Community Law Centre to ensure that not only the inputs of child justice practitioners were used for the design of the pilot programme, but that the design was also informed by children themselves.⁵⁹ Therefore this study sought to achieve three main objectives: firstly to allow children to participate in the research initiative on children used in the commission of crime,⁶⁰ secondly to obtain more information on the nature, extent and causes of children being used by adults to commit crime and, thirdly, to inform the design of the prevention and diversion programmes that would form part of the CUBAC Pilot Programme implementation.

Sub-contractors were appointed to undertake the study and it was carried out during June – August 2005.⁶¹

⁵⁹ This study was conceptualised in the Pilot Design Service Contract for Phase 2 and 3, note 41 above.

⁶⁰ Article 12 of the UNCRC is thought to be one of the cornerstones of the Convention and deals with the child's right to participate in all matters affecting him or her. There are two aspects to the right contained in Article 12, namely the child's right to express his or her views and the child's right to be heard. Article 12(1) is of a far more general application than Article 12(2), which focuses on the right of the child to be heard, in person or duly represented, in specific proceedings affecting himself or herself. Article 12(1) allows the child a free reign to participate in all levels of decision making, both public and private. This can range from participation in drafting of legislation and policy-making to family decisions. In this instance, seeking the views of children in relation to the instrumental use of children to commit crime represented a way in which their views could inform the design of the Pilot Programme as well as contributing to a greater understanding of the concept amongst children and adults. For further discussion, see generally, Van Bueren G, *The International Law on the Rights of the Child*, Martinus Nijhoff Publishers: The Netherlands, 1995, p 136 et seq; Detrick S, *A Commentary on the United Nations Convention on the Rights of the Child*, Martinus Nijhoff Publishers: The Hague, 1999, p 219-220 and 689 et seq; Lücker-Babel M-F, 'The right of the child to express views and to be heard: An attempt to interpret Article 12 of the UN Convention on the Rights of the Child', *The International Journal of Children's Rights*, Vol. 3, No. 3-4, 1995, p 391- 404 and Kassan D, *Children's rights to be heard in divorce proceedings*, unpublished LLM dissertation, University of the Western Cape, 2004.

⁶¹ The research findings are available as a separate report and a publication summarising the study, see note 10 above. The research was undertaken by Cheryl Frank and Lukas Muntingh, who at the time were independent consultants. See also Frank C, 'Abuse of a different kind: Adults using children to commit crime' *SA Crime Quarterly* No. 16 (June 2006), at p13 - 18.

The children who participated in the study were identified and selected from those who already found themselves in trouble with the law and who were awaiting trial or sentenced in facilities. Originally, only children who resided or originated from the four pilot site areas were going to be targeted, but this was changed during the course of the study in order to include the views of all children who were incarcerated at the respective custodial facilities irrespective of the area from which they came, so as to extend the scope of the study. The methodology used for this research involved the application of research tools (using general guiding questions as opposed to structured questionnaires) in focus group discussions.⁶² A total of 41 focus group discussions involving a total of 541 young people in five Secure Care Facilities (SCF) and one government school were conducted. The school group comprised of 121 children and there were a total of 420 children in the SCFs that participated in the study. Two of the SCF's were located in the Western Cape and three in Gauteng. The school was also in Gauteng, south of Johannesburg. The research explored several key themes relating to children being used by adults or older children to commit crime. These included how children first become involved in crime; how adults are involved when children commit crime; who the adults are; and what should be done to assist children who had been used to commit crime.

An overview of the study respondents shows that the median age of the children in the school setting was 14 years and the median age of the children in the SCFs was 16 years. A total of 492 males (91%) participated in the focus group discussions and 49 females (9%). The females were all from the school group, as it was not possible to include females from SCFs. As far as the offences with which the children from the SCFs were charged, the three main offences were burglary/ housebreaking and theft (25%), robbery (25%) and murder or attempted murder (11.7%).⁶³

⁶² The focus group discussions included between six and 16 participants, with an average of 14 participants. The duration of the focus group discussions was on average 55 minutes.

⁶³ Children's Perceptions research, p 5– 9, note 10. The profile of these children again accords with the type of children coming into conflict with the law as evidenced in the two Muntingh studies, note 56 above. Generally, it is male children over 14 years who find themselves charged with offences in the criminal justice system. The two Muntingh studies tended to show that property offences were the most common offences with which children are charged. The study regarding children used in the

For the purposes of the design and implementation of the pilot programme, police, prosecutors and probation officers were alerted to the fact that a child is charged with an adult co-accused may be a strong indicator that the child's involvement in the offence was at the instigation of the adult. Therefore, it is interesting to note that a high proportion of children in the study were co-accused with adults. Of those respondents in the SCF group on whom the information was available through self-reporting (n=389), a total of 182 (46.7%) were co-accused with adults, and 207 (53.2%) were charged on their own.⁶⁴

A wealth of information emanated from the study in relation to the causes of children being used by adults to commit crime and the details of how this is effected, as well as information on who the adults usually are that involve children in crime.

It was found that roughly 37% of the children had engaged in some legal activity to earn money. In terms of illegal activities, just more than 30% of the total group, and 38% of the SCF group, had engaged in such activities to earn money. In contrast, only 2.5% of the school group reported that they had engaged in illegal activities to earn money. Those children who reported that they had engaged in some activities to earn money were asked how they used the money. It was found that a significant number of respondents of the total group and of the SCF group spent their money on drugs and alcohol. None of the school group reported spending their money in this way. Buying clothes was also a significant expenditure and it appeared that the school

commission of crime showed, however, that crimes against the person were the predominant type of offence category with which the children were charged (54%). One explanation is that the children from the study were all being held awaiting trial in SCFs, and usually it would be children charged with more serious offences that are detained in these facilities awaiting trial, rather than children who are charged with theft, shoplifting or other less serious offences, as the latter are usually released into the care of their parents or guardians.

⁶⁴ Children's Perceptions research, p 10, note 10. This finding does not mean that these children were actually used by their co-accused in the commission of the offence, as it may be that the child was in fact the instigator in the commission of the offence. However, it should lead a probation officer or prosecutor to interrogate the circumstances surrounding the commission of the offence further to determine if the child was used to commit crime.

group used their income to “contribute to household income” to a greater extent than their counterparts in the SCFs.⁶⁵

The focus group participants were asked how they believe children first became involved in crime and in response they indicated a wide range of factors.⁶⁶ Firstly, they identified factors at home that related to economic circumstances, care, and family relationships. By far, poverty (and in some cases, unemployment), was noted as the most pervasive of these conditions, described mostly by children as forcing children into committing crime.⁶⁷ Apart from these direct financial factors, 13 of the 41 groups noted a range of issues relating to caretaking that they believed resulted in children committing crime. These included abuse and neglect by parents, parents’ abuse of alcohol and drugs, children have to take care of themselves, and the lack of parental advice and supervision.

Secondly, of the 41 groups, 30 groups raised the issue of peer pressure and the influence of friends as having an impact on children becoming involved in crime.⁶⁸ The third factor identified by the children as causing children to become involved in crime relates to the use of drugs and alcohol and in particular, what was characterised as addiction to drugs, emerged as a significant theme throughout the study.⁶⁹ Fourthly, 13 of the 41 groups indicated that gangs have an influence on children committing crimes for the first time. This was most prominently noted by the groups in the Western Cape, and to some extent in the school group. The nature of gang influence was described as aspirational, in so far as children observe what gangsters have and how they are perceived by the community, and aspire to the same things.

⁶⁵ Children’s Perceptions research, p 11-12, note 10.

⁶⁶ Children’s Perceptions research, p 13-16, note 10.

⁶⁷ Of the 41 groups, 20 raised this as an issue. However, it became apparent that the lack of financial means did not just relate to unfulfilled basic needs but also the children aspiring to things that they could not afford. This was a theme that emerged throughout the study, and is connected to the desire expressed by some of the children to impress others in order to gain respect and status.

⁶⁸ For example, children wanting to impress their friends by wearing labelled clothing.

⁶⁹ This was raised as a reason why children become engaged in crime for the first time by 29 of the 41 groups in the study. It should be noted that “drugs” were cited by 21 of these groups, far more frequently than “alcohol” which was noted by only 5 of the groups.

Finally, the influence of adults was given by 9 of the 41 groups in answering the question of what caused children to commit crime the first time. They described this influence in different ways: for example through coercion, where children describe being “forced” to commit crime. There is also an indication of adults “guiding” children, with adults showing children what to do.

Children in the focus groups were then asked several questions that attempted to elicit information regarding whether and how adults engage children in crime. These questions elicited responses along a number of major themes.⁷⁰ The first of these related to adults’ engagement of children in crime. Children described this as being both direct and indirect in nature. In terms of direct involvement of children by adults in crime, which was noted by 30 of the groups, this related to engaging children as accomplices in the commission of crimes by either committing crimes together, by children acting as look-outs, by adults taking children to crime scenes, by adults overseeing the commission of the crime or by adults paying children for the commission of crime. It also involved using children to sell drugs. Children also described more indirect involvement of adults in engaging children in criminal activities, and these were noted and described in 32 of the group discussions as, for instance, buying stolen goods, showing children how to commit crime and providing the means to do so (such as guns).

Second, children described the means used by adults to engage children in criminal activities, noting coercive means, such as threats and beatings as well as persuasive measures, which included the provision of rewards for example, money and drugs. Participants also described children being drawn into crime by adults through deception, i.e. they cause the child to become indebted to the adult in some way in

⁷⁰ Children’s Perceptions research, p 17 – 24, note 10.

order to get the child to commit crime.⁷¹ Thirdly, children described a range of other factors that mostly related to home and family.⁷²

Interestingly, based on the responses obtained from these questions the researchers noted that it could be concluded that children often felt exploited, deceived and manipulated by adults. This related mostly to the feeling of being used, when adults did not inform them of their true intentions when committing a crime. It also related to the adults' deliberate deception, described as a process where adults would (over time) provide children with things such as money, drugs, clothes and other items and then claim that "these things cost money" and request the repayment of the "debt" in the form of criminal activities. The children also pointed out that they felt that they were being cheated by adults in relation to the actual spoils of crime. In addition, it related to adults not informing them, or lying to them, about the consequences of the offence, for example, that they would get off lightly for the offence due to the fact that they were children. Some children also expressed anger about being abandoned by adults in order to face the criminal justice process on their own. Despite this, as will be discussed in section 7.6 of this chapter, the implementation of the Pilot Programme saw few children providing information on any adult perpetrators identity, and only two possible cases emerged where the child was angry enough to implicate the

⁷¹ As noted above, the issue of drugs emerged throughout this study as a primary means through which children were engaged in crime by adults. Even the acquisition of money was often described by children as relating to the acquisition of drugs, in order to feed what was described as an addiction. 15 of the groups described the process by which adults got children addicted to drugs in order that they may be used to commit crime.

⁷² These factors sometimes related to the abuse of drugs and alcohol by parents or caretakers, but children also noted other reasons for parents' inability to take care of children such as illness or unemployment. Children also noted parents and families not teaching children right from wrong, not providing appropriate examples for children, and particularly, exhibiting inappropriate and criminal behaviour themselves, which was then seen by the children as constituting permissible behaviour. Another set of responses related to parents and families either actively or passively excusing or ignoring their children's criminal behaviour and in some cases, children described ways in which parents subtly rewarded such behaviour as well. The groups were of the view that this resulted in children being more likely to continue with such criminal behaviour.

adult.⁷³ This tends to show that even where the child is angry with the adult or feels manipulated, there are stronger forces at play than seeing the adult held to account in the criminal justice process.

The groups were also asked about the identity of the adults that used children to commit crime. The children responded by pointing to persons from the community, family and friends, gangs and foreigners such as Nigerians and Zimbabweans.⁷⁴ The largest category singled out were men in the community, with children often calling them 'businessmen'. The research did not obtain a clearer idea of who these people were other than an indication that these people were known in the community, and known to be conducting 'business' of some nature. Gangsters represented the second largest category. The presence of the category of 'friends' as the third highest resonates with a similarly high rating of 'peer pressure and the influence of friends' that participants identified under the question of how children become involved in crime. In Gauteng, 'businessmen' were noted most frequently as the types of adults using children and in the Western Cape, it was gangsters that were the most frequently referred to, and the researchers concluded that it was more than possible that these two groupings essentially performed the same functions in relation to involving children in crime.

A question that provided insightful responses was one that enquired whether children were always coerced to commit crime or whether they did so willingly.⁷⁵ The groups

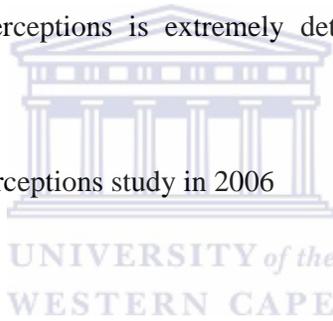
⁷³ Both were shoplifting matters, one in Hatfield and one in Mamelodi. Described in the personal notes of the author and the Final Output Form for the Summary Outline for Action Programme on Child Labour, RAF/03/50P/USA, Project Budget Code: P250.16.100.050, Pilot programme for children used by adults and older children to commit crime as a worst form of child labour in South Africa (CUBAC): Implementing Agency – Children's Rights Project, Community Law Centre, University of the Western Cape, April 2007 (hereinafter referred to as Final Output Form).

⁷⁴ Children's Perceptions research, p 25 – 27, note 10. They also mentioned drug dealers, relatives other than parents, neighbours, ex-prisoners and friends of siblings.

⁷⁵ The emphasis on the voluntary involvement of a child in criminal action even when used by an adult was an important issue in the matter of *S v Siphon Mongezi Mfazwe and 4 others* (unreported, CPD Case No. 07/2006) discussed in the section 7.7 of this chapter, where it was argued that Accused No. 5, who at the time of the commission of the offence was 16 years of age, should be treated as a victim of exploitation as well as a perpetrator of the offence. It is of significance that Accused No. 5 denied he

provided responses to indicate that children were often threatened and coerced into committing crimes. However, the groups noted that children also decided themselves whether or not they should commit crime, with 39 of the groups stating that children often committed crime willingly, and that their willingness was frequently due to the nature of the reward expected.

The remainder of the study examined whether children needed help and what forms such assistance should take.⁷⁶ This information was useful in the compilation of the diversion and prevention interventions for children used in the commission of crime as well as the design of the Pilot Programme in relation to what state actors should do to address the issue of children being used to commit crime. Overall, it has been pointed out that ‘this work ranks amongst one of the finest child participation studies yet undertaken in the South African context...This evaluation is based on the fact that the report on children’s perceptions is extremely detailed and the analysis very nuanced...’.⁷⁷



7.4.3.1 Second children’s perceptions study in 2006

had been influenced to commit the offence but in the sentencing judgment, this was found not be the case.

⁷⁶ Children’s Perceptions research, p 30-36, note 10. Education and training was frequently cited as a means of assistance but only by children in the SCFs. The researchers, however, noted a number of sub-themes that emerged from the responses: firstly, there is the problem of access to education, which may be due to poverty. Secondly, a number of children (from Gauteng) complained that their criminal records are disclosed to the school and then they were not permitted to enrol. Thirdly, apart from general school-based education, it emerged that there is a need to empower children with skills in other areas such as art or more skills suited to the formal job-market. A substantial number of focus group discussions gave counselling, therapy and speaking to a social worker or other person that you trust, as a means of assisting children. When asked who should help children, the most frequent response was “social workers/care workers and psychologists”. The next category of persons was “parents/adults and grandparents”. Many children stated that “the government must help” but were not specific on who or what branch in government should perform this task. Some children were specific to the other extreme and named President Mbeki and Minister Ngconde Balfour (Minister of Correctional Services) as individuals who should assist children.

⁷⁷ Sloth-Nielsen, note 44.

During 2006 a follow up study examined the experiences of children in two rural provinces. The study did not directly replicate the previous children's perceptions study, but was intended to build on the learning emerging from that and other child participation/consultation efforts over the past few years; nevertheless it did seek to answer the same types of questions posed in the first study, for example, what causes children to commit crime, are adults involved in children committing crime, how are they involved and who are the adults that use children to commit crime.⁷⁸

This study engaged 202 children in consultation on the issue of the extent to which children are used by adults to commit crime. Use was made of 15 focus group discussions. The study focused on children in rural communities in two provinces, the Eastern Cape and Mpumalanga, and sought to engage the views of equal numbers of children who had been in contact with the criminal justice system, and those who were in schools. Of the total of 202 children, 133 (66%) of these were male and 69 (34%) were female. 103 of these children were drawn from school and community settings, while 99 were drawn from diversion programmes. The average age of the children who participated in the study was 14.5 years. Children from diversion programmes tended to be older than children drawn from schools. Boys also outnumbered girls among those drawn from diversion programmes.⁷⁹

It was found that about a third of the children in the rural study reported having engaged in work to earn money. However, there were no direct reports of children engaging in illegal activities to earn money. Nevertheless, despite none of the children having engaged in illegal activities to earn money, all the children who participated in the study were found to display considerable knowledge of the crimes that occur in

⁷⁸ Frank C, *Children Used by Adults to Commit Crime: Child Consultation Study with children from rural areas in the Eastern Cape and Mpumalanga*, Draft Report, ILO, December 2006 (hereinafter Rural Study research). Copy on file with the author. The study came about after a briefing on the CUBAC pilot programme to the Sexual Offences and Community Affairs (SOCA) Unit of the National Prosecuting Authority, which indicated that they would only consider replication of any pilot programme if there was evidence to show that any programme developed for children (such as the prevention or diversion programmes) could be applied in rural as well as urban areas. TECL then commissioned this second study (personal notes of the author).

⁷⁹ Rural Study research, p 14, note 78. The age and gender profile tended to mirror that of the first study.

and around their communities and were able to provide information about the different kinds of crimes that occurred.⁸⁰

In response to the question of what caused children to become involved in crime a number of responses not dissimilar to those from the first study, were elicited.⁸¹ Poverty and unemployment were identified by the children as being the principal reasons for children becoming involved in crime. The second strongest theme to emerge in response to this question related to issues of parenting, care and other circumstances at home. Children stated that involvement in crime was often a result of children receiving inadequate parenting. The influence of alcohol and drugs emerged as the third theme in response to this question. Fourthly, participants noted that friends and other people could have a strong influence on children and that this was one of the factors that caused children to become involved in crime. Finally the children noted other factors such as television programmes, disorder in the community, and the lack of recreational activities and other facilities to keep children busy.⁸² It is noteworthy, that these factors generally mirror those found in the first report, with the exception of drugs, which played a less prominent role.

In relation to the question of what role adults play in children committing crime, the study revealed that adults directly used children to commit crime, for example, by offering children money to commit crime, or by manipulating them to become involved in crime.⁸³ Children also identified the role of parents and caregivers as actively engaging children in criminal activities or failing to provide them with the

⁸⁰ Rural Study research, p 18 – 19, note 78. These generally consisted of housebreaking/burglary, rape, murder, assault, and theft. The issue of alcohol abuse emerged in several groups. Children stated that there was a great deal of violence and community disorder that resulted from the fact that alcohol was being consumed, and that this was a source of some of the crime problems. Children also linked alcohol abuse to the crimes of rape, murder and housebreaking.

⁸¹ Rural Study research, p 19 – 21, note 78.

⁸² The research found that children noted that television was one of the few forms of entertainment that children have access to, and that they would easily get excited about the characters and their activities.

⁸³ Rural Study research, p 21 - 22, note 78. Generally children are sent to steal and then rewarded. Other examples include children procuring customers for drugs or adults sending children to reconnoitre a location prior to a housebreaking.

care, protection or information needed in order to prevent the child's involvement in crime.⁸⁴

Interestingly children in several groups noted that adults often bought stolen goods from children after the crime had been planned and executed by the children. They noted that it was not just "criminals" who did this but other people in the community. This is an indirect means of using children to commit crime as, even though the adult may not have instigated the commission of the offence, the action of providing a readily accessible avenue for disposing of stolen goods encourages the commission of crime.

Children pointed to the use of rewards as being the means most often employed by adults to engage children in crime.⁸⁵ They noted that adults promised a range of rewards for children engaging in criminal activity including money, food, alcohol, and clothing. The use of coercion emerged as the next most frequent response to this question. This included threats of the withdrawal of care or other benefits. Children stated that this was most often done by parents and caregivers. Finally, the study participants also indicated that children were easy to manipulate through the use of lies and 'tricks' and that adults often used these strategies to get children involved in crime.

Children were asked to identify the types of adults that engaged children in crime.⁸⁶ They generally provided a wide spectrum of responses, but overwhelmingly agreed that these were people that were known to children and were primarily friends, neighbours, known people in the neighbourhood, and family members. Only two of the groups stated that strangers were involved. Children were then specifically asked whether parents and caregivers were involved in engaging children in crime. Responses to this question were somewhat surprising in comparison to the results of the previous study as most of the groups agreed that parents and caregivers were also involved.

⁸⁴ Examples given included parents requiring their children to steal for them or parents drinking alcohol and fighting.

⁸⁵ Rural Study research, p 23 - 25, note 78.

⁸⁶ Rural Study research, p 26 - 27, note 78.

Children were asked what kinds of assistance should be provided to children who found themselves in these situations.⁸⁷ Firstly, the children stated that the government should provide a range of services in order to assist children including the provision of recreational facilities, counselling and support groups. Secondly, they noted the needs for changes in neighbourhoods and communities. This related to services in these communities as well as changes in attitudes. Finally, the participants stated that parents and families also had a role to play in providing assistance to children in that they had a responsibility to assist and support children as well as to discipline them. While children in both studies clearly place the responsibility for assistance with government, the children in the second study showed more insight into the value of crime prevention in communities and families by highlighting the need to intervene at that level.

While the findings from the two studies appear very similar, the researcher (the same person for both studies) distinguishes them in two respects.⁸⁸ Firstly, she notes that the profile of the participants is quite different as the first study engaged a larger sample that included far more children who had had contact with the criminal justice system. Secondly, while the rural study was broadly modelled on the first study in terms of methodology, changes had been made to the data collection tool and not all the questions were the same across both studies.

However, generally the researcher concluded that the risk factors for children being used by adults to commit crime identified in the second study did not differ that dramatically from those identified in the first study, with the exception of, in the first place, the fact that rural areas may not be as strongly affected by the drugs as urban areas, as alcohol possibly plays a much larger role and, in the second place, that poverty possibly had a greater influence on the nature of risk for children being used in the commission of offences in rural areas than in urban areas.⁸⁹

⁸⁷ Rural Study research, p 27 - 29, note 78.

⁸⁸ Rural Study research, p 31, note 78.

⁸⁹ Rural Study research, p 34, note 78.

The report concludes that the implication of the setting – rural or urban- in which children grow up is not that significant for the design of the prevention and diversion programmes. However the fact that alcohol emerged very strongly as a factor in the second study indicates that prevention efforts need to address the question of how this influence may be reduced, and in particular focus on how children’s access to alcohol may be limited. In addition, in so far as the main group of adults that were identified as using children to commit crime in the second study were people known by the children, it was concluded that more sophisticated prevention efforts are required to address this.

Both studies constitute a first glimpse into what happens when children are used by adults to commit crime. The adult research participants were only able to provide ad hoc examples of where children had been used and this only happened if the children had disclosed that they had been used, and the children ultimately still controlled the amount of information shared with the adults. However, the children who participated in the two participation studies provided rich detail that presented a clearer picture of how blatant, on one hand, and nuanced on the other, the instrumental use of children can be. In addition, the findings illustrate just how invidious the practice of using children is, and how deeply it permeates into the various corners of children’s lives, whether this results from being used by their families, friends, neighbours or community members. The information is invaluable in that it provides the backdrop against which crime prevention initiatives can be designed to target specific conduct and persons. The study findings have been widely disseminated and they should contribute to a wider crime prevention initiative, beyond the specific purpose of the actual studies.

7.4.4 Design of the CUBAC Pilot Programme

The second key component to the Baseline Study was the design of pilot interventions that would comprise the essence of the CUBAC Pilot Programme in Mitchell’s Plain and Mamelodi/ Hatfield, which was to run for 12 months in each site. The Baseline Study report provides an overview of what the proposed Pilot Programme would

consist of,⁹⁰ but the detail is contained in the Action Programme Summary Outline (APSO).⁹¹

In compiling the APSO, two crucial principles were adhered to:⁹² firstly the principle of mainstreaming- this consisted of the premise that any pilot programme designed to implement obligations under the CLPA (and Convention 182 for that matter) has to fit in with existing policy. Therefore the CUBAC Pilot Programme had to be designed in order to complement existing child justice practice i.e. assessments, diversion, prevention, alternative sentences and the like. Secondly, and closely connected to the first principle, was the principle of sustainability. The CUBAC Pilot Programme had to be designed in such a manner that its individual components would be able to continue after pilot period had terminated. In other words, the pilot interventions and practices had to be of such a nature that they could be integrated into existing policy and practice.

The overall developmental objective of the CUBAC pilot programme was to contribute to the elimination of the worst forms of child labour in South Africa in the form of the instrumental use of children in illicit activities in South Africa.⁹³ This overall goal would then be achieved through five distinct yet interlinked objectives, including direct interventions with children, strengthening government capacity and

⁹⁰ Baseline Study, p 110 – 117, note 9. For further discussion see Gallinetti J, 'Children used by adults to commit crime (CUBAC) in South Africa', paper presented at the 17th World Congress of International Association of Youth and Family Law Judges and Magistrates, Belfast, August 2006 and Gallinetti J, 'The instrumental use of children in criminal activity: crossing the void between child justice and the worst forms of child labour', paper presented at the Reducing Exploitative Child Labour through Education (RECLISA): Regional Child Labour Conference hosted by RECLISA, Johannesburg, July 2006 (copies on file with the author).

⁹¹ ILO Summary Outline for Action Programme on Child Labour, RAF/03/50P/USA, Project Budget Code: P250.16.100.050, Pilot programme for children used by adults and older children to commit crime as a worst form of child labour in South Africa (CUBAC): Implementing Agency – Children's Rights Project, Community Law Centre, University of the Western Cape, April 2006 (hereinafter referred to as the APSO).

⁹² APSO, p 14, note 91, and Gallinetti J, 'Overview of the CUBAC Pilot Programme', presentation delivered at the Western Cape Workshop on the Child Labour Programme of Action, Department of Labour, May 2007, copy on file with the author.

⁹³ APSO, p 18, note 91.

awareness-raising. The five objectives will be discussed in detail during the examination of the implementation phase of the pilot programme in section 7.6 below.

7.4.5 Children in organised armed violence

At this point, a brief discussion on a project focusing on children in armed violence (COAV) is merited. Although COAV does not strictly fall within the ambit of this thesis, it does have some relevance to children used in the commission of crime. The reason is that the project focused on a particular aspect of the use of children in the commission of crime, namely, their recruitment into armed violent activities by organised crime syndicates. COAV is a recent initiative started by Viva Rio in Brazil and is aimed at investigating policy and interventions for children in organised armed violence.⁹⁴ Although an initial study on COAV in Cape Town was undertaken by the Institute for Security Studies as part of a 10-country study that resulted in the so-called Dowdney publication, concerted efforts to address the issue in South Africa only commenced in November 2005.

Frank describes COAV as follows:

“Children in organised armed violence (COAV) is an awkward concept in the current child rights discourse. It does not fit within the neat categories that have been established, and may not be defined either as child offending or as relating to children in armed conflict.”⁹⁵

She notes that the term was intended to describe “children and youth employed or otherwise participating in organised armed violence where there are elements of a command structure and power over territory, local population or resources” for the purposes of the 10-country study.

⁹⁴ See generally Dowdney L, *neither War nor Peace*, COAV, Viva Rio. ISER, IANSA, undated.

⁹⁵ Frank C, ‘Children’s involvement in gangs and violent crime: the COAV Cities Project and its implications for South Africa’, in Gallinetti J, Kassan D and Ehlers L (eds) *Child Justice in South Africa: Children’s Rights under Construction Conference Report*, Open Society Foundation for South Africa and the Child Justice Alliance, 2006, p 123 (available at www.communitylawcentre.org.za).

In so far as the concept of COAV refers to children who are involved in organised armed violence through the initiation or recruitment by an adult, this phenomenon not only intersects with child justice and children involved in armed conflict but also the instrumental use of children in illicit activities as a worst form of child labour. The reason for this is that these children are being exploited for their services in organised armed violence. Dowdney describes how children are often recruited by family or friends, and even in one case in the Phillipines by the local mayor, they then pass through a transitional phase where they perform favours or small jobs and tasks for the organised crime entity, followed by full membership which is, in some cases, as simple as being given a gun and being paid.⁹⁶

Therefore it is submitted that because of the specific nature of the type of criminal activity the children are involved in, COAV can be located within the wider concept of the instrumental use of children generally. Unease sets in, however, when one considers the previous discussion regarding POCA and the punitive approach it adopts towards persons involved in gang or organised crime activities. The question that arises is what should measures should be adopted when dealing with children used in organised armed violence? This is the precise goal of the COAV project undertaken in Cape Town in 2005/6, when the Institute for Security Studies and RAPCAN⁹⁷ collaborated to co-ordinate the COAV Cities Project, a one-year intervention intended to focus on developing solutions to the unique problems relating to COAV experienced in Cape Town and as part of a larger 5-country initiative (again co-ordinated internationally by Viva Rio).⁹⁸

The Cape Town COAV Cities Project started with a workshop, which was held in November 2005 to review the findings of a Rapid Assessment undertaken specifically for that project and plan for project activities in 2006. This workshop identified five thematic areas for policy discussions in 2006, and noted specific issues that needed to

⁹⁶ Dowdney, p 72 – 77, note 94.

⁹⁷ RAPCAN (Resources Aimed at the Prevention of Child Abuse and Neglect) is a children's rights organisation based in Cape Town.

⁹⁸ For a general discussion of the COAV Cities Project in Cape Town and its objectives and methodology see Frank, note 95. For an overview of the international 5-country study as well as all the associated documents and reports, visit www.coav.org.br.

be addressed in relation to each area, namely, strengthening information and research strategies relating to children's involvement in gangs and youth violence; the role of the criminal justice departments in responding to children's involvement in gangs; law reform relating to children's involvement in gangs; exploring the role of social services in responding to children's involvement in gangs and intervention programmes relating to children and gangs.⁹⁹ These issues were similar to those which were addressed during the CUBAC Pilot Programme. In addition, the COAV Cities Project provided a particular platform through which the use of children by adults could be highlighted and discussed.

Certain key recommendations emerged from the project.¹⁰⁰ Firstly, with regard to programme delivery it was thought that there are already many interventions being implemented by the South African government that involve working with children, youth and families in relation to prevention, early intervention, diversion and reintegration. It was argued that there is a need to raise the quality of these interventions and for these to be made as effective as possible through, for example, promoting the idea that no one single programme or intervention would resolve the complex problems that are being faced. This recommendation would apply equally to any programme dealing with children in conflict with the law as well as children used in the commission of crime. Secondly, with regard to the co-ordination of efforts by government, it was recommended that there is a need to use an established structure, or establish a new structure, to co-ordinate government efforts to deliver services to children and families. Finally, with regard to law reform, it was recommended that special attention should be paid to the Child Justice Bill and the Prevention of Organised Crime Act in so far as they address youth who commit serious offences.

Interestingly, the Project also undertook a child consultation study which elicited the opinions and experiences of children in Cape Town regarding gangs and organised

⁹⁹ Frank C and Waterhouse S, *COAV Cities Project Policy Recommendations*, Draft 1, Institute for Security Studies, undated, copy on file with the author. This document traces the history of the project, the methodology, rapid assessment findings and the recommendations emanating from the 5 policy workshops.

¹⁰⁰ Frank and Waterhouse, p 31-32, note 99.

armed violence. This research was undertaken by the Human Sciences Research Council and produced significant insights.¹⁰¹

In sum, the COAV project signaled the fact that within the discussion of the use of children to commit crime, there may be different manifestations of the phenomenon, requiring a more nuanced approach to the issue. A child who had been used to shoplift, for instance, would require a distinctly different intervention than a child who had, for example, been used as an assassin for an organised crime network. The value of a programme focused on children in armed violence is that carefully considered proposals and systems can be formulated. This, in turn, can result in appropriate measures being fashioned to address children who have been used in the commission of crime according to their individual needs.

7.5 Preparation for the Pilot Programme

The Baseline Study was completed in August 2005 and the implementation of the CUBAC Pilot Programme commenced in April 2006. In the interceding months the Community Law Centre undertook various activities in order to ensure that the pilot programme was ready to begin once the Action Programme had been approved.¹⁰² These activities included facilitating the compilation of instructions for prosecutors, police and probation officers at the pilot sites by their relevant provincial department

¹⁰¹ Ward CL, *'It feels like it's the end of the world': Cape Town's young people talk about gangs and community violence*. Report to the Institute for Security Studies on the child participation study in support of the COAV Cities Project. Cape Town, South Africa: Human Sciences Research Council 2006. In the consultation with children on gangs in the Western Cape, children in all of the focus groups indicated that they were exposed to extremely high levels of violence in their communities. The report also indicates that some children noted that gang members would take revenge against people who defied them, reflecting a sense of helplessness in the inability to protect themselves. The children indicated that gang activity also took place at their schools, and the report notes that schools were seldom described by the children as safe places. For further discussion see also Frank and Waterhouse, p 15-17, note 99.

¹⁰² The Community Law Centre was contracted by TECL to prepare for the pilots in this way. See the Service Contract between the International Labour Organisation and the Children's Rights Project, Community Law Centre: Pilot Inception Contract, Commitment No. 2004-25, September 2005 (copy on file with the author).

or office; sub-contracting diversion and prevention service providers who would deliver the diversion session and prevention programme aimed at the use of children in the commission of crime; training of diversion and prevention service providers as well as educators in the pilot sites in order to ensure that they were ready to deliver the prevention and diversion programme; ensuring that local steering committees responsible for child justice or other children's issues at the pilot sites were suitable for addressing issues related to the use of children to commit crime during the pilot and, finally, the publication of five CUBAC publications.¹⁰³

Worth mentioning is the drafting of instructions for the officials at the pilot sites. Following from the recommendation in the Baseline Study that the instructions be drafted at provincial level and then sent to national departments for endorsement, the Community Law Centre initiated the drafting of these instructions. These instructions, which constituted an official mandate, were seen to be critical to criminal justice officials complying with the obligations contained in the Actions Steps in the 2003 CLPA. As these action steps were rather broad, and essentially consisted of the setting a particular aim, for instance, that children used in the commission of crime should be diverted where appropriate or that adults who use children in the commission of crime be investigated and prosecuted, instructions were necessary in order to determine 'how' this would happen.

The key roles and responsibilities set out in the instructions included: the identification of children used by adults in the commission of offences by all the role-players; the need for the police to investigate charges such as conspiracy and incitement against adults who use children; the need for prosecutors to prosecute adults who use children on charges of conspiracy and incitement where appropriate; the need for probation officers to recommend the diversion of children used by adults to commit crime where appropriate and to inform police and prosecutors of any such cases. The police and prosecutors were requested to not withdraw matters against adults co-accused with children, even if children admitted their guilt and tried to

¹⁰³ These publications dealt with the Situation Analysis and Pilot Design, Children's Perceptions of their Use by Adults in the Commission of Offences; Guidelines for Role-players in the Criminal Justice System; the Diversion Programme Manual and the Prevention Programme Manual. All were published in early 2006 and are available on www.communitylawcentre.org.za.

exonerate the adult. The police and prosecutors were also provided with information on how the offence of incitement was applicable to situations where children had been used in the commission of a crime.¹⁰⁴

I would suggest that without the intervention of the Pilot Programme, the CLPA action steps would never have been explained or ‘translated’ into specific roles and responsibilities that could be incorporated into police, prosecution and probation practice. Again, this illustrates the value of the work of IPEC, in this case through the technical assistance programme of TECL.

7.6 CUBAC Pilot Programme Implementation

The CUBAC Pilot Programme began at the Mitchell’s Plain, Mamelodi and Hatfield pilot sites on 1 April 2006 and was completed on 31 March 2007.¹⁰⁵ The implementation focused on achieving the objectives contained in the APSO through the selected activities. This process has also been described as the design of a pilot project aimed at the elimination or reduction of children used in the commission of crime as a worst form of child labour, and then testing and implementing the materials, strategies and approaches identified to achieve that aim.¹⁰⁶ What follows is a discussion of how the objectives identified in the pilot design were implemented and whether they achieved their intended goal.

7.6.1 Objective 1: Programmatic interventions for children

¹⁰⁴ Copies of the instructions from all the provincial offices are on file with the author.

¹⁰⁵ For a full account of the implementation phase, see Children’s Rights Project, Community Law Centre, University of the Western Cape, *Children Used by Adults to Commit Crime (CUBAC): Final Report on Pilot Programme Implementation*, ILO, April 2007 (hereinafter Final Report). Copy on file with the author.

¹⁰⁶ Sloth-Nielsen, p 22, note 44. She notes further that the project was intended to ultimately provide government stakeholders with the tools to address the problem of children being used by adults in the commission of offences throughout the country, via a range of stakeholders in different sectors and that it was expected that the project would lead to concrete recommendations for policy and programme reform, and possibly for legislative action.

This objective was aimed at ensuring that at the end of the project, 1500 children would have received services through specific diversion and prevention interventions targeted to combat the use of children to commit crime, including 600 children who would have been withdrawn from the situation where they had been used in the commission of a crime as a worst form of child labour through their successful completion of a diversion programme that contained a session dealing with the use of children in the commission of crime.¹⁰⁷

The Baseline Study produced information that informed the design of programmatic content for the prevention programme and diversion session. In addition, a separate awareness-raising session for adults to be delivered in community settings was developed. These direct programmatic responses were aimed at social crime prevention with a focus on children, parents and the broader communities at the selected sites.¹⁰⁸

Diversion programmes that incorporated a component aimed at preventing the use of children in the commission of crime and equipping children to resist such situations in the future were delivered by NICRO in the Western Cape and YDO and RJC in

¹⁰⁷ APSO, p 18. The terminology of ‘withdrawing’ can be traced back to Article 7 of Convention 182, which speaks of removing children from worst forms of child labour.

¹⁰⁸ The key objectives of the prevention programme and diversion session are very similar although aimed at different target audiences. Essentially, the idea for both programmes was premised on the basis that if children are provided with appropriate information and behaviour skills, they will be more capable of responding in a functional way when faced with a situation in which adults attempt to use them to commit crime. The key objectives of the programmes are to introduce the participants to the issue of children being used by adults to commit crime and indicate its international significance; enable children to examine the risk factors relating to offending in general and define factors that relate to the individual, family school and community; to enable children to identify some of the common situations for children being engaged in crime by adults; to provide participants with opportunities to role-play different behavioural responses to situations involving the instrumental use of children in illicit activities and to provide information to children as to where and how to access further assistance if this is needed. See Children’s Rights Project, Community Law Centre, University of the Western Cape, *Children Used by Adults to Commit Crime: Prevention Programme Manual*, ILO, 2006 and Children’s Rights Project, Community Law Centre, University of the Western Cape, *Children Used by Adults to Commit Crime: Diversion Programme Manual*, ILO, 2006 both available on www.communitylawcentre.org.za.

Gauteng.¹⁰⁹ In total 433 children were withdrawn or diverted. This was less than the original target of 600. The reason was that the anticipated number of referrals from Mamelodi and Hatfield courts were less than expected and in December 2006, the Mamelodi probation officer resigned and Mamelodi court did not have a full-time probation officer to do assessments and recommend referrals to diversion.

In the design of the CUBAC Pilot Programme it was intended that in addition to the diversion services that the children would receive, they would also receive follow-up services to assist them with re-integration. Unfortunately, follow-up services, in the form of mentoring, are not standard practice in South Africa.¹¹⁰ YDO was the only diversion service provider, at the time of the commencement of the pilot programme, to provide a mentoring component to their diversion programme. Their mentoring component involves linking or assigning a mentor to the young person, who acts as a role model and provides individualised support to the young person and facilitates reintegration back into the community. Neither RJC nor NICRO had similar mentoring components to their diversion programmes. It was therefore thought that YDO could provide mentoring services for the children who had completed the RJC

¹⁰⁹ For a full discussion of the programmatic interventions see the Final Report, page 28 – 30, note 105. As far as the diversion and prevention service providers were concerned, it was agreed in the APSO that the Restorative Justice Centre (RJC) and National Youth Development Outreach (YDO) would provide the diversion session on children used in the commission of offences as part of their diversion programmes in Mamelodi and Hatfield, while NICRO would offer it in Mitchell's Plain. In offering the diversion session, YDO offered an additional mentoring service to children undergoing their diversion programme. They were also contracted to provide this service as an add-on to the RJC diversion programme. As NICRO has no mentoring component, Creative Education for Youth at Risk (CRED) was contracted to offer follow-up services to the children who completed the NICRO diversion programme in Mitchell's Plain. The prevention programme aimed at the use of children in the commission of crime would be offered by YDO in Mamelodi and Hatfield and by CRED in Mitchell's Plain.

¹¹⁰ As indicated in section 6.4.2.4 in Chapter 6 diversion services only began in the early 1990's and are still not consistently available in a legislative framework on account of the Child Justice Bill 49 of 2002 not being passed. As a result, the main focus thus far has been on the provision of diversion services, and these are still not widely available in South Africa, with the greatest concentration of programmes being in the urban areas and rural areas only having access to limited diversion interventions.

programme and CRED could provide follow-up services, similar to those that they offered in their post-release programme for children in prison.

Sloth-Nielsen notes that the method chosen, namely, of adding content relating to the instrumental use of children in the commission of crime to existing diversion programmes was appropriate for three reasons.¹¹¹ Firstly, the diversion service providers had existing access to children in conflict with the law and an established reputation with the local criminal justice officials. Secondly, it enabled the development of additional skills and the experience in those organisations (particularly in identifying special vulnerability and risk in children who had been referred). Thirdly, it increased the human resources available to the CUBAC Pilot Programme in a cost efficient way, by capitalising on people already employed by these structures.

The prevention programme service providers were YDO in Gauteng and CRED in the Western Cape, and the programme was also offered by certain educators and child care workers who had received training in the programme. The prevention programme was designed as a stand-alone intervention that can be delivered in schools as part of the life-skills curriculum or in institutions such as places of safety, secure care facilities and prisons.

However, in addition to merely offering the prevention programme, the programme facilitators were also instructed to be alert to children who may need follow-up interventions due to them being at high-risk of offending or becoming involved in child labour or them requesting assistance themselves. These follow-up interventions would be the same services offered in the diversion programmes and offered by YDO and CRED.

The target set in terms of this objective was to reach 900 children. This number was exceeded and exactly 2000 children were reached between the two sites. Thanks to the programme also being run by educators in schools at the pilot sites, at the end of the pilot phase, 28 different classes of children in Mamelodi schools, ranging from

¹¹¹ Sloth Nielsen, p 35 – 36, note 44.

grades 4, 5, 6 and 7, to secondary school children up to grade 9, received the benefit of the prevention programme.¹¹²

Sloth-Nielsen identifies two good practices in relation to the prevention programme.¹¹³ Firstly she notes the delivery of the prevention programme in schools, as this utilises existing teaching staff, the current life skills programme in the school system, is virtually cost-neutral and indicates that the prevention programme aimed at the use of children in the commission of crime is sustainable in the education sector in the medium term. Secondly she considers the offer of follow-up services to the prevention programme as a good practice as this recognises that prevention is not a ‘once-off’ event but a process aimed at the ongoing avoidance of children ‘at risk’ becoming involved in crime.

7.6.2 Objective 2: Strengthening government capacity

This objective was aimed at ensuring that by the end of the project, key institutions such as the Departments of Justice, Social Development and Education, police, prosecutors, probation officers and non-governmental organisations would have been strengthened to plan and deliver services and programmatic interventions for children used in the commission of offences.¹¹⁴ Part of this objective also involved assisting and overseeing the operationalisation of the action steps in the 2003 CLPA that dealt with the instrumental use of children to commit crime and this would involve piloting measures to ensure that probation officers, police and prosecutors were equipped to identify children used by adults to commit crime, where possible to divert them, and if feasible, to investigate and prosecute the adults who used them.¹¹⁵

¹¹² See Final Report, p 37 – 38, note 105.

¹¹³ Sloth-Nielsen, p 33 - 34, note 44. She describes good practices as actions or methodologies which are successful, innovative, are transferable to other areas or domains and are sustainable. She notes that they lead to actual change, which is measurable and can affect the policy environment, with replicability being a key aspect in identification of a good practice, as is the institutionalisation of the initiative in every day practice.

¹¹⁴ APSO, p 6-8, note 91.

¹¹⁵ APSO, p 20, note 91. The actual activities to achieve this objective included the provision of information on the use of children to commit crime to the relevant departments and assisting them to

The instructions issued to the local role-players and the accompanying training provided to them seemed to meet with some success. This was evidenced by the number of children identified by probation officers as having been used by adults in the commission of offences, as well as a number of adults being prosecuted.¹¹⁶

It became evident that the capacity of the state officials at Mitchell's Plain, Mamelodi and Hatfield was considerably strengthened in relation to situations involving children used in the commission of crime. This can be seen from the insightful presentations of all the various role-players at the two provincial seminars on the Pilot Programme at each site as well as the CUBAC National Workshop.¹¹⁷ It appeared that police, probation officers and prosecutors alike familiarised themselves with the subject-matter and were able to engage with their colleagues on key points. In particular, the

identify needs and plans for their activities on addressing the instrumental use of children in the commission of crime; specific liaison with the Department of Education to facilitate link between the CUBAC Pilot Programme and initiatives within the Department of Education on vocational education programmes; further training on the use of children to commit crime including on the prevention and diversion programmes for officials within the Departments of Education and Social Development; the finalisation of instructions to the local prosecutors, police and probation officers by the provincial police, Director of Public Prosecutions and the Department of Social Services in both provinces in order to promote the investigation and prosecution of adults involved in the use of children to commit crime and the training of police, prosecutors and probation officers at Mitchell's Plain and Mamelodi on the instruction and guidelines specific to their duties and responsibilities and the cross-cutting duties and responsibilities of other role-players. Training material for Justice College, the training institution responsible for in service training of prosecutors and magistrates would also be developed. In addition, two provincial seminars were planned for the provincial and local role-players to take stock of the implementation process in their site, identify challenges, difficulties in implementation and emergent good practice. A final national workshop was planned to present the results of implementation and make recommendations for future action after the completion of the pilots.

¹¹⁶ Prosecutors identified 20 cases where children had been used in the commission of crime and probation officers 58 cases. The figures from the Mamelodi probation officer are unknown due to her resignation.

¹¹⁷ Information contained in Report on National Workshop on Children used by Adults to Commit Crime (CUBAC), Braamfontein, February 2007 (hereinafter CUBAC National Workshop); Report on the First CUBAC Provincial Seminars in the Western Cape and Gauteng, August 2006 and Report on the Second CUBAC Provincial Seminars in the Western Cape and Gauteng, November 2006. Copies on file with the author.

state officials identified key challenges in implementing the CUBAC pilot programme, including how to ensure the safety of children, children appearing in court with drug-lords and gang members masquerading as guardians,¹¹⁸ the insufficiency of evidence to prosecute the adults, how to identify false statements by children that they had been used in the commission of an offence, and distrust of the police by the children.¹¹⁹ Likewise, the provincial officials from SAPS, the Director of Public Prosecutions and the provincial Departments of Social Development all actively participated in the two sets of provincial seminars and the National Workshop. The result of this level of engagement was evidenced by the recommendations (discussed below) made at the CUBAC National Workshop by local, provincial and national role-players from the criminal justice departments (including the national Departments of Justice and Education).¹²⁰

The principal recommendation was the development of a protocol on children used by adults to commit crime for all departments which would, amongst others, address the issuing of official instructions for each department to operationalise the roles and responsibilities of officials under the protocol and provide guidelines on safety issues concerning children. Another recommendation was the compilation of a specific policy on children co-accused with adults that needed to be drafted to flesh out the provisions contained in the Criminal Procedure Act and Child Justice Bill on the separation of trials, joinder of trials and not withdrawing charges against co-accused adults where child has accepted responsibility. A third recommendation was the development of a standardised assessment form to be made available in all provinces that incorporates risk factors attendant to the use of children by adults in the commission of crime. It was also recommended that a specific offence for the use of children in the commission of crime should be enacted as a general law amendment or included in the Child Justice Bill 49 of 2002. Training on the issue was also singled out as needing to be integrated in departmental training initiatives.

¹¹⁸ The drug-lords and gangsters would pretend to be the child's guardian and the child would be intimidated and not disclose that he or she had been used in the commission of the crime

¹¹⁹ These issues were identified at both sets of provincial seminars as well as the National Workshop, note 117 above.

¹²⁰ The Report of the CUBAC National Workshop, note 117, contains a full set of recommendations.

This set of recommendations can be said to form a blueprint of what action government needs to adopt in order to further the initial work done by the CUBAC Pilot Programme. The CUBAC Pilot Programme operationalised the action steps contained in the 2003 CLPA and in so doing pinpointed areas that needed extra attention as well as the means of ensuring a co-ordinated approach to addressing the use of children to commit crime through the 2003 CLPA. In fact, the fruits of the recommendations flowing from the pilot programme have already been evidenced by the acceptance of a provision in the Children's Amendment Bill 19F of 2006, which makes the use, offering or procuring of a child for illicit activities a criminal offence – see the discussion in section 5.3.3 of Chapter 5.

Another key achievement in meeting this objective was the inclusion of chapters on the use of children in the commission of crime in the training manuals for magistrates and prosecutors developed under the auspices of Justice College.¹²¹ In addition, a separate presentation on this subject-matter was included in training on alternative sentencing for magistrates undertaken by Justice College in all nine provinces during 2006. This institutionalisation of the issue of children used by adults to commit crime in justice training initiatives will pay dividends for years to come because of the large numbers of magistrates receiving the training, and sets the tone for the further integration of the issue into departmental training initiatives.¹²²

7.6.3 Objective 3: Ensuring the sustainability of the issue of children used in the commission of crime at child justice committees

¹²¹ See Final Report, p 45 – 46, note 105.

¹²² Sloth-Nielsen, p 27 - 28, note 44, questions whether the incorporation of children being used by adults to commit crime in Justice College curriculum and initiatives should be seen as a good practice as it occurred because of the existing established relationship between the Community Law Centre and Justice College officials and so may not be replicable given another set of pilot programme implementers. This concern is certainly valid, as it remains to be seen whether the impetus on the use of children in the commission of crime in the justice sector will continue given the exit of the Community Law Centre at the end of the pilot phase. However, the ultimate responsibility to address the issue lies with the relevant government departments in terms of CLPA and therefore, while a period of adjustment may be needed after the service provider's departure, the departments will nevertheless have to meet their obligations at some point and this will require further action, precisely of the nature described as having occurred in relation to Justice College.

This objective was aimed at ensuring that the issue of children being used in the commission of offences was discussed on an ongoing basis at the national, provincial and local child justice steering committees to ensure not only that all the relevant role-players were kept abreast on the developments and progress of the pilot, but also to address any challenges and obstacles that were being encountered during the pilot and to explore ways in which these could be resolved.¹²³ The main outputs in achieving this objective included the management of issues relating to the use of children in the commission of crime by the ISCCJ, the Western Cape Child Justice Forum (WCCJF), the Gauteng Programme of Action (GPAC) and the local committees located at the 2 pilot sites, namely, the Mitchell's Plain Case Review Team, the Hatfield Steering committee and the Mamelodi (informal) local committee.

There are two significant achievements in relation to this objective. Firstly, the ISCCJ was briefed at regular intervals on the progress of the research and Pilot Programme from the start of the Situation Analysis to the end of the Pilot Programme implementation phase. This meant that the officials at national level responsible for the administration and monitoring of child justice issues in South Africa were provided with first-hand information on the instrumental use of children to commit crime. This resulted in the ISCCJ participating in the drafting of the set of recommendations formulated at the CUBAC National Workshop. Secondly, it also resulted in the Department of Justice including the issue of children being used in the commission of offences in its budget briefing to the Portfolio Committee on Justice and Constitutional Development in February 2007, an indication that the Department of Justice is including the subject-matter into its planning process.

Sloth- Nielsen notes that the interaction with the ISCCJ has resulted in the project achieving maximum impact regarding the integration of the CLPA into child justice programmes and plans at the national level.¹²⁴

¹²³ See Final Report, p 52 – 55, note 105.

¹²⁴ Sloth-Nielsen, p 37, note 44. She states that “the fact that CUBAC is now a standing item on the agenda of this committee, that role players from all agencies (such as the Legal Aid Board whose Justice Centres at regional and district level provide legal representation services to children in trouble with the law) and other government departments involved are fully aware of the background to the

The second significant achievement of the CUBAC Pilot Programme relates to the Mamelodi informal steering committee. In Mamelodi, at the beginning of the implementation phase, no formal local structure on child justice existed. However, following the appointment of a pilot programme officer, a local steering committee was established specifically to address the issue of children being used to commit crime and since September 2006, regular meetings were convened and attended by all child justice role-players. Therefore, as a result of the CUBAC Pilot Programme, a local child justice forum was established that has continued after the completion of the CUBAC Pilot Programme and in this manner, the programme has contributed to the ongoing monitoring of child justice issues in the area.¹²⁵

7.6.4 Objective 4: Awareness-raising on CUBAC

This objective was aimed at ensuring that adequate awareness was created on the issue of children being used by adults to commit crime within the child justice sector and amongst the community at large.¹²⁶ Consultation with almost all of the role-players and participants during the Baseline Study had revealed that while they were aware of children being used by adults to commit crime, they had never really concentrated on this as a separate category of children requiring protection nor had they seen these children as victims of exploitation and a worst form of child labour. Therefore the pilot project design identified awareness-raising as a key element and devised various activities aimed to create greater awareness on the issue of children being used by adults to commit crime. These included printing a poster on the issue,¹²⁷ distributing the five publications dealing with the instrumental use of

project as well as the need to combat CUBAC, and that the ISCCJ will inevitably play an influential role in the legislative process when the Child Justice Bill does come up again for debate in Parliament, is a major achievement of the programme.”

¹²⁵ Personal communication between the author and Rene Botha of YDO on 21 July 2007.

¹²⁶ Final Report, p 55-58, note 105.

¹²⁷ This was sent to all Magistrates Courts in South Africa as it was felt that these locations were ideally suited to ensure the maximum exposure of criminal justice officials to the poster. The poster was well received and numerous requests for more were received from certain Magistrates' Courts (correspondence from various Magistrates Courts, on file with the Community Law Centre).

children to commit crime, publishing Articles in lay journals,¹²⁸ presenting conference papers at national and international conferences,¹²⁹ linking websites and raising awareness of the issue within the communities where the two sites were located.

Sloth-Nielsen regards the efforts around awareness-raising as one of the good practices of the CUBAC Pilot Programme. In particular she refers to the term ‘CUBAC’ as having become a term of art, appearing on meeting agendas and bandied around in professional and semi – professional conversation, including by persons completely unattached to the project itself.¹³⁰ She also singles out the publications and posters for comment, noting that they constitute concrete tools for stakeholders and programme implementers, as well as invaluable ‘marketing tools’ enabling the CUBAC Pilot Programme to become more widely known on account of their forming a ‘brand’ around the topic of children being used by adults to commit crime.¹³¹

7.6.5 Objective 5: Increasing knowledge on the nature, extent and causes of children used in the commission of crime

This objective was aimed at ensuring that there was sufficient knowledge about children used in the commission of crime available through references that were accessible either in hard copy or on the internet. Thus the production and distribution of the initial five publications on the instrumental use of children in the commission of crime amongst child justice role-payers at national, provincial and local level as well as amongst civil society and research institutions contributed to this. The publications were also placed on the websites www.communitylawcentre.org.za and www.childjustice.org.za in order to ensure wider accessibility.

The various research reports referred to in this chapter, along with the seminar reports and report on the National Workshop were all distributed amongst the relevant departments identified by the CLPA as having responsibilities for addressing the issue

¹²⁸ For instance, Editor, ‘Children used by adults to commit crime: Pilot projects in South Africa – an update’, *Article 40*, Vol. 8 No. 3, 2006 and Frank, note 61 above.

¹²⁹ For instance, Gallinetti, note 90 above.

¹³⁰ Sloth-Nielsen, p 27, note 44.

¹³¹ Sloth-Nielsen, p 25, note 44.

of children used in the commission of crime, the ISCCJ and the Implementing Committee for CLPA. This meant that the detail of the CUBAC Pilot Programme from the Situation Analysis to the Final Report on the pilot implementation was available to government officials responsible for policy development.

A final report on good practice and lessons learned from the Pilot Programme implementation was drafted by Sloth-Nielsen and this provides a useful insight into the successes and challenges of the CUBAC Pilot Programme.

7.7 S v Mfazwe and 4 others¹³²

On 15 June 2005, mid-way through the Baseline Study on children used by adults to commit crime, 6-month old Jordan-Leigh Norton (Baby Jordan) was stabbed to death in a Cape Town residential suburb. This horrific crime sparked a media-frenzied trial, which ended in June 2007, when five accused were sentenced for her death.

Following the murder, 2 men,¹³³ one woman,¹³⁴ a 17 year old¹³⁵ and a 16 year old boy¹³⁶ were arrested and charged with, amongst others, conspiracy to commit murder, murder and robbery. They pleaded not guilty. At the trial, the Court found that the following facts were undisputed by both the prosecution and the accused: on 15 June 2005, the Norton home was attacked and robbed by four persons; Baby Jordan died on 15 June 2005, as a result of a penetrating incised wound to the neck and the consequences thereof; she was six months old at the time; an open box, similar to a box which normally contains photocopy paper was found on the premises in the entrance to the lounge after the robbers had left; and a waybill (type of delivery note) was found in the passage way of the Norton home; fingerprints were found on the

¹³² Unreported Judgment: Case No. CC07/06, Cape of Good Hope Provincial Division of the High Court of South Africa, copy on file with the author, (hereinafter Trial Judgment).

¹³³ Accused No. 1 was Sipho Mongezi Mfazwe; Accused No. 2 was Mongezi Bobotyani.

¹³⁴ Accused No. 3 was Dina Manuele Rodriguez.

¹³⁵ Accused 4 was Zanethemba Gwada.

¹³⁶ Accused No. 5 was Bonginkosi Sigenu. During the trial his identity was withheld from the media on account of him being under 18 years at the time of the commission of the offence, however once he turned 18 years of age, his identity was revealed.

waybill. The Court found that the undisputed facts and evidence proved beyond a doubt that Baby Jordan was stabbed to death on 15 June 2005. The accused denied that they were responsible for the murder of Baby Norton and any related charges and pleaded not guilty.

After a trial that lasted longer than a year, on 5 May 2007, all five accused were found guilty of count 2, namely the murder of Baby Jordan, Accused No. 1, 2, 4 and 5 were found guilty of the count of robbery and Accused No. 1 was found guilty of the illegal possession of a firearm. There was a plethora of media reports which attempted to recount the tale of this heinous offence,¹³⁷ but what follows is a brief account of the official factual findings of the Court. Baby Jordan was born out of wedlock and at the time of her murder, Accused No. 3 was dating Baby Norton's biological father, Neil Wilson. Evidence was led that Accused No. 3 was distressed and perturbed by the fact that her boy-friend had a child by some-one else and that after Baby Norton's death she told Neil Wilson that she had paid R10 000 to make Baby Norton 'go way'.¹³⁸ The evidence also indicated that the waybill found at the Norton home on the day of the murder had been previously delivered to Accused No. 3 at her place of work.¹³⁹ Fingerprint evidence established that the fingerprints of Accused No. 1, Accused No. 3 and Accused No. 4 were found on the waybill.¹⁴⁰ Handwriting comparison evidence was also presented that led to the conclusion that Accused No. 3 was probably the person that completed the waybill.¹⁴¹ In addition, evidence was led that a phone call was made to the Norton home the day before the murder from the telephone number of the place at which Accused No. 3 was employed and that on that day, Baby Jordan's uncle received a telephone call informing him that a package would be delivered to the house the next day.¹⁴² The Court also accepted evidence that between

¹³⁷ For example, a quick internet search on www.news24.co.za reveals approximately 65 stories just under the search indicator 'Baby Norton Trial' from the period January to October 2007 –this excludes other search indicators associated with the case such as 'Dina Rodrigues', 'Rodrigues trial/prosecution', 'Baby Jordan- Leigh Norton' as well as other news sources.

¹³⁸ Trial judgment, p 19 – 30, note 132.

¹³⁹ Trial judgment, p 30-36, note 132.

¹⁴⁰ Trial judgment, p 40 – 42, note 132.

¹⁴¹ Trial judgment, p 46 – 50, note 132.

¹⁴² Trial judgment, p 131 – 132, note 132.

12 June 2005 and 15 June 2005 a number of calls had been placed from Accused No. 3's cellular telephone to Accused No. 1's cellular telephone.¹⁴³

None of the accused testified except Accused No. 5 (who at the time of the commission of the offence was 16 years of age). He gave evidence that on the Friday before the murder he was playing pool with Accused No. 2 and 4 at Accused No. 1's tavern, when Accused No. 1 approached them and said that a woman wanted a baby killed for R10 000. He testified that he was shocked, but because the others agreed to do it, he did so as well.¹⁴⁴ He also said that Accused No. 1 suggested they rob the house to hide the fact the real objective was to kill the baby. He testified about an incident when Accused No. 1 was telephoned by the woman who said she would give them something to deliver to the house to gain entry and then how they went with Accused No. 1 who met with the woman and who gave him a cardboard box. He identified Accused No. 3 as that woman.¹⁴⁵ He explained that the next day they all went to the Norton house and he was given the cardboard box to deliver, which he did and, in that way, the other accused gained entry to the house. Accused No. 1 then instructed him to kill the baby, but he could not do so as she reminded him of his younger brother.¹⁴⁶ Accused No. 2 then took the knife from him, he left the room and was later joined by Accused No. 2 who showed him and the other accused the bloodied knife that he had used to stab the baby.¹⁴⁷ They then took items from the house and left and met with Accused No. 3 who gave Accused No. 1 an envelope, which he later shared out between them with Accused No. 5 receiving R1 100.00 (approximately \$150.00). Accused No. 1 told them that the remainder of the money would be paid the next day. Accused No. 5 stated he spent the money on new clothes.¹⁴⁸ The Court found that his testimony was essentially true and was corroborated by other evidence presented at the trial.¹⁴⁹ Thus, based on the evidence

¹⁴³ Trial judgment, p 132, note 132.

¹⁴⁴ Trial judgment, p 142 – 143, note 132.

¹⁴⁵ Trial judgment, p 144, note 132.

¹⁴⁶ Trial judgment, p 145, note 132.

¹⁴⁷ Trial judgment, p 146, note 132.

¹⁴⁸ Trial judgment, p 147, note 132.

¹⁴⁹ Trial judgment, p 154, note 132.

briefly summarised above, the Court found the all the Accused guilty of the murder of Baby Jordan.

At the time of the guilty verdict, the CUBAC Pilot Programme had been finalised. Part of the programme had been focused on awareness raising and ensuring that the criminal justice system was able to identify situations when children had been used in the commission of crime and accordingly take appropriate measures to assist the accused, whether through diversion or alternate sentencing, as well as take measures against the adult perpetrators. One of the best ways of assimilating a particular concept, rule of law or practice into South African law is through legal precedent set by the courts,¹⁵⁰ and the Community Law Centre recognised that the Baby Jordan case represented an opportunity where an argument could be proffered that Accused No. 5 had been used in the commission of the offence, thereby causing him to be a victim of exploitation and a worst form of child labour.

The Community Law Centre then proceeded to appoint the Centre for Child Law at the University of Pretoria to represent it in an *amicus curiae* application to intervene in the case at sentencing stage.¹⁵¹ The Constitutional Court rules as well as High Court rules permit a person with an interest in the matter before a court and who is not a party in the matter to be admitted as an *amicus curiae* or friend of the court.¹⁵²

In the matter of *Hoffmann v South African Airways*¹⁵³ the Court gave the following description of an *amicus curiae*:

‘[a]n *amicus curiae* assists the court by furnishing information or argument regarding questions of law or fact. An amicus is not a party to litigation, but believes that the court’s decision may affect its interest. The *amicus* differs

¹⁵⁰ See for example the discussion on pre-sentence reports in section 6.4.2.5 in Chapter 6 of the thesis, which illustrates that pre-sentence reports have become standard practice when a child offender is sentenced, thanks in the main to judicial precedent.

¹⁵¹ The Centre for Child Law has a specialised litigation unit which concentrates on children’s issues, in particular the realisation of the rights contained in section 28 of the Bill of Rights.

¹⁵² Currie I and De Waal J, *The Bill of Rights Handbook*, Juta: Lansdowne, 2005, p 136.

¹⁵³ 2001(1) SA 1 (CC) paragraph 63.

from an intervening party, who has a direct interest in the outcome of the litigation and is therefore permitted to participate as a party to the matter. An amicus joins proceedings, as its name suggests, as a friend of the court. It is unlike a party to litigation who is forced into the litigation and thus compelled to incur costs. It joins in the proceedings to assist the court because of its expertise on or interest in the matter before the court. It chooses the side it wishes to join, unless requested by the court to urge a particular position.’

There have been a number of examples where *amici curiae* have intervened in matters with a children’s rights argument.¹⁵⁴ The effect of the Constitution, which extended the scope of the common law concept of *locus standi* to allow for varying persons and groups to approach the court either in their own interest, in the interest of a class or group or in the public interest, has allowed for the development of impact litigation in South Africa.¹⁵⁵

¹⁵⁴ For example, in the case of *N and another v S* (Case No. AR 359 and AR 360 of 2006, Natal Provincial Division), in which two cases were treated as one because the same issues arose in both, the Centre for Child Law intervened as amicus curiae. The first accused had been convicted on a charge of being in possession of suspected stolen property (a jacket and a microphone), the second accused had been convicted of housebreaking and theft. Both were sentenced to reform school. By the date of an urgent special review of the sentences both had spent approximately 22 months in Westville prison, part of this awaiting trial, but the greater portion of it awaiting transfer to reform school. The boys were represented by counsel briefed by the Legal Aid Board. The amicus placed information before the court regarding the history of reform schools. They also explained the nature of reform schools, clarifying how they differ from prisons in that children placed there have access to educational and recreational programmes in a therapeutic environment. The amicus also emphasised the fact that the Criminal Procedure Act provides that pending placement in a reform school the Court may order that the child in question be detained in a place of safety, but that the courts nowadays remand offenders to prison to await placement. The judge ordered the immediate release of the boys, pointing out that the sentence was a competent one. He therefore did not set the sentence aside but released the two boys on the grounds that it was the interests of justice to do so. See Skelton A, “Lack of reform schools: a most unsatisfactory and undesirable state of affairs”, *Article 40*, Vol. 8, No.2, 2006, p 1-3.

¹⁵⁵ Apart from *amicus curiae* applications, section 38 of the Constitution states that: ‘[a]nyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are: (a) anyone acting in their own interest; (b) anyone acting on behalf of another person who cannot act in their own name; (c) anyone acting as a member of, or in the interest of, a group or class of persons; (d) anyone acting in the public interest; and (e) an

It was therefore against this background that the Community Law Centre launched its application to enter as *amicus curiae*. Its submissions concerned the Court's obligations generally, when considering sentencing of child offenders, to accord proper status to the principle that the instrumental use of children in the commission of crime is a form of exploitation, that as such it is a violation of the rights of a child, and constitutes 'a worst form of child labour', which South Africa is obliged via international law to eliminate.

At the outset, the Community Law Centre acknowledged that, historically, courts have recognised that when exercising sentencing discretion, the presence of adult influence may serve as a mitigating factor for the child.¹⁵⁶ The Centre then invited the Cape High Court to develop this notion in light of the provisions of the Bill of Rights and binding and non-binding international law dealing with the instrumental use of children in the commission of criminal offences.¹⁵⁷

The arguments made by the Community Law Centre can be summarised as follows. First, it was submitted that international law recognises that the use of children

association acting in the interest of its members.' This section of the Bill of Rights provides for the grounds of standing to ensure that the most appropriate person(s) approaches a court on constitutional issues. Not all of the above categories have been made use of in impact litigation cases, and in the case of children, most of the case law has resulted from persons acting in their own interest in terms of section 38(a) and applications being brought in the public interest in terms of section 38(d). An example of a case brought under section 38(d) in relation to children involved the Centre for Child Law acting in the public interest. In the matter of *Centre for Child Law and Others v MEC for Education and Others* (unreported judgment of the Transvaal Provincial Division, Case No. 19559/06), discussed in Sloth-Nielsen J and Mezmur B, '2 + 2 = 5? Exploring the domestication of the CRC in South African jurisprudence 2001-2006', paper presented at the International Conference on Children's Rights, University of Ottawa, Canada, March 14-17 2007.

¹⁵⁶ Paragraph 7 of the Community Law Centre's Heads of Argument, dated 29 May 2007, drafted by Advocate Susannah Cowen (hereinafter referred to as Heads of Argument). For examples of some of the cases dealing with adult influence see *S v Shangase* 1972(2) SA 410 (N); *S v Lehnberg* 1975(4) SA 553 (A), *S v Hlongwana* 1975(4) SA 567 (A), *S v Van Rooi* 1972(2) SA 580 (A), *S v Ndima* 1994(4) SA 626 (D), *S v Malgas* 2001(2) SA 1222 (SCA) in respect of a 22 year old accused, *Sv Nkosi* 2002(1) SA 494 (W).

¹⁵⁷ Paragraph 8 of the Heads of Argument, note 156.

instrumentally in the commission of offences is a grave phenomenon and constitutes exploitation of children.¹⁵⁸ It was argued that such conduct is a severe human rights violation of that child and has been condemned as one of the worst forms of child labour in Article 3(c) of ILO Convention 182, ratified by South Africa on 7 June 2000.¹⁵⁹ Accordingly, it was argued that in view of the fact that Accused No. 5 was recruited to commit the offence, there could be no question that his involvement in the offences in question was procured and that he was used in its commission, and that this alone rendered the Convention applicable.¹⁶⁰

¹⁵⁸ The Heads of Argument refer to the obligations in Articles 33 and 36 of the UNCRC requiring states to protect children from all forms of economic exploitation and especially being used in the illicit production and trafficking of narcotic drugs and psychotropic substances (paragraphs 11-13). Reference is also made to the 1990 UN General Assembly Resolution entitled 'Instrumental use of children in criminal activities', which considered that the instrumental use of children by adults in profit-making criminal activities is a grave practice that represents a violation of social norms and a deprivation of the right of children to proper development, education and upbringing and prejudices their future (paragraphs 15-18). Although the latter constitutes non-binding international law, the argument was made that the resolution embodies a principle or norm of international law that acknowledges that this conduct is to be treated as exploitation. Nevertheless, whether or not the resolution is binding or non-binding, the Heads of Argument (at paragraph 19) also argued that it could be legitimately taken into account by Courts in terms of section 39(1) of the Constitution, referring to Chaskalson in *S v Makwanyane* 1995(3) SA 391 (CC) at paragraph 35, where he remarked that '...[P]ublic international law would include non-binding as well as binding law. They may both be used under the section as tools of interpretation. ...' These remarks were affirmed by the full Constitutional Court in *Government of the RSA and others v Grootboom and others* 2001(1) SA 46 (CC) at paragraph 26.

¹⁵⁹ It was also argued that in view of South Africa's ratification of the Convention, Convention 182 constitutes binding international law, may provide guidance as to the correct interpretation of the Bill of Rights, and is accordingly directly applicable to the interpretation of the Bill of Rights (*Government of the RSA and others v Grootboom and others*, note 158, at paragraph 26 citing Chaskalson in *S v Makwanyane*), in particular the provisions thereof that are germane to sentencing (paragraph 25 of the Heads of Argument).

¹⁶⁰ Paragraph 28 of the Heads of Argument, note 156. Moreover it was submitted that there could be no question that the case involved the use of Accused No. 5 in the commission of a homicide for reward as contemplated by the UN Resolution. It was, however, stated that the element of reward was not a necessary ingredient to trigger the Court's duties, as the coercion may take other forms (such as money, food or drugs), but in any case where a child receives a reward, the exploitative dimension must in principle arise (paragraph 30 of the Heads of Argument, note 156).

Second, the Court's attention was directed to the fact that whenever a court exercises any discretion, including a sentencing discretion, it is enjoined to consider the provisions of the Bill of Rights,¹⁶¹ and that section 39(1) of the Constitution obliges courts to consider international law when interpreting the Bill of Rights.¹⁶² It was then argued that children enjoy a right in terms of section 28(2) of the Constitution to have their best interests treated as paramount and that Courts have recognised that this right is relevant to the exercise of a sentencing discretion.¹⁶³ In addition, children enjoy a right to be protected from exploitative labour practices in terms of section 28(1)(e) of the Constitution and that this right too, should be considered in the exercise of courts' sentencing discretion on the same principles.¹⁶⁴

To this end it was argued that, as recognised by the United Nations, the instrumental use of children in criminal activities undermines a child's development and denies them opportunities for a healthy and responsible role in society and that it fundamentally prejudices the child's future.¹⁶⁵ Therefore, it is in the interests of any particular child offender who has been used instrumentally in the commission of an offence to have his or her status as a victim of this form of exploitation recognised both as a mitigating factor and in devising a specific and appropriate sentence,

¹⁶¹ Paragraph 31 of the Heads of Argument, note 156, referring to section 39(2) of the Constitution, which requires that when interpreting any legislation and developing the common law or customary law every court must promote the spirit, purport and objects of the Bill of Rights, as well as *Dawood, Shalabi and Thomas v Minister of Home Affairs* 2000(3) SA 936 (CC) at paragraph 46.

¹⁶² Paragraph 32 of the Heads of Argument, note 156, referring to *S v Kwalase* 2000(2) SACR 135 (C) at paragraph 139 per Van Heerden J (as she then was) and *DPP, KwaZulu-Natal v P* 2006(1) SACR 243 (SCA) at paragraphs 11-16 where the Courts in question relied on international law when sentencing child offenders.

¹⁶³ For example see *S v B* 2006 (1) SACR 311 (SCA) at paragraph 20, which essentially held that section 28(2) is highly relevant to the exercise of a Court's sentencing discretion and a Court, when sentencing a child is obliged to consider that child's best interests.

¹⁶⁴ Acknowledging that section 28(1)(e) (discussed in section 5.2 of Chapter 5) had not yet been subject to judicial interpretation, it was argued that in view of children's rights law regarding the exploitation of children and the worst forms of child labour, the provision should be interpreted as entitling children to protection from, at least, the practices that form the target of measures such as Convention 182 and the UN General Resolution.

¹⁶⁵ Paragraph 40 of the Heads of Argument, note 156.

custodial or not.¹⁶⁶ In other words, it was submitted that the condemnation of the instrumental use of children in criminal offences; the recognition that this constitutes exploitation of children; and that it seriously compromises their development must be considered when giving content to section 28(2) and section 28(1)(e). This is on account of section 39(1) of the Constitution requiring courts to have regard to international law when interpreting the Bill of Rights.

In turn, it was argued that these rights must guide the Court when interpreting and applying the law applicable to the exercise of its sentencing discretion.

Third, given the fact that the matter involved a criminal prosecution and the horrific nature of the crime, the Community Law Centre was at pains to establish a balance between the circumstances of the offence and the proffered argument, namely that Accused No. 5 was a victim of exploitation and a worst form of child labour.

The Centre clearly stated that it did not seek to underplay the culpability of a child offender, particularly when a serious and violent crime has been committed, nor the willing participation of the child in the commission of an offence. However, it argued that when sentencing child offenders whose involvement in a crime has been instigated and secured by adults (and all the more so when the child is rewarded for his or her involvement), a sentencing court must also recognise that the child is a victim of a serious form of exploitation.¹⁶⁷ It was argued that the real challenge of the international human rights jurisprudence is for courts to balance the need to see child offenders who have been used instrumentally in the commission of criminal offences both as perpetrators – and thus responsible for their sometimes heinous conduct – and also as victims of exploitation in need of appropriate intervention.¹⁶⁸

¹⁶⁶ Paragraph 43 of the Heads of Argument, note 156.

¹⁶⁷ Paragraph 7 of the Heads of Argument, note 156.

¹⁶⁸ Paragraph 49 of the Heads of Argument, note 156. In making this argument it was emphasised that the Community Law Centre did not contend that child perpetrators (with criminal capacity) should not be held responsible for their conduct, nor that imprisonment may not be an appropriate sentence in a particular case, provided it is imposed as a last resort; see paragraph 51 of the Heads of Argument, note 156.

In order to assist the Court in striking this balance, certain factors to consider were suggested, including: the nature and extent of the offender's participation as sought by the adult instigator; the nature and extent of the child offender's actual participation in the offence; the circumstances in which the offender's involvement was procured or initiated; the nature of the reward that was offered to the child; the factors that influenced the child when becoming involved in the commission of the offence; the relationship of the adult procurer to the child offender; and the impact of the exploitation on the child's development.¹⁶⁹

The final argument related to the fact that it was important to note that the position of the child offender is different to that of the adult instigator. It was submitted that whenever a child is used or procured to commit an offence, this will almost inevitably constitute exploitation of a child and must be seen as a mitigating factor. In the converse, evidence must show that the adult had in fact used or procured the child in the commission of the offence before a court can justifiably regard this fact as an aggravating circumstance for purposes of sentencing.¹⁷⁰ Thus it was argued, for example, that an adult's knowledge that he or she was using a child in the commission of the offence is relevant. This argument acknowledged the difficulty of proof needed to hold the 'user' liable for a harsher sentence (or even criminal liability if instrumental use of a child constituted a criminal offence) and that intent to use a child is an essential element, which is not easy to establish.

Having launched the application to enter as *amicus curiae* in the matter, on 4 June 2007, when the matter was on the court roll for sentence, the Community Law Centre withdrew its application after Counsel for Accused No. 5 handed the Centre's Heads of Argument into Court as her own.¹⁷¹

¹⁶⁹ Paragraph 52 of the Heads of Argument, note 156.

¹⁷⁰ Paragraph 53 of the Heads of Argument, note 156.

¹⁷¹ The reason for withdrawing the application to enter as *amicus curiae* was a tactical one. First, the legal representatives for Accused 1, 2 and 4 had indicated that they would oppose the application. Second, *amicus curiae* applications rarely occur in criminal matters and if they do it is a consequence of an appeal or review. In only one matter previously has an application for *amicus curiae* been made in the lower court during the trial and it was refused – see *S v Zuma* 2006 (2) SACR 257 (W). However, despite the fear that a failed application may set a bad precedent for future matters, the Community

On 28 June 2007, after the matter had been postponed, sentences were handed down for all five accused. Accused No's 1, 2 and 3 received sentences of life imprisonment,¹⁷² and Accused No.'s 4 and 5 received sentences of 15 years imprisonment for the murder and 7 years imprisonment for the robbery, both of which were to run concurrently.¹⁷³

In considering the sentence of Accused No. 1, who the Court had found had recruited the other accused after having been approached by Accused No. 3 to commit the offence, the Court held that the role he played in the commission of the murder for reward; the obtaining of accused 2, 4 and 5 to accompany him; the fact that he played the role of the leader of the group of criminals that committed the murder; and his age compared to that of his co-accused must be taken into account as aggravating circumstances.¹⁷⁴ While these factors border on acknowledging that Accused No. 1 exploited the child offenders and used them in the commission of the crime, the Court stopped short of actually making such a finding, in all probability on account of the fact that there was no proof that Accused No. 1 intentionally used a child in the commission of the offence. This again illustrates the difficulties in actually holding perpetrators liable for the use of children in the commission of offences. As has been noted, often there is insufficient evidence to prosecute such perpetrators. But even where a conviction has been obtained and the perpetrator is co-accused with the child

Law Centre nevertheless felt it was necessary to proceed with the application up until 4 June 2007. However, on the day set for sentencing, agreement was reached with all the legal representatives that Counsel for Accused No. 5 would hand in the Heads of Argument as her own, thereby allowing the arguments to be placed before the Court and avoiding the application having to be argued against opposition on one hand, and the Court ruling against the application, on the other. The end result was achieved, namely that the argument relating to the instrumental use of a child in the commission of an offence was placed before the Court for consideration in sentencing Accused No. 5 (the child accused).

¹⁷² Sentencing judgment, p 31, Case No. 07/06, copy on file with the author, (hereinafter sentencing judgement). Accused No. 1 also received a sentence of 6 months imprisonment for illegal possession of a firearm and 10 years imprisonment for the robbery. Accused No. 2 was also sentenced to a period of 10 years imprisonment for the robbery.

¹⁷³ Sentencing judgment, p 30, note 172.

¹⁷⁴ Sentencing judgment, p 16, note 172.

victim of exploitation, there might still not be sufficient evidence to find that the adult intentionally used the child in the commission of the offence.

Another concern that has arisen in this thesis pertains to the child-rights approach to this particular worst form of child labour. In other parts of this study, the fact that children deny they have been used to commit crime and assert that it is their decision alone to commit crime has been alluded to. This refusal to acknowledge exploitation in favour of asserting their independence of thought and action, creates potential problems when trying to adopt protectionist measures for such children. The sentencing judgment confirms that even Accused No. 5 insisted that he had not been influenced to commit the offence, where it was quite evident that he would not have been involved in the crime had it not been for adult instigation and recruitment. In response, Wagley J states: '[a]lthough, at a stage, he claimed not to have been influenced by others to participate in the crimes I am not convinced that that is entirely correct'.¹⁷⁵

Significantly, in considering the sentences of Accused No.'s 4 and 5, the Court agreed that the use of children and juveniles to commit crime amounts to the exploitation of children and juveniles, stating that: '[t]herefore when sentencing children and juveniles especially where payment was offered to them to commit an offence, courts should see these children and juveniles not only as perpetrators of the offence but also victims of a serious form of exploitation'.¹⁷⁶ The Court then continued to find that: '[w]hile both accused numbers 4 and 5's offences were initiated and secured by adults, that is by accused numbers 1 and 3, who sought to reward them for their involvement, this adult influence also serves as mitigation'.¹⁷⁷

Thus, in essence the Court acknowledged that children can be perpetrators as well as victims; that the circumstances in this particular case amounted to the use and exploitation of children; and that adult influence serves as mitigation in sentencing. These are important findings as they confirm that courts should take the instrumental

¹⁷⁵ Sentencing judgment, p 20, note 172.

¹⁷⁶ Sentencing judgment, p 21, note 172.

¹⁷⁷ Sentencing judgment, p 22, note 172.

use of children into account for the purposes of sentencing and they may recognise the status of child offenders as also being victims of exploitation in certain circumstances.

However, there are two disappointing aspects to the judgment. First, despite arguments being submitted regarding the need to fashion appropriate sentences for child offenders to ensure that proper interventions are available to address their victimisation, the Court nevertheless imposed a sentence of imprisonment. However, it must be acknowledged that the circumstances of this particular offence as well as the expectations of society that these particular offenders be given harsh punishments, suggests why the Court was of the view that imprisonment was the most appropriate sentence. Second, despite holding that Accused No.'s 4 and 5 were victims of exploitation and had been used in the commission of the offence, no reference was made to section 28 (2) and section 28(1)(e) of the Constitution, nor to the UNCRC or Convention 182. Therefore, the Court missed an opportunity to interpret the two subsections of section 28 in light of binding international law.

7.8 An assessment of the CLPA and Convention 182 in light of the CUBAC pilot programme

The CUBAC Pilot Programme was aimed at attempting to create a system for managing children who are used by adults to commit crime as a worst form of child labour in the criminal justice system, while recognising their status as both perpetrator and victim. In addition, the CUBAC Pilot Programme was also designed in such a way that it could be assimilated into ordinary child justice practice through, for example, diverting offenders identified as having been used by adults in the commission of crime and acknowledging the importance of the role played by probation officers in the assessment procedure.

However, the pilot programme remained just that: a test to see whether these interventions would work. Short of an official evaluation, the pilot relied heavily, therefore, on the feedback of the Pilot Programme participants obtained through the provincial seminars and National Workshop. Therefore it is useful to examine the challenges identified and difficulties experienced by the criminal justice officials at

the pilot sites, as these need to be taken into consideration in future policy and practice relating to the issue.

Firstly, the safety of the children had been an issue that was already identified as a risk factor at the outset of the entire project. It has become clear that children who are used by adults fear the consequences and possible reprisals from the adult perpetrators should they disclose the identity of the adult to assist in the prosecution of that individual. The pilot programme participants during the provincial seminars and National Workshop confirmed that these fears on the part of children exist and that they had experienced difficulty in trying to ensure that the adults are prosecuted in the absence of the evidence of the children. Linked to this issue was the failure of the children to disclose that they had in fact been used in the commission of offences. This was also identified as a risk factor at the outset of the project. It was found that if children fear their safety is at risk, they will refuse to either declare that they were used (even in the face of information that indicates they have in fact been used) or disclose who the adult perpetrator is.

Another challenge, which is a consequence of the aforementioned issues, is the insufficiency of evidence to prosecute the adults using children to commit crime. Despite the available offences of incitement or conspiracy, the prosecutors in both pilot sites noted during the seminars and National Workshop that the available evidence is often insufficient to secure a prosecution of the adult involved. This could be on account of the child not disclosing the identity of the adult, not knowing the identity of the adult, being a co-perpetrator or being an unreliable witness.¹⁷⁸ The difficulty attendant to the prosecution of adults was acknowledged in CLPA 2 by way of the removal of the Action Step requiring the police to investigate the adults who used children and prosecutors to prosecute such perpetrators.

Finally, the issue of children in gangs was highlighted. As noted earlier in this chapter, the South African organised crime legislation allows for very punitive steps to be taken against children who are identified as gang members. Practice and policy around the implementation of this legislation needs to be developed to ensure the law

¹⁷⁸ See note 108 above.

is properly applied and the adult gang-leaders are prosecuted as opposed to the child “underlings” who may very well have been used by the gang leaders.

These problems and challenges do not involve child labour issues as much as they do criminal justice practice and the criminogenic environment. It is therefore questionable whether the provisions of Convention 182 or any child labour policy contained in the CLPA or other instruments would be able to adequately address these issues.¹⁷⁹ In fact it is argued that the CUBAC action steps in the CLPA rely too heavily on other policies and laws, particularly those in the criminal justice system. They fail to take into account the possible failures in criminal justice policy and practice that may thwart their implementation, and this I argue is a major failing of Convention 182.

I contend, further, that Convention 182 and the 2003 CLPA may create standards that may be impossible to deliver on in relation to the use of children in the commission of offences. For example, requiring the effective investigation and prosecution of adults who use children to commit crime has been shown to be particularly difficult (if not nigh impossible) without the necessary evidence. Such evidence, in the absence of testimony from the children who may, for various reasons, including fear for their safety, not be able to testify, is simply not available to ensure these prosecutions occur. This indicates that the drafters of the 2003 action steps may not have fully comprehended the implementation requirements for this particular measure to address the use of children to commit crime, and so, too, the drafters of Convention 182 did not fully realise that the criminalisation of worst forms of child labour may be rendered useless by an inability to secure convictions for such offences. However, it must be said that CLPA 2 no longer includes such a requirement. This amendment of the earlier policy seems to acknowledge that the outcomes of the Pilot Programme in relation to this tricky issue. The issue of effective prosecution manifests the concerns of certain commentators who have noted that prostitution, pornography and the drug trade are vice crimes that are notoriously difficult to eliminate and law enforcement efforts typically drive these activities underground without actually eliminating

¹⁷⁹ See Gallinetti, note 4 above.

them.¹⁸⁰

Again, the problems with prosecuting those who use children in the commission of crime highlights the simmering doubt regarding the effectiveness of the overall objective of Convention 182, namely the elimination of worst forms of child labour. While, it may be arguable that it is possible to eliminate hazardous work as a worst form of child labour, I would argue that one would be hard-pressed to find acceptance of the notion that crime, and in particular organised crime entities that mastermind many of the worst forms of child labour, are capable of elimination within a time-bound period. The fact that countries have criminal justice systems, implies tacit acceptance that crime is an ongoing feature of societal existence. While it is obviously highly desirable that children are not affected by such crime, the elimination thereof could be described as unrealistic, and it is this aspect of Convention 182 which in all likelihood will render it ineffective.

The third difficulty with Convention 182 and the CLPA regarding the use of children to commit crime is that both indicate a lack of insight into the extent of the problem outside of the context of child labour. Both extol the value of schooling and vocational training in the fight against child labour. However, when the benefits of education or skills development are outweighed by the supposed financial benefits of the “second” economy or the “economy of crime”, little can be done to lure children away from adults in the criminal underworld who use them in their illicit endeavours.¹⁸¹ The larger issue of a comprehensive crime prevention policy, and especially preventing organised crime as opposed to mere law enforcement measures, such as prohibition and criminal investigation, while a feature of Convention 182, is significantly absent from the 2003 CLPA and CLPA 2.

7.9 Conclusion

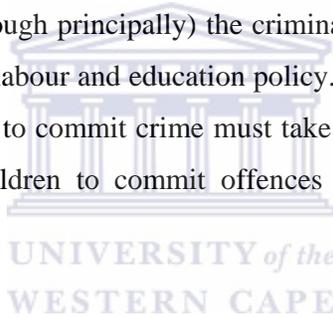
¹⁸⁰ Smolin D, ‘A tale of two treaties: Furthering social myths through the redemptive myths of childhood’, *Emory International Law Review*, Vol. 17, Fall 2003, p 993.

¹⁸¹ See Frank and Muntingh, note 10 above, for a discussion of risk factors that cause children to be used by adults to commit crime as a worst form of child labour.

The entire programme on the issue of the use of children in the commission of crime overall has illustrated the huge amount of detail and attention that is necessary to simply start to design measures to assist children who have been used in the commission of crime. The work which took place from end-2004 to mid-2007 should be regarded as the tip of the proverbial iceberg. It is by no means the primary blueprint or model on which other countries should base their efforts regarding the instrumental use of children.

However, what the work does demonstrate is the complex nature of the problem, the need for careful planning and detailed implementation and finally, a good monitoring system to ensure that measures are incorporated into child justice practice generally and in a sustainable manner. Sight must also not be lost of the fact that the issue of children used in the commission of crime is an inter-departmental or inter-ministerial issue, affecting not only (though principally) the criminal justice system, but also the child protection system and labour and education policy. Any measures to address the instrumental use of children to commit crime must take all of the above into account and address the use of children to commit offences as part of a comprehensive strategy.

Ultimately, I would argue that measures can be put in place to assist children who find themselves victims of exploitation, that this is not an impossible task, but it cannot be done against a deadline; and regrettably, the issues are too complex and intertwined to result in the elimination of such a serious human rights violation, despite a fervent desire on the part of all promoters of children's rights to achieve such an aim.



Chapter 8

Conclusion

8.1 Introduction

The aim of this thesis, as set out in Chapter 1, has been to evaluate the theoretical and practical soundness of Convention 182 in relation to South Africa with particular reference to the instrumental use of children in the commission of crime as a worst form of child labour.

In order to do this, it was necessary to embark on a historical synopsis of child labour, as well as an overview of the prevailing international legal framework, including an assessment of Convention 182. This examination sought to determine the significance of Convention 182 from a general perspective, examining its content and mechanisms for enforcement and comparing it to the UNCRC in particular, and Convention 138 to a lesser extent. The reason that the UNCRC has been used as the principal yardstick for comparison is that, like Convention 182, it deals with the serious forms of economic exploitation of children that Convention 182 terms 'worst forms of child labour', rather than Convention 138, which is limited to setting a minimum age of admission to employment and prohibiting hazardous work.

The thesis then undertook a review of the relevant laws and policies relating to child labour in South Africa with specific reference to child justice and the instrumental use of children to commit crime. This was done to trace the manner in which the economic exploitation of children is addressed in the national legislative and policy framework of South Africa, and to lay the basis for an evaluation of the extent to which South Africa is complying with its international obligations relating to child labour under the ILO.

Finally, in order to explore its practical significance, the implementation of Convention 182 in South Africa was examined, particularly in the context of one worst form of child labour, namely, the instrumental use of children in the commission of crime. The interface between worst forms of child labour and the South African criminal justice

system as it pertains to children was considered. Of particular relevance was the discussion about how child labour and child justice issues intersect; and how this convergence of issues is dealt with in South Africa and, thereafter, to assess whether Convention 182 has had any significant influence.

This final chapter draws together two sets of conclusions. First, there are conclusions regarding the significance of Convention 182 generally in international law. Second, there are those that relate to the influence of Convention 182 on South African law and policy, as well as its effectiveness specifically in relation to the use of children in the commission of crime as a worst form of child labour.

8.2 The significance of Convention 182 as an international legal instrument on child labour

As a precursor to this discussion, the following two observations are warranted.

The brief historical examination of child labour, particularly in the industrial revolution provided in Chapter 2, forms the basis for the suggestion that the broader child rights movement itself was initiated by concerns over the exploitation of working children and that protecting children generally most certainly had its roots in this era of history. In fact, as described in Chapter 2, Nardinelli, in describing the contemporary critics of child labour in the industrial revolution, articulately sets out the various ways in which this protectionist approach manifested itself.¹ It is submitted that the child labour movement was a catalyst for the development of international and national protections for children in especially difficult circumstances such as refugee children and children who are victims of sexual abuse.

The child labour movement, starting in the industrial revolution and continuing with the work and Conventions of the ILO pertaining to child labour, up to and including Convention 138, focused almost exclusively on the regulation of employment conditions and work inappropriate for a child's age. In fact Convention 138, discussed in section 3.1

¹ Section 2.1.1 of Chapter 2.

Chapter 3, set as its goal the progressive abolition of child labour, in the context of setting a minimum age of admission to employment, regulating conditions of work and prohibiting hazardous work. This goal of the ILO in relation to child labour has persisted and is re-iterated in Convention 182, despite increasing criticism that such an aim is not conducive to a child rights paradigm in the field of child labour.²

8.2.1 Was it necessary for the ILO to adopt a new international legal standard in the form of Convention 182?

The examination of the emerging standards regarding children's rights clearly recognised that children were subject to economic exploitation, and pointedly did not limit the nature of this exploitation to employment or working conditions (as was the approach of contemporary labour reformers and the ILO) referring rather to 'every form of exploitation' (1924 Declaration on the Rights of the Child) and 'all forms of neglect, cruelty and exploitation' (1959 Declaration on the Rights of the Child).³ Even treaties such as the ICCPR and ICESCR, although not child-centred and now regarded as needing to be interpreted in conjunction with the UNCRC, recognised the vulnerabilities of children and their need for special protection, with the ICESCR specifically requiring that '[c]hildren and young persons should be protected from economic and social exploitation'.⁴

Thus it is argued that it was the broader child rights movement, instead of the ILO, that first acknowledged the need to protect children from all forms of economic exploitation; however, it was only with the adoption of the UNCRC in 1989 that the broad scope of economic exploitation of children was acknowledged and addressed at a comprehensive level for the first time in an international legal treaty dedicated to children.

Against this backdrop, I argue that the adoption of Convention 182 is significant as it illustrates that it took child labour activists over two centuries, and the ILO exactly 80

² See section 3.1.1 of Chapter 3 for a discussion of these criticisms.

³ See the discussion in section 2.3.2 of Chapter 2.

⁴ See section 2.3.3 of Chapter 2.

years, and until the dawn of a new century, to formally recognise that there were manifestations of economic exploitation of children, over and above conditions of employment and hazardous work, which were issues worthy of international legal regulation.

However, it is argued that was not necessary for the ILO to adopt a new Convention, given that the UNCRC represents the overarching child rights legal instrument, which also deals with the full spectrum of economic exploitation of children, and which pointedly does not set the abolition of child labour or economic exploitation of children as one of its goals.⁵ Given the substantive provisions of the UNCRC; its universal nature and speedy ratification; its Optional Protocols; as well as the Committee on the Rights of the Child's swiftly evolving jurisprudence on the economic exploitation of children through Theme Days, Concluding Observations and General Comments, it is contended that the UNCRC an eminently suitable international instrument to protect the rights of children who are victims of all forms of economic exploitation. Against this backdrop, I suggest that the ILO, in adopting Convention 182 and as the body entrusted with issues relating to labour and economic exploitation, might have been motivated by the need to be seen to address child economic exploitation. In this way, I argue, Convention 182 could be said to be an attempt by the ILO to re-exert its authority in an area that had been quite easily and appropriately assimilated into the UNCRC. Hence, as a treaty, Convention 182 does not add measurably to the panoply of normative standards already evident in international law.

8.2.2 Has Convention 182 enhanced the international regulatory framework?

This question elicits a number of mixed responses. In certain aspects it can be argued that Convention 182 has added value to the international regulatory framework on child labour through certain unique features.⁶

⁵ See the discussion in section 3.2.1 of Chapter 3.

⁶ See the discussion in section 4.4 of Chapter 4.

First, Convention 182 introduced a new approach to child labour standards, namely, the prioritisation of certain 'extreme' or 'intolerable' forms of child labour, which states should immediately take steps to address. While still couched within the overall objective of abolishing all child labour, the adoption of a treaty on 'worst forms of child labour' recognised that all child labour cannot be eliminated overnight, but that certain forms should be placed at the vanguard of state action. It is perhaps a testament to the emotive weight of the subject matter of the treaty that it was unanimously adopted and swiftly ratified, becoming one of the most ratified treaties of the ILO.

Second, that Convention 182 represents an attempt to bind states to undertake positive action in an international legal instrument, in a manner hitherto not utilised, is notable. It specifically obliges states to take particular, clearly enunciated measures aimed at implementing its content. Not only do Articles 6 and 7 require states to design and implement plans of action and take effective time-bound measures to prevent worst forms of child labour; provide direct assistance for removing children from worst forms of child labour and ensure access to free, basic education, but these obligations are supplemented by a non-binding blueprint, in the form of Recommendation 190, on how and what can be done to achieve this. This is a move, within a children's rights instrument, to bolster implementation efforts through the creation of targeted and specific legal obligations; an approach which is aimed at attempting to ensure concrete results.

Third, for the first time in international law, the use of children in the commission of illicit activities was acknowledged as an issue that requires attention. The provisions of the UNCRC deal specifically only with the use of children in the drug trade. Although it could be argued that Article 36 could apply to children used to commit crime more generally, being the 'blanket' provision protecting children from 'all other' forms of exploitation, the fact that children who are victims of this form of exploitation are also seen as perpetrators and are subject to the criminal justice system, merits specific recognition of the phenomenon by international law. Thus Convention 182 has highlighted this form of exploitation and called the attention of the international

community to the fact that child offenders can also be victims of exploitation and, consequently that protective measures must be taken to assist these children.

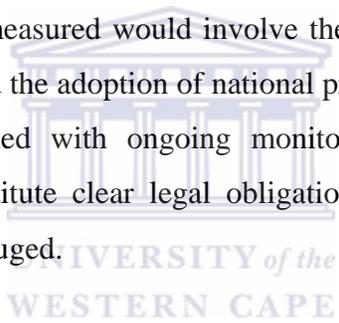
However, these features of Convention 182, while adding value on one level, present their own problems on another.

It is contended that while Convention 182 seems to represent an attempt to concretise states' obligations in order to produce actual results regarding the prohibition and elimination of worst forms of child labour, the complexity of the true nature of most of the worst forms of child labour seems to have been overlooked in the desire to adopt a new international legal standard on the issue. By setting the overall aim of the Convention as the elimination of the worst forms of child labour, the monumental difficulties of eradicating pervasive crimes such as child prostitution, child trafficking, drug trafficking and so on, seems to have been lost sight of, or at minimum, not to have been adequately acknowledged. From the totality of the discussion in Chapter 4 regarding the drafting and adoption of Convention 182, it seems little attention was paid to whether this was an achievable outcome, given the fact that the conduct in question, forced labour, commercial sexual exploitation and trafficking in children, are markedly different from conduct previously dealt with by the ILO under the umbrella of child labour, namely the minimum age for admission to work and employment and the regulation of employment conditions. It is submitted that the overall objective of the ILO with regard to child labour, namely its progressive abolition, has also incorrectly informed the approach to dealing with the worst forms of child labour.

Obviously, I would not assert that those worst forms of child labour which also constitute crimes against children, such as child trafficking and child pornography, should not be addressed with the full force of action that states can muster. My concern is that, if one examines the true nature of the worst forms of child labour, states cannot reasonably be expected to 'eliminate' conduct that their domestic, as well as the international criminal justice systems have been grappling with for centuries. I would argue that such an aim is too ambitious, misguided and unachievable, thereby considerably reducing the significance of Convention 182.

‘Elimination’ is not the only hurdle that needs to be overcome. Given the use of the terms ‘urgency’, ‘time-bound’ and ‘immediate’ in Convention 182, states have obliged themselves to undertake such action to eliminate the worst forms of child labour at a very expeditious pace. But, as pointed out in the conclusion to Chapter 4, by what criteria are those terms to be measured? Six months, one year, three years or a decade? Again, it is argued that states cannot reasonably be expected to eliminate certain crimes against a specific deadline.

My suggestion is that, if it was seen as a necessity to adopt a new Convention, a more viable approach would have been to set an objective that involved prohibiting and preventing the worst forms of child labour. If this was the goal, then the use of time-bound programmes would not be as objectionable, as the yardstick against which the time-bound actions could be measured would involve the enactment of laws to prohibit worst forms of child labour and the adoption of national programmes to prevent the worst forms of child labour, coupled with ongoing monitoring and evaluation. If these prevention efforts could constitute clear legal obligations on states, their compliance therewith could be easily be gauged.



Finally, on one hand, while the Convention can be commended for drawing attention to the need, in international law, for measures to address the use of children in the commission of crime, on the other, it is questionable whether a treaty on the worst forms of *child labour* (emphasis added) was the correct vehicle to do so. It does not appear that the inclusion of the use of children in the commission of crime as a worst form of child labour was based on any clear research or scientific knowledge on the extent, nature and scope of the phenomenon.⁷ This concern will be borne out in the latter part of these conclusions when the effectiveness of Convention 182 is discussed in the context of the Pilot Programme aimed at implementing measures to address the use of children in the commission of crime in South Africa.

⁷ See the discussion in section 4.2 and 4.3 of Chapter 4.

Thus, while I believe that the formulation of Convention 182 has shown that it is possible to include positive obligations on states for measures of implementation in a principal treaty and also be speedily and widely ratified, and thus raised the bar for international standard setting, its overall objective detracts from its potential effectiveness and in this way its significance may be considerably reduced.

8.3 The significance of Convention 182 in South Africa

8.3.1 Has Convention 182 influenced South African law and policy?

The purpose of the examination of South African law and policy was to determine whether, overall, Convention 182 has played a significant role in shaping the legal and policy landscape.

The South African Constitution, the supreme law of the land, has a dedicated section on children's rights, which together, with the general rights afforded to all citizens, covers the key principles of the UNCRC, such as the best interests of the child principle, the right to non-discrimination and the child's right to survival and development. Section 28(1)(e) of the Constitution specifically refers to the child's right to be protected against exploitative labour practices and section 28(1)(f) refers to a minimum age of admission to employment for children and protection from hazardous work. While these sections were initially drafted at a time when South Africa had not yet ratified the UNCRC, it is arguable that the UNCRC definitively informed their content, as well as Convention 138, in respect of section 28(1)(f), despite the fact that South Africa only ratified the latter in 2000.

The Constitution was finalised at a time when the drafting process for Convention 182 had not yet started and therefore it cannot be said that Convention 182 influenced the inclusion of the section protecting children from exploitative labour practices in the Bill of Rights. However, this does not preclude Convention 182 informing the interpretation of the content of the right in future. South African courts are enjoined to use international law when interpreting provisions of the Constitution, and so, given South Africa's

ratification of Convention 182 in 2000, it is highly likely that Convention 182 can play a role in shaping the meaning of section 28(1)(e) in future.

As far as domestic law is concerned, detailed in Chapter 5, there are two long-standing child law reform processes which should reflect the influence of Convention 182 if South Africa is to comply with its international obligations under the Convention. These law reform processes have resulted in the Child Justice Bill 49 of 2002, the Children's Act 38 of 2005 and Children's Amendment Bill 19F of 2006.

First, the Child Justice Bill, not only provides a legal, procedural framework for children who come into conflict with the law to ensure that their rights are safeguarded and they are accountable for their actions, but also tries to ensure that they are seen as individuals and appropriate interventions and direct measures of assistance are provided to them through the criminal justice system. In addition, the tabled version of the Bill has a provision that empowers courts to view the use of a child in the commission of an offence as an aggravating circumstance in sentencing persons convicted for incitement or conspiracy. Although this is a somewhat weaker provision than the SALRC proposal for a distinct statutory crime for the use of a child in the commission of an offence, it nevertheless represents the acknowledgement of the seriousness of such conduct and it is proposed that the provision may serve as a deterrent for persons who seek to use children to commit crime. However, the Child Justice Bill is not yet passed and there remain advocacy opportunities for motivating that its adopt measures to address the issue of children used by adults to commit crime, particularly in light of the wealth of new information that the Pilot Programme, discussed in section 7.6 of Chapter 7, has produced.

Turning to the Children's Act 38 of 2005 and the Children's Amendment Bill 19F of 2006, the drafting process and provisions of which are discussed in detail in Chapter 5, it becomes clear that Convention 182 has had a significant influence on the law reform process. When Children's Bill of 2003 was tabled in parliament, the composite version of the Bill specifically dealt with prohibiting the worst forms of child labour in clause

141, albeit not in a manner that was comprehensive or fully compliant with the requirements of Convention 182.⁸ However, the Children's Amendment Bill 19F of 2007, which was passed on 22 November 2007, has been drafted in a manner that more clearly reflects the influence of Convention 182 as it prohibits the worst forms of child labour listed in Convention 182. Although it is not evident from any clearly identifiable source, I would suggest that the influence of the 2003 CLPA and CLPA 2 has led to the recent changes to the Children's Amendment Bill to make it fully compliant with Convention 182's obligation on states to prohibit the worst forms of child labour.⁹

The policy arena is the other area where Convention 182 seems to have had considerable influence. Both the 2003 CLPA and CLPA 2 show signs of the effects of Convention 182 on their drafting through: the identification of worst forms of child labour of concern in South Africa; the inclusion of specific actions to address these forms of child labour including measures identified in Article 7 of Convention 182; and the use of time-bound measures and deadlines by which certain results must be achieved. However, I would argue that the influence of Convention 182 on both versions of the CLPA, and through this medium the Children's Amendment Bill 19F of 2006, has been largely informed and directed by IPEC through its Memorandum of Understanding with South Africa, and the subsequent establishment of the technical assistance project TECL.¹⁰ Therefore, while Convention 182 has influenced South African law and policy, I would suggest that such influence might not have been as evident had IPEC not had such a strong presence in the country.

I have illustrated that Convention 182 has had a discernable influence on South African law and policy. Having said this, the next question which arises is whether the policy, legislative reform and procedural framework will produce the results envisaged by Convention 182, namely the elimination of worst forms of child labour. Unfortunately, the answer, I would submit, appears to be no, and I have tried to show the reasons for this

⁸ See the discussion in section 5.3.3.1 of Chapter 5.

⁹ See the discussion on the South African CLPA in section 5.4 of Chapter 5.

¹⁰ See the discussion in section 5.4 of Chapter 5 and section 7.1 of Chapter 7.

conclusion in the extensive description of the Pilot Programme on the use of children in the commission of crime in Chapter 7.

8.3.2 The implementation of Convention 182 in practice in the context of the instrumental use of children in the commission of crime.

This final assessment of the significance of Convention 182 involved an examination of a Pilot Programme aimed at addressing the instrumental use of children in the commission of crime in South Africa. It is argued that an analysis of the outcomes of the Pilot Programme illustrates the complexities of the problem and demonstrates that the lofty goals of Convention 182 are of diminished effect.

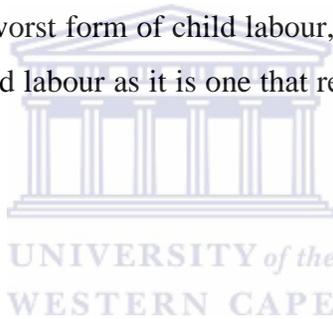
The Pilot Programme has shown that the most appropriate measures to address the issue of children used in the commission of crime are those which exist in the criminal justice system, such as alternative sentences, referral to the child protection system where necessary, and the practice of assessment and diversion. These measures, as discussed in section 6.4 of Chapter 6, are not attributable to Convention 182 or either version of the CLPA, or even the Pilot Programme itself.

In addition, none of the outcomes of the Pilot Programme on the use of children in the commission of offences point to the possibility of this worst form of child labour being eliminated within a time-bound programme. In fact, some of the findings, such as the difficulty in securing convictions against those who use children to commit crime and the fact that children are afraid to admit to having been used in the commission of crime, suggest strongly that elimination is not a feasible reality at this stage.

So too, the failure of the Court in *S v Mfazwe and 4 Others* (discussed in section 7.7 of Chapter 7) to term the use of children in the commission of crime a 'worst form of child labour' despite submissions to that effect, bodes ill for the effectiveness of Convention 182, particularly in the area of children used by adults to commit offences. It also signals that the inclusion of the subject matter in Convention 182, a treaty on child labour, is an uneasy fit, given that children who are victims of this form of exploitation are also

perpetrators of crime and not ‘classic’ victims as are children who are used in child pornography or subject to slavery or forced labour.

Ultimately, the benefit of the Pilot Programme, and the CLPA, for children used in the commission of crime is that criminal justice and child protection role-players are now more attuned to the fact that these children may have been exploited and victims, and that procedures can be put in place to ensure that they receive appropriate and suitable assistance within the framework of the criminal justice and child protection system. However, the issue of child labour and its worst forms was found not to be a consideration for role-players in the criminal justice system as they placed their concern regarding the use of children in the commission of crime squarely in the child justice arena. I argue that this illustrates to a large degree how, in the context of children used in the commission of crime as a worst form of child labour, the issue in South Africa is not so much one that relates to child labour as it is one that relates to the rights of children in conflict with the law.



8.4 Conclusion

I have tried to show in this thesis that Convention 182 has two fatal flaws, yet despite this some redeeming features.

The first flaw is that it is, for all intent and purposes, a treaty that was not necessary. Its substantive provisions, and the implementation thereof, are adequately addressed by the UNCRC and the evolving jurisprudence of the Committee on the Rights of the Child. This in turn led to the second fatal flaw.

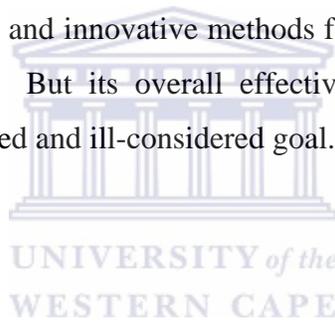
In addressing, what it termed ‘worst forms of child labour’ the ILO had to bring its new Convention in line with the Organisation’s aim and fundamental goal regarding child labour, namely, that it should be abolished. This has led to Convention 182 setting the elimination of the worst forms of child labour as its aim. As stated on numerous occasions in this thesis, I believe that this is unrealistic and unachievable given the nature

of most of the conduct described as worst forms of child labour and the outcomes of the South African Pilot Programme on the use of children in the commission of crime.

Nonetheless, Convention 182 has for the first time given international recognition, in a binding legal standard, to the use of children in the commission of illicit activities, a form of exploitation that even the UNCRC failed to fully articulate.

In addition, Convention 182 has elevated international treaty-making to a new level by including positive obligations, of the nature found in Article 7, on states parties.

In conclusion, I would argue that Convention 182 is a treaty of contradiction – it demonstrates genuine concern for child victims of human rights violations in their most extreme forms. It includes new and innovative methods for implementing the obligations contained in the Convention. But its overall effectiveness and potential success is somewhat diluted by a misguided and ill-considered goal.



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