The Role of International Law in the Elimination of Child Labor

Holly Cullen

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To my mother, Laurette Cullen,
and to the memory of my father, William Cullen (1922–1999)

Contents

Preface and Acknowledgments

This book offers a contribution to current debates over child labor. It also presents child labor as a problem to which various branches of international law have made a response. Because of the broad range of international law subdisciplines treated in this book, and because of the necessity of understanding the context of child labor as a social, economic and cultural issue, I have benefited from the contributions and support of many individuals and organizations throughout the research and writing of this book.

I am, first of all, grateful to Burns Weston, the previous editor of the Procedural Aspects of International Law series, for inviting me to publish this book in the PAIL series. His successor, Roger Clark, has continued the intellectual and moral support for this book begun by Professor Weston. I appreciate the editorial skills of Roger Clark's research assistant, Marshall Kizner.

Burns Weston also receives my thanks for inviting me also to become part of a great learning experience, the Child Labor Research Initiative (CLRI). The CLRI led to a multi-disciplinary colloquium and book on child labor, to both of which I contributed.[1] However, my experience of the CLRI involved more than my own contribution to a challenging set of debates. It presented a unique opportunity to learn from a group of experts in a wide range of aspects of child labor. I hope that their influence can be seen in this book—I certainly feel that the book was enriched by my experience of working with them.

Papers based on aspects of the book were presented to staff seminars at the Universities of Newcastle upon Tyne and Nottingham. Sonia Harris-Short, Dino Kritsiotis and Colin Warbrick read some of the chapters in draft and provided helpful comments. The responsibility for the ultimate result, nonetheless, is mine alone.

During the period of researching and writing this book, I was a member of the Department of Law at the University of Durham and the Durham European Law Institute. I benefited from support from both the Department and the Institute. The Department provided me with two terms of research leave in 2002–2003. The Institute, directed by Professor Rosa Greaves, provided research assistance, ably performed by Eleni Katselli and Sebastian Harter-Bachman. Matthew Gibson, a graduate of Durham's LLB and LLM programs, also provided research assistance in the final stages of the project.

Further support for this project was given by the United Kingdom's Arts and Humanities Research Council, which provided me with a grant as part of their

[1] CHILD LABOR AND HUMAN RIGHTS: MAKING CHILDREN MATTER (Burns H. Weston ed., 2005).

Research Leave Scheme in 2003, enabling me to take a further term of leave.

Finally, I wish to recognize the support of my family and friends, who provided encouragement and listened to endless discussions of child labor issues. I particularly wish to thank my husband, Dylan Griffiths, who always helped me to escape from the long, dark teatime of the soul when I thought that I could not possibly complete this project successfully.

I have attempted to state the law as of January 31, 2007. All Web sites were last visited between March 15–18, 2007.

Holly Cullen
March 2007

Foreword

The Role of International Law in the Elimination of Child Labor is the 28th volume in the Procedural Aspects of International Law (PAIL) Monograph Series. Transnational Publishers has now been acquired by Brill, and incorporated under their Martinus Nijhoff imprint. There is a certain symmetry in all this, as I published my first monograph with Nijhoff, *A United Nations High Commissioner for Human Rights*, 35 years ago.

The author of this monograph, Holly Cullen, is a Reader in the Department of Law and a member of the Human Rights Centre at Durham University in England. She is a law graduate of McGill University in Montreal and of the University of Essex.

PAIL's Monograph Series is aimed at encouraging the production of books on any subject of public or private international law involving a procedural dimension in the practical development, observance or enforcement of international law, rights and duties. Ms. Cullen's book fits nicely into the series. Part I of the work is concerned more with what we think of as "development" of contemporary law relating to child labor. It examines, in particular, what the International Labor Organization categorizes as the "worst forms of child labor"—namely slavery and slavery-like practices, the commercial sexual and criminal exploitation of children and the use of child soldiers. It also discusses efforts at prioritizing responses to the worst forms. Part II is devoted to observance and enforcement. It discusses the value of state reporting mechanisms (developed by the ILO since the 1920s), individual or collective complaints procedures, trade sanctions, technical assistance and private enforcement methods. It is not only a superb contribution to our understanding of child labor law, it is also a major contribution to understanding human rights enforcement in general.

This is the second work in the series that I have been privileged to edit. We have some exciting works in the pipeline, but we are always happy to consider manuscripts or proposals. PAIL is particularly interested in nurturing the work of younger scholars.

Roger S. Clark
Rutgers University School of Law
Camden, New Jersey
June 21, 2007

List of Abbreviations

ACHR	American Convention on Human Rights
ACP states	African, Caribbean and Pacific states
CCC	Corporate codes of conduct
CICC	Coalition for an International Criminal Court
CRC	Convention on the Rights of the Child
CSC	Coalition to Stop the Use of Child Soldiers
CSR	Corporate Social Responsibility
DSU	Dispute Settlement Understanding
EC	Treaty Establishing the European Community
ECHR	European Convention on Human Rights
ECOWAS	Economic Community of West African States
ECPAT	End Child Prostitution, Child Pornography and Trafficking of Children for Sexual Purposes
ECSR	European Committee on Social Rights
ESC	European Social Charter of 1961
EU	European Union
FLA	Fair Labor Association
GATT	General Agreement on Tariffs and Trade
GSP	European Union's Generalized System of Preferences
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICFTU	International Confederation of Free Trade Unions
ICJ	International Commission of Jurists
ICRC	International Committee of the Red Cross
ILC	International Law Commission
ILO	International Labor Organization
ILRF	International Labor Rights Fund
IPEC	ILO International Program on the Elimination of Child Labor
ISO	International Standards Organization
LDC	Least-developed countries
MOU	Memorandum of Understanding
NAFTA	North American Free Trade Agreement
NGO	Non-governmental organization
OAS	Organization of American States
OECD	Organization for Economic Cooperation and Development
Revised ESC	Revised Social Charter of 1996
SAARC	South Asian Association for Regional Cooperation

SAI	Social Accountability International
SPIF	Strategic Program Impact Framework
TBP	Time-Bound Program
TED	Turtle excluder device
TEU	Treaty on European Union
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UDHR	Universal Declaration of Human Rights
UNAMSIL	United Nations Mission in Sierra Leone
UNCTAD	United Nations Conference on Trade and Development
UNESCO	United Nations Educational, Cultural and Scientific Organization
UNHCHR	United Nations High Commissioner for Human Rights
UNICEF	United Nations Children's Fund
WHO	World Health Organization
WTO	World Trade Organization

Note on ILO Conventions

The International Labor Organization (ILO) gives each of its Conventions and Recommendations a title and a number. For example, the Convention concerning the Prohibition and Immediate Elimination of the Worst Forms of Child Labor, adopted on June 17, 1999, is Convention No. 182. In most literature discussing ILO measures, Conventions and Recommendations are referred to by their numbers rather than their titles, and are often abbreviated as, for example, C 182. Recommendations are abbreviated as, for example, R 190. I have adopted this form of referring to ILO measures throughout the book.

Chapter 1
Introduction

There has been a great deal of literature examining the phenomenon of child labor,[1] yet comparatively little of that literature is related to the legal response, particularly from an international perspective. However, an increasing number of international legal instruments now address, directly or indirectly, various aspects of child labor. Undeniably, legal responses alone are insufficient to address such a multi-faceted problem. Nonetheless, it is worthwhile to analyze the international legal responses to child labor and the role of international law in respect of the campaign to end child labor.

A. Historical Perspective

As the Industrial Revolution emerged, it became policy in the United Kingdom that poor children should work, even the very young.[2] The use of children, initially those without family, but later children in families, was widespread in early factories.[3] However, new ideas of childhood and child-rearing led to changed attitudes, and by the 1830s, child labor in factories was the subject of considerable outrage and even public protest in the United Kingdom.[4] The decline of child labor, however, only really began in the latter part of the 19th century, and it took the better part of a century to accomplish between initial protest to practical disappearance.[5] Nonetheless, the norm in most Northern European countries became that children combined school with work.[6] In the United States, a somewhat different pattern of child labor occurred, with child labor found in the informal sector as well as in factories, and associated with new immigrants rather than the poor in the existing population.[7] Child labor grew most rapidly in the late 19th century following new waves of immigration. The differing patterns between Northern Europe, particularly the United Kingdom, and the United States demonstrate the importance of flexibility in

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1 *See, e.g., Bibliography, in* CHILD LABOR AND HUMAN RIGHTS: MAKING CHILDREN MATTER 463–512 (Burns H. Weston ed., 2005).

2 Hugh Cunningham & Shelton Stromquist, *Child Labor and the Rights of Children: Historical Patterns of Decline and Persistence, in* CHILD LABOR AND HUMAN RIGHTS: MAKING CHILDREN MATTER 58 (Burns H. Weston ed., 2005).

3 *Id*., 59.

4 *Id*., 61.

5 *Id*., 63.

6 *Id*., 64.

7 *Id*., 66.

approaches to eliminating exploitative child labor. These patterns are reflected more recently in the International Labor Organization's (ILO's) International Program on the Elimination of Child Labor (IPEC), which has developed technical assistance programs based on specific problems of child labor in one country at a time, even one region or one industry in a country.[8]

The ILO was the first international organization to adopt binding rules on child labor. Amongst its earliest conventions was C 5 of 1919 concerning child labor in industrial employment. It adopted a further three conventions on child labor in 1920 and 1921 and four in the 1930s.[9] All of these treaties were based primarily on the setting of minimum ages for admission to employment, and they were sector-specific, focusing on the manufacturing industry, seafaring, agriculture, trimming and stoking and services (or non-industrial employment). As such, they had more in common with today's national legislation regulating labor standards than with recent treaties concerning human rights. Furthermore, these treaties focused on the issue of setting minimum age, usually in line with the school leaving age in Western states.[10] Only C 10 on the minimum age for employment in agriculture was drafted with an understanding that children could both be employed and in education.

This patchwork of standards for various industrial sectors remains in place, at least in theory. Most of the conventions are still open for signature. In practice, however, the sector-specific standards have mostly been supplanted by ILO C 138 of 1973. This was intended to be a universal treaty covering all child workers. It continues the labor regulation approach of the early conventions, setting minimum ages for employment. However, instead of setting minimum ages for employment in different sectors, it creates three main categories of work. The first is the general category, for which the minimum age is at least 15 or the school leaving age. The second is light work. Children over 13 (12 in developing countries) can work alongside education for a limited number of hours. The final category is hazardous work, where the minimum age is 18 (16 if adequate protective measures are provided). Despite this detailed and almost technocratic approach to child labor, C 138 is based on a policy that employment of children is fundamentally unacceptable. Article 1 calls on states parties to make the abolition of child labor a national policy. The language of progressive abolition derives from anti-slavery movements of the 18th and 19th centuries and was employed in early campaigns against child labor in the United

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8 *See* Chapter 8.

9 Holly Cullen, *Child Labor Standards: From Treaties to Labels, in* Child Labor and Human Rights: Making Children Matter 87, 111 (Burns H. Weston ed., 2005). Additional conventions were adopted in the 1940s and 1950s, but these were either minor amendments of earlier conventions (for example to raise the minimum age for employment) or concerned related matters such as medical examinations for child workers.

10 *Id*., 89.

Kingdom.[11] However, it is questionable whether such an extreme approach was ever necessary for child labor. Some child labor does involve slavery-like practices, but some is freely chosen by the child. If we consider the relationship of child labor to children's rights rather than to labor regulation, then the blanket use of terms deriving from the anti-slavery movement, such as abolition, may not be helpful. It is certainly worth noting that until the adoption by the ILO of its 1998 Declaration on Fundamental Principles and Rights at Work, C 138 had received relatively few ratifications. Following the Declaration, the ILO undertook a campaign to encourage ratification of the Conventions listed in the Declaration, and the number of states parties to C 138 tripled in a decade.[12]

B. Child Labor as a Human Rights Issue

Not surprisingly, after the Convention on the Rights of the Child (CRC) was opened for signature in 1989, the language of children's rights does start to creep into child labor issues. The main provision on child labor, however, is somewhat ambivalent, reflecting the fact that its language draws from Article 10 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and from ILO C 138:

Article 32

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

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[11] Adam Hochschild, Bury the Chains: The British Struggle to Abolish Slavery 349 (2005).

[12] Cullen, *supra* note 9, at 102. In 1996, only 49 states had ratified C 138; by the end of 2006, it was 147 states.

Thus, while paragraph 1 identifies the evil to be eliminated as exploitation or interference with the child's development, paragraph 2 emphasizes the setting of a minimum age for employment, regardless of the existence of harm. However, it is worth noting that Article 32(2)(b), unlike most child labor standards, requires that states also regulate the conditions of children's employment. ILO conventions tend to operate on the assumption that by eliminating the employment of young children, the question of protective working conditions becomes a non-issue. European regional standards, such as the Young Workers Directive[13] and Article 7 of the European Social Charter and Revised European Social Charter,[14] however, do set out rights in relation to minimum standards for working children.

The tension between the two paragraphs in Article 32 CRC must be set against the more fundamental tension in the CRC as a whole. It sets out two models of children's rights—child welfare and child agency. Child welfare is expressed through the best interests principle in Article 3. Child agency is most clearly expressed in Article 12, which requires states to take account of the views of children in accordance with their age and maturity. The tension between child welfare and child agency is played out in many aspects of child labor. The fact that, as noted below, the ILO now appears to recognize that some work by children is beneficial reflects not only ideas of welfare of children but also the idea that children should be allowed to make choices in their own lives. Nonetheless, in relation to the worst forms of child labor as identified in C 182, the welfare principle predominates. In relation to slavery-like practices and sexual or criminal exploitation, the exclusion of child agency is not particularly problematic. However, in relation to child soldiers, as discussed in Chapter 4, taking the choice to join armed forces away from even older children does require justification.

ILO C 182 and R 190 follow the children's rights approach of the CRC. In 1992, the ILO established IPEC, which developed technical assistance programs for countries that sought to address their child labor problems. In conjunction with IPEC, the ILO began to campaign for a new child labor convention. The result of this campaign is C 182 and the accompanying R 190.[15] Unlike the blanket abolitionist approach of C 138, C 182 requires states to eliminate the worst forms of child labor. The worst forms of child labor are defined by Article 3:

> For the purposes of this Convention, the term "the worst forms of child labor" comprises:
>
> (a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced

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13 Directive 94/33/EC, O.J. 1994 L216/12.

14 ETS No. 163, May 3, 1996, entered into force 1 July 1999.

15 Cullen, *supra* note 9, at 94–98.

or compulsory labor, 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 carried out, is likely to harm the health, safety or morals of children.

The focus on the worst forms of child labor has been called a prioritization approach.[16] In the prioritization approach, effort is focused on the most harmful forms of child labor. It implicitly accepts that some forms of child labor are acceptable, even beneficial, by rejecting the approach of C 138, that all child labor must be abolished. Nonetheless, the approach expressed in Article 3 of C 182 has been criticized.[17] The lack of detail in paragraph (d) has been criticized as providing too little guidance and requiring a level of inspection and monitoring that many countries are unable to provide.[18] The categories in paragraphs (a)–(c) have been criticized as moving the ILO outside its area of expertise, into the realm of international criminal law.[19]

Nonetheless, the categories in Article 3 have the benefit of reflecting the concerns of a wider body of international law. C 182 was adopted by the International Labor Conference in 1999. At the same time as it was being debated, 1998–99, the United Nations was debating the drafting of two optional protocols to the CRC: (1) on the Involvement of Children in Armed Conflict; (2) and on the Sale of Children, Child Prostitution and Child Pornography. Both of these were adopted in 2000. Between them, they address most of the same issues that are covered by paragraphs (a)–(c) in Article 3 of C 182, except for some aspects of slavery and slavery-like practices. The Statute of the International Criminal Court, adopted in 1998, makes the recruitment and use of child soldiers a crime at international law, along with some other aspects of child exploitation. Two supplementary conventions to the 2000 U.N. Convention Against Transnational Organized Crime also address some of the worst forms of child labor. The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children and the Protocol Against the Smuggling

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16 *Id*., 88.

17 *See* Chapter 5.

18 Judith Ennew, William E. Myers & Dominique Pierre Plateau, *Defining Child Labor as if Human Rights Really Matter, in* CHILD LABOR AND HUMAN RIGHTS: MAKING CHILDREN MATTER 41–43 (Burns H. Weston ed., 2005).

19 David M. Smolin, *Strategic Choices in the International Campaign Against Child Labor*, 22 HUM. RTS. Q. 942 (2000).

of Migrants by Land, Sea and Air, both adopted in 2000, address some aspects of forced labor and trafficking for sexual exploitation. Finally, in 2005, the Council of Europe adopted its own convention against trafficking, the Convention Against Trafficking in Human Beings.[20] One way, therefore, of looking at Article 3 of C 182 is as a distillation of those aspects of economic exploitation of children that raise particular concern and for which states seek to have an international law response.

C. Defininig Child Labor

The move towards a prioritization approach to child labor arises in part because of the ambiguity of the concept. The definition of child labor can be understood purely in a legal sense in that child labor can be said to constitute those forms of work that are prohibited by law, whether national or international. However, those legal definitions are the product of political settlements, particularly in the context of international law, which are themselves the result of social, cultural, political and economic positions taken by states and other actors in forums that draft and implement international legal provisions.[21] Looking at these social and other assumptions about child labor, we see that there is a perplexing lack of certainty in the definition of child labor.[22]

A large part of the disagreement over the definition of child labor derives from the fact that there is disagreement over the definition of childhood. Prior to the 19th century, no idea of childhood as a concept in itself existed.[23] Without this concept, the idea of children's rights is hard to imagine. There are nonetheless, still difficulties in defining the scope of childhood. In some cultures, childhood is defined by role, which means that an economically active child is no longer a child. While the CRC in Article 1 defines a child as any person under the age of 18, it is equally clear that this definition is by no means universally accepted in all contexts,[24] nor are the implications of childhood as a concept universally agreed. As Ennew, Myers and Plateau describe, childhood is a social

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20 ETS No. 197, May 16, 2005, not yet entered into force.

21 On the issue of child soldiers as an example of the impact of positions taken by states and NGOs, see Claire Breen, *The Role of NGOs in the Formulation of and Compliance with the Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflict* 25 HUM. RTS. Q. 453 (2003); Anne Sheppard, *Child Soldiers: Is the Optional Protocol Evidence of an Emerging "Straight-18" Consensus?* 8 INT'L J. CHILDREN'S RTS. 37 (2000).

22 Ennew, Myers & Plateau, *supra* note 18.

23 Cunningham and Stromquist, *supra* note 2, at 60.

24 As will be discussed in Chapter 4, Article 38 CRC sets the age of 15 as the minimum age for recruitment of child soldiers.

construction mapped onto the observable facts of biological immaturity and dependence.[25]

Increasingly, commentators and international legal regimes attempt to restrict the concept of child labor to activities that are exploitative or harmful.[26] In ILO documents in the mid-1990s, a distinction was made between child labor (harmful) and child work (harmless).[27] More recently, the ILO has used more specific terminology and definitions, although with an unfortunate lack of consistency. In the statistical section of the 2006 Global Report on child labor, part of the follow-up to the 1998 ILO Declaration of Fundamental Principles and Rights at work, the following three main definitions are used:

- Economic activity by children: "a broad concept that encompasses most productive 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 and 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."
- Child labor: a narrower concept than "economically active children," excluding all those children aged 12 years and older who are working only a few hours a week in permitted light work and those aged 15 years and above whose work is not classified as "hazardous."
- Hazardous work: "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."[28]

The categories of "child labor" and "hazardous work" follow the definitions in C 138. Later in the report, the ILO describes the international consensus on child labor as follows: "work that falls within the legal limits and does not interfere with children's health and development or prejudice their schooling can be

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25 Ennew, Myers & Plateau. *supra* note 18, at 31.

26 In Child Labor and Human Rights: Making Children Matter (Burns H. Weston ed., 2005), the definition used is "work done by children that is harmful to them because it is abusive, exploitative, hazardous, or otherwise contrary to their best interests—a subset of the larger class of children's work, some of which may be compatible with their best interests (variously described as 'beneficial,' 'benign' or 'harmless' children's work)." *See, e.g., id*. at 19.

27 ILO, "Child Labor: What is to be Done?," *Document for Discussion at the Informal Tripartite Meeting at the Ministerial Level* (1996).

28 ILO, *Global Report 2006, The End of Child Labor: Within Reach: Global Report Under the Follow-Up to the ILO Declaration on Fundamental Principles and Rights at Work* 6 (2006).

a positive experience."[29] In other words, not all work by children is unacceptable, and therefore not all work by children needs to be proscribed or regulated by international law. Three main categories of unacceptable child labor are then presented:

- the unconditional worst forms of child labor (as set out in Article 3 of C 182);
- labor performed by a child who is under the minimum age specified for that kind of work by national and international law;
- labor that jeopardizes the physical, mental or moral well-being of a child, or hazardous work.[30]

This scheme recognizes, as does the statistical categorization, that some work by children is acceptable and even positive. However, the categories of unacceptable child labor derive both from the prioritization approach of C 182 and the abolitionist approach of C 138. While some commentators hoped that the adoption of C 182 would lead to the abandonment of C 138,[31] it is clear that the ILO is trying to integrate both sets of standards into its work. The main force for the continuing recourse to C 138 is the 1998 ILO Declaration of Fundamental Principles and Rights at Work. This Declaration elevated four sets of conventions to crucial importance in the ILO—freedom of association, freedom from forced labor, non-discrimination and non-use of child labor. In the category of child labor, both C 138 and C 182 were identified as the core conventions. As a result, they became the joint focus for a campaign to increase ratifications. C 138 remains the least ratified of the core conventions associated with the 1998 Declaration, but it now has over 100 states parties, which gives it a sufficient level of support to justify the continued recourse to its provisions in the work of the ILO, including IPEC. However, the increased level of ratification does not eliminate the justifiable criticisms of the inflexibility of C 138 and its inappropriateness for many developing countries.[32]

In light of the definitional ambiguity surrounding child labor, a comprehensive definition is not proposed here. However, because this work focuses on the worst forms of child labor, the perspective taken is that child labor involves an element of exploitation and is not merely the employment of children. Some child work is acceptable and should not be the proper subject of international law, which must address the needs of states with widely diverging economic,

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29 *Id*., 23.

30 *Id*., 24.

31 *See, e.g*., William E. Myers, *The Right Rights? Child Labor in a Globalizing World*, 575 ANNALS THE AM. ACAD. POL. & SOC. SCI. 38 (2001).

32 *Id*.; Breen Creighton, *Combating Child Labor: The Role of International Labor Standards*, 18 COMP. LAB. L.J. 362 (1997).

social and political circumstances. However, as discussed in Chapter 5, this does not necessarily mean that the prioritization approach of C 182 is a complete response to exploitative child labor in terms of standard setting.

D. Structure of the Book

This book is divided into two parts. Part I analyzes contemporary international law standards concerning child labor. The first three chapters of Part I analyze provisions relating to the worst forms of child labor as set out in Article 3 of ILO C 182, namely: slavery and slavery-like practices (Chapter 2); the commercial sexual and criminal exploitation of children (Chapter 3); and child soldiers (Chapter 4). Chapter 5 analyzes criticisms of the approach taken by C 182 in prioritizing the worst forms of child labor and examines alternative approaches to addressing child labor through international law.

Part II deals with methods of implementation and enforcement of child labor in international law. Chapter 6 looks at the use of state reporting mechanisms and individual or collective complaints procedures to supervise state implementation of child labor norms. Chapter 7 examines the debate over the use of trade sanctions against states where child labor is common, particularly the question of whether such trade sanctions are consistent with international obligations under World Trade Organization treaties. Finally, Chapter 8 covers technical assistance programs within the ILO and private enforcement methods. These include social labeling and corporate codes of conduct, which increasingly integrate reference to international law norms, such as those relating to child labor. Some overall conclusions about the role of international law in the elimination of child labor, including the limits of international law methods of addressing this problem, are presented by the author in Chapter 9.

Part I

International Standard-Setting in Child Labor: Examining the Priorities of International Law

Chapter 2
Child Slavery and Slavery-Like Practices

A. *Introduction*

Among the worst forms of child labor that have been identified as priority areas by the International Labor Organization (ILO) are practices analogous to slavery, such as bonded labor, where workers, while not being owned by the employer, are so bound that they cannot voluntarily end the employment contract. ILO C 182, Article 3(a), includes as one of the worst forms of child labor, "all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom or compulsory labor, including forced or compulsory recruitment of children for use in armed conflict." This type of child labor is probably the clearest case of abusive child labor, and even those commentators who have been critical of the prioritization approach of C 182 have accepted the appropriateness of slavery-like practices as a target for child labor campaigns.[1] However, it must be remembered that forced labor and slavery-like practices constitute serious human rights abuses whether they are committed against adults or children. Many of the widespread situations of bonded or forced labor affect both children and adults, often within the same families.

Bonded labor and similar practices, however, often arise from long-standing practices in many countries, and despite attempts by states, including their courts, to outlaw such practices, they continue. States usually have laws against such practices, but the problem is that of enforcement, or sometimes even acknowledging the continuing existence of slavery-like practices. This is the context in which the struggle against forced child labor must be understood.

In addition to C 182, there are several international instruments that ban slavery, slavery-like practices and forced labor. The historical evolution of international norms against slavery and forced labor will be examined in detail in this chapter. In addition, this chapter will examine the legal status of the prohibition on slavery as a customary norm of international law and possibly as an *erga omnes* obligation or a norm of *jus cogens*, and the implications for the elimination of child labor, particularly in light of the International Law Commission (ILC) Articles on State Responsibility. In particular, the scope of any custom-

[1] David M. Smolin, *Strategic Choices in the International Campaign Against Child Labor*, 22 HUM. RTS. Q. 942, 962–63 (2000).

ary or *jus cogens* norm will be considered to determine which abusive forms of child labor will be included as part of "slavery" for such purposes.[2]

There is considerable overlap with issues raised by slavery-like practices and other priority areas of child labor. Some issues, therefore, which are raised in the context of Article 3(a) of C 182, will be dealt with in other chapters. The issue of trafficking in children will be dealt with in the chapter on commercial sexual and criminal exploitation of children (Chapter 3), as international norms on trafficking have largely been attached to initiatives against prostitution, although more recent standards have recognized the practice of trafficking for forced labor as well.[3] Forced recruitment of children into the armed forces of a country is dealt with in the chapter on child soldiers (Chapter 4). While slavery-like practices are often found in domestic service and some forms of agriculture, these sectors are discussed in the chapter on alternative approaches to regulating child labor (Chapter 5).

B. Definition of Slavery in International Treaties

Provisions of international law relating to the prohibition on slavery include both slavery itself and slavery-like practices or practices similar to slavery. Slavery itself implies that one person owns another in some way.[4] Rassam suggests that there are two elements: ownership plus the commodification of labor through coercion.[5] The requirement of ownership is confirmed by Article 1(1) of the 1926 League of Nations Slavery Convention,[6] which states that "slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are executed." It is questionable whether a separate requirement of coerced labor is necessary, since this seems to follow inevitably from the condition of ownership. Notably, the 1926 Convention includes a prohibition on forced labor but does not address slavery-like prac-

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2 A. Yasmine Rassam, *Contemporary Forms of Slavery and the Evolution of the Prohibition of Slavery and the Slave Trade Under Customary International Law*, 39 VA. J. INT'L L. 303 (1999).

3 *See* ILO, *Stopping Forced Labor, Global Report of 2001 on the Declaration of Fundamental Principles and Rights at Work* ch. 8 (2001) [hereinafter ILO Global Report 2001]. The Report links the rise of trafficking with globalization.

4 David Weissbrodt, *Updated Review of the Implementation of and Follow-Up to the Conventions on Slavery*, Working Paper for the United Nations Working Group on Contemporary Forms of Slavery, E/CN.4/Sub.2/2000/3, paras. 17–18 (May 26, 2000).

5 Rassam, *supra* note 2, at 320. *Compare* S. Drew, *Human Trafficking: A Modern Form of Slavery?* EUR. HUM. RTS. L. REV. 481, 487 (2002), who asserts that "all the different forms of slavery . . . which the U.N. instruments address have in common two elements: lack of true consent and lack of control over one's own labor or reward for it."

6 60 L.N.T.S. 253.

tices, such as debt bondage, which do not involve incidents of legal ownership but put the subject person in a position similar to slavery.

After World War II, the United Nations appointed a Committee of Experts on slavery that recognized the gaps created by the definition of slavery in the 1926 Convention.[7] The result was the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery.[8] The definition of slavery was, however, carried over from the 1926 Convention. The innovation of the 1956 Supplementary Convention was to include a number of forms of "servile status." These may be described as institutions and practices, which do not give one person ownership rights over another, but do have the effect of binding the subject persons in such a way that their freedom is severely limited or that they have no means of voluntarily ending the legal relationship with the beneficiary.[9] The degree of control exercised by the beneficiary over the subject person's labor is such that the practical effect of the relationship is much like slavery, although there is no assertion of ownership over the subject person.[10]

Article 1 of the 1956 Supplementary Convention does not attempt to define exhaustively, or even inclusively, the institutions and practices similar to slavery. It lists and defines four categories of such practices:

> (a) Debt bondage, that is to say, the status or condition arising from a pledge by a debtor of his personal services or 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;
>
> (b) Serfdom, that is to say, the condition or status of a tenant who is by law, custom or agreement, bound to live and labor 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;

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7 Weissbrodt, *supra* note 4, at para. 13.

8 266 U.N.T.S. 40.

9 See the decision of the European Court of Human Rights in *Siliadin v. France*, 43 Eur. H.R. Rep. 16 (2006), where the loss of autonomy was considered the essential element of servitude.

10 Weissbrodt, *supra* note 4, at paras. 18–20. He argues that it is the circumstances of the subject person that establish whether a situation is a slavery-like practice, including the following factors: "(i) the degree of restriction of the individual's inherent right to freedom of movement; (ii) the degree of control of the individual's belongings; and (iii) the existence of informed consent and a full understanding of the nature of the relationship between the parties."

(c) Any institution whereby:

(i) A woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any person or group;

(ii) The husband of a woman, his family, or his clan has the right to transfer her to another person for value received or otherwise; or

(iii) A woman on the death of her husband is liable to be inherited by another person;

(d) Any institution or practice whereby a child or young person under the age of 18 years is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labor.

Few of these forms of servile status include any form of ownership, except probably Article 1(c)(iii). All, however, remove the freedom of the person to dispose of their labor according to their will. All, including serfdom, which usually involves entire families, are relevant to issues of child labor.

Other human rights instruments have not attempted to define slavery or slavery-like practices in such detail or in such an exclusive way. Article 4 of the Universal Declaration of Human Rights (UDHR) bans "slavery or servitude." The International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR) use the same phrase. The American Convention on Human Rights (ACHR) uses the very similar "slavery or involuntary servitude," emphasizing the loss of freedom entailed by slavery-like practices. The language in Article 5 of the African Charter on Human and Peoples' Rights is broader but less clear: "All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be punished." This list is illustrative rather than the exhaustive list of the 1956 Supplementary Convention, but it skips from slavery itself to torture and other forms of physical ill-treatment, which are often associated with slavery-like practices but are in nature very different, not involving the same element of extreme control of individuals and their labor. C 182, Article 3 gives a less detailed, but probably more inclusive, definition than the 1926 and 1956 Conventions by referring in general to slavery-like practices.

The evolution of norms against slavery to include slavery-like practices is important, as slavery in the sense of full ownership of one person by another is rare, although it still exists, for example in the Sudan, where persons have been abducted into slavery.[11] Often, these undisguised forms of slavery emerge or re-emerge during times of armed conflict, particularly civil war.[12] Instead,

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11 ILO Global Report 2001, *supra* note 3, at 16–18.

12 *Id*.

the situations that are often discussed in the context of contemporary forms of slavery are practices, such as debt bondage, where the worker is not legally owned, but the worker's labor, or that of a family member, is contracted to the lender as repayment of the debt.

Measures addressing slavery and the slave trade may also implicitly cover issues of trafficking in persons. For example, the *travaux preparatoires* of the UDHR indicate that the term "slavery" in Article 4 UDHR was intended to include the trafficking in women and children.[13] However, specific measures on trafficking have, until recently, tended to be associated with commercial sexual exploitation, particularly prostitution.[14]

Slavery is one of the oldest human rights issues to be addressed by international law. The practices that are covered by the prohibition on slavery have been developed over time to reflect changing understandings of the complexity of the problem. Article 3(a) of C 182 is therefore understandably drafted in broad terms to cover the variety of situations that are understood to be contemporary forms of slavery

C. Example of Contemporary Forms of Child Slavery: Bonded Labor

Bonded labor is a slavery-like practice resulting from indebtedness. The creditor/employer offers loans in exchange for labor, often that of the child or children of the debtor. These loans, which are often relatively small, are usually theoretically to be paid off by the work of the children.[15] In some cases, however, the child's work or wages are not used to offset the debt or its often usuriously high interest, and the family has to pay off the debt separately. Even where the debt is to be paid off by the child's work, the wages are so low and the interest so high that it may be impossible for the debt to be cleared, and successive members of the same family may be compelled to work on the basis of the same debt.[16]

Debt bondage is a very old practice, similar to and sometimes linked to serfdom.[17] In fact, it has been argued that in some cases, what appears to be a

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13 Rassam, *supra* note 2, at 333 n.134.

14 For a detailed discussion of the international legal provisions on trafficking, see Chapter 3.

15 Lee Tucker, *Child Slaves in Modern India: The Bonded Labor Problem*, 19 HUM. RTS. Q. 572, 573 (1997).

16 *Id*.

17 Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights: *Contemporary Forms of Slavery: Updated Review of the Implementation of and Follow-Up to the Conventions on Slavery, Addendum, Forms of Slavery*, E/CN.4/Sub.2/2000/3/Add.1, para. 4 (May 26, 2000) [hereinafter Commission on Human Rights Report].

slavery-like practice is simply an incident of traditional patterns of land ownership, although others have argued that debt bondage is often associated with very contemporary forms of commercial agriculture.[18] It is certainly the case that bonded labor is found outside agriculture, in forms of manufacturing such as brick kilns. International law is clear that it is a prohibited practice and a form of slavery. The 1956 Supplementary Convention gives a legal definition of debt bondage as the "status or condition arising from a pledge by a debtor of his personal services or those of a person under his control as security for a debt, if the value of those services are not respectively limited and defined." In practice, a "person under [the debtor's] control" usually means a child. In addition to ILO and U.N. standards banning slavery-like practices including bonded labor, the ILO has adopted conventions that discourage the payment of wages in forms other than legal tender.[19] The ILO's Social Finance Unit has developed projects to encourage microfinance schemes in countries with persistent debt bondage, in order to prevent the indebtedness which results in slavery-like employment for the debtor or his family.[20] Microfinance involves the provision of credit, loans and savings to persons who, because of poverty, are unable to access the usual range of financial services, particularly through the granting of very small loans.[21]

Because forms of bonded labor have existed for centuries in some parts of the world, it is difficult for states to eliminate these practices. At the roots of the pervasiveness of debt bondage are poverty, lack of access to affordable credit, particularly microcredit, few employment opportunities and, in many cases, poor education.[22] Furthermore, the sectors in which debt bondage is common are manufacture for internal consumption (as in the brick kiln industry in Pakistan), agriculture and domestic service. Although campaigns have focused on internationally traded goods, such as hand-knotted carpets, most bonded labor, as is the case for child labor in general, is not in export industries.

In addition to the economic factors that lead to the persistence of bonded labor, there are social factors as well. In many countries where bonded labor exists, the groups most likely to be subject to debt bondage are those that are already disfavored or excluded. In India, the vast majority of bonded laborers are from the scheduled castes or indigenous tribal peoples.[23]

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18 ILO Global Report 2001, *supra* note 3, at 32–33.

19 In particular, Convention No. 117, Basic Aims and Standards of Social Policy, 1962 and Convention No. 95, Protection of Wages, 1949; *see* Commission on Human Rights Report, *supra* note 17, at paras. 16–17.

20 ILO Global Report 2001, *supra* note 3, at 81.

21 2006 Nobel Peace Prize winner Mohammed Yunus is a pioneer of microfinance schemes.

22 Tucker, *supra* note 15, at 575–78.

23 *Id*., 575.

Most states where the practice is common have adopted legislation banning debt bondage, but it nonetheless persists.[24] In India, there is an extensive array of laws, from the Constitution to relatively recent legislation, which bans bonded labor and child labor.[25] The Indian Supreme Court has even recognized the payment of extremely low wages as a form of bonded labor.[26] However, the legislation has gaps and exemptions that allow bonded labor to continue, particularly in small businesses in the informal sector.[27]

A much larger problem, however, is the lack of enforcement of the law. At times, India has been reluctant to accept publicly that bonded child labor is a continuing problem or that where it is a problem, it can be addressed through state policies.[28] In general, there is poor enforcement of the child labor and bonded labor laws.[29] The enforcement of the Bonded Labor System (Abolition) Act is delegated to state governments, as is responsibility for rehabilitation of bonded laborers.[30] However, matters such as ensuring that the allowance to which former bonded laborers are entitled is raised to a decent level were not put into effect by state governments.[31] The central government has increased the level of assistance benefit for former bonded laborers as part of a more integrated approach in more recent years.[32] A more pervasive problem is the poor quality of the labor inspection system, which results in few situations of bonded labor being identified or prosecuted, despite the wide range of legislation relating to child and bonded labor.[33]

The Indian Courts have, on several occasions, recognized the responsibility of the Indian authorities to eliminate bonded labor and to rehabilitate for-

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24 ILO Global Report 2001, *supra* note 3, at 33–34. However, Nepal did not have appropriate legislation prior to cooperation with the ILO on the issue: *id*. at 42.

25 See discussion in Tucker, *supra* note 15, at 580–87.

26 See cases cited in Commission on Human Rights Report, *supra* note 17, at para. 17.

27 This is particularly the case for the Child Labor (Prohibition and Regulation) Act, 1986; *see* Tucker, *supra* note 15, at 585–86.

28 Lammy Betten, International Labor Law: Selected Issues 308–10 (1993). On India's response to the question of bonded labor generally, see *id*. at 136.

29 *Id*., 137–39. The non-enforcement of child labor laws is a worldwide problem; *see, e.g*., International Commission of Jurists v. Portugal, Complaint No. 1/1998, 6 I.H.R.R. 1142 (1999) (admissibility), 7 I.H.R.R. 525 (2000) (merits), discussed in detail in Chapter 6.

30 Tucker, *supra* note 15, at 622, who argues that it is nonetheless the central government that bears the ultimate responsibility and that has the legislative and budgetary powers to ensure that state governments live up to their obligations under the Act.

31 *Id*., at 623.

32 ILO Global Report 2001, *supra* note 3, at 37.

33 Tucker, *supra* note 15, at 624–27.

mer bonded laborers. For the Indian Supreme Court, this responsibility derives from the Constitution itself, not just from the legislation. This was first established in 1984[34] and reaffirmed in the *Mehta* case. *Mehta v. State of Tamilnadu and Others* was a petition filed by a lawyer under Article 32 of the Indian Constitution, requesting the Supreme Court to issue directions for the enforcement of fundamental rights under the Constitution.[35] The petition concerned child labor in general rather than bonded labor specifically, but it demonstrates the continuing lack of enforcement of the relevant laws that enable bonded child labor to continue. This was the second case brought by Mehta concerning child labor. The first resulted in orders made by the Court to prevent illegal child labor and to improve the working conditions for child workers.[36] However, the Court noted that child labor had in fact become more widespread over the period since the first case. It noted that the right of children below 14 not to be employed in factories, mines or other hazardous employment is a fundamental right in the Constitution, as is the right to education.[37] Having found that illegal child labor was still a pervasive problem in India, the Court ordered that inspectors should enforce the most recent relevant legislation, the Child Labor (Prohibition and Regulation) Act 1986, and that offending employers be required to pay 20,000 rupees compensation for each child illegally employed.[38] The money should be invested and the proceeds then used for a rehabilitation and welfare fund for former child workers.[39] Alternatively, the authorities should be required to find a suitable job for an adult in the child worker's family.[40] This order recognizes the fact that employers often prefer child workers, even in the context of bonded labor, where in some industries, children are replaced by their younger siblings as they reach an age where they would have to be paid more.[41]

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34 Chaudary v. State of Madhya Pradesh, 3 S.C.C. 243 (1984), cited by Tucker, *supra* note 15, at 622. See also discussion of the judgments of the Indian Supreme Court in this area in ILO Global Report 2001, *supra* note 3, at 34.

35 Mehta v. State of Tamilnadu and Others, 2 BUTTERWORTHS HUMAN RIGHTS CASES 258 (1997) (Supreme Court of India). For a discussion of the development of social action litigation in under the Indian Constitution, particularly in relation to the enforcement and development of economic and social rights, see PAUL HUNT, RECLAIMING SOCIAL RIGHTS ch. 4 (1996).

36 Mehta v. State of Tamilnadu and Others, *supra* note 35, paras. 3A-5.

37 The right to education has been recognized as a fundamental right following the 1993 case of *Krishnan v. State of Andra Pradesh and Others*, A.I.R. 2171 (1993) (Supreme Court of India); *see* Mehta, *supra* note 35, at para. 14.

38 *Id*., para. 27.

39 *Id*.

40 *Id*., para. 30.

41 Tucker, *supra* note 15, at 594.

Bonded labor in India exists in some hazardous industries.[42] For example, jewelry-making uses harmful chemicals. The silk and carpet industries expose children to hazards from inhalation of particulates. These hazards are inherent to the industries themselves, although the nature of the bonded labor relationship may make employers less likely to provide protective equipment and medical care. In addition to these inherent hazards, however, are the abuses committed by employers of bonded labor on the children, including physical punishment, sexual abuse (usually of girls) and chaining the children to their work stations.[43]

One significant barrier to eliminating bonded labor, despite the laws that ban it, is the fact of its long-standing practice.[44] In the silk-weaving industry in India, examples have been found of employers invoking the assistance of village elders for the enforcement of contracts establishing the bonded labor relationship.[45] Culture also comes into play when the bonded workers are in some way different from the communities in which they work. In India's carpet industry, migrant bonded labor, often trafficked from other regions, will be subject to worse treatment than local bonded labor, many earning only their food.[46] Similarly, in Pakistan's brick kilns, many of the bonded workers are non-Muslims.[47]

The brick kiln industry in Pakistan presents particularly intractable problems of bonded labor. Entire families are bonded on the basis of debts that are theoretically advances on wages, sometimes going back generations.[48] The Supreme Court of Pakistan declared bonded labor on this basis to be contrary to the Constitution in 1989,[49] but it persists nonetheless.[50] The Supreme Court

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42 *Id*., 587–619.

43 *Id*.

44 On the causes of child labor in India, including "traditional attitudes," see Mehta, *supra* note 36, at para. 25.

45 Tucker, *supra* note 15, at 605. In some cases, the absconding child worker will be fined for violation of the contract.

46 *Id*., 609–10.

47 ICFTU, *Bonded Brick Kiln Workers—1989 Supreme Court Judgment and After, a Study by the All Pakistan Federation of Labor* ch. 3 (Oct. 20, 1998), *available at* http://www.icftu.org/displaydocument.asp?Index=990916045&Language=EN [hereinafter ICFTU Report].

48 *Id*., chs. 1 and 3.

49 Constitution Case No. 1 of 1988, discussed by BETTEN, *supra* note 28, at 139–40. *See also* ICFTU Report, *supra* note 47, at ch. 3.

50 The central problem was that the Supreme Court decision did not order that bonded debts should be treated as void and unrecoverable but only that wages could not be used as a means of recovery; *see* BETTEN, *supra* note 28, at 139–40; *see generally* ICFTU Report, *supra* note 47. On the persistence of bonded labor in the brick kiln industry, see Anti-Slavery International, Submission to the United Nations Working Group on

made a specific order prohibiting owners from coercing laborers to use their family members to supplement their work rate. However, the presence of child labor in the brick kiln industry as a result of the debt bondage system continues.[51] There are particular problems of lack of social security coverage (particularly problematic due to the seasonal nature of the work) and educational provision for children that reinforce the hardship created by the debt bondage system itself.[52] As in India, the problem appears to be one of poor enforcement of the law.[53] The problem has been sufficiently high profile, however, to attract international concern, which has led to Pakistan's cooperation with the EU and the ILO on technical assistance programs towards the elimination of bonded labor in brick kilns.[54]

The Working Group on Contemporary Forms of Slavery has also received information on bonded labor in the agricultural sector in Nepal.[55] Bonded labor in several sectors in Nepal has been an area where the International Program on the Elimination of Child Labor (IPEC) has also been active. IPEC was established by the ILO in 1992 to provide technical assistance to countries that wish to eliminate child labor from their economies.[56] IPEC's activities have included assistance in drafting new legislation, research and targeted project activities in areas most badly affected by bonded labor.[57] Since 1998, IPEC and UNICEF have focused on child bonded labor, particularly on strengthening the capacities of local actors.[58] More recently, IPEC and other

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Contemporary Forms of Slavery, 28th Sess., June 16–20, 2003, *available at* http://www.antislavery.org/archive/submission/submission2003-discrimBL.htm [hereinafter Anti-Slavery International Submission]. In particular, the Report notes that a 2002 decision of the High Court in Sindh dismissed 94 applications for release from bonded labor. In the view of Anti-Slavery International, "The ruling has the effect of negating the Bonded Labor System (Abolition) Act 1992." The case is, however, under appeal to the Supreme Court.

51 ICFTU Report, *supra* note 47, ch. 5, table 6, and ch. 6.

52 *Id*., chs. 5 and 7.

53 Pakistan adopted the Bonded Labor System (Abolition) Act in 1992 and the Bonded Labor System (Abolition) Rules in 1995; *see* ICFTU Report, *supra* note 47, Introduction, section on "Government Initiatives," and chs. 2 and 4.

54 ILO Global Report 2001, *supra* note 3, at 40. The brick kilns are not the only industry where bonded labor is found in Pakistan, however. There are pockets of bonded labor in agriculture in some parts of the country: *id*., 41–42.

55 *Report of the Working Group on Contemporary Forms of Slavery*, E/CN.4/Sub.2/1999/17, para. 67 (July 20, 1999). *See also* Anti-Slavery International Submission, *supra* note 60.

56 The activities of IPEC are discussed in greater detail in Chapter 8.

57 ILO Global Report 2001, *supra* note 3, at 79.

58 *Id*., 79–80. The project was one of the few supported by social partner organiza-

parts of the ILO have developed a comprehensive project to combat bonded labor in Nepal.[59]

Bonded labor as a practice clearly amounts to an abusive form of child labor, regardless of the industry. In India, there are some industries where children work both freely and under bond. The non-bonded child workers have better work conditions and earn several times more than their bonded counterparts.[60] This slavery-like practice permits economic and physical abuse of children in a way that goes well beyond the simple fact of employing school-age children.

D. Forced Labor: International Standards and Supervision

Forced labor is a broad category that can include bonded labor as well as other slavery-like practices. Its essence is coercion rather than ownership but arguably a less intense coercion than in the case of servitude. As a result of the breadth of the category of forced labor, in even the most recent versions of the prohibition on forced labor there are exceptions, most notably for military conscription of adults.[61] Forced labor includes various types of coercion, including legal and physical. It shares some common historical roots with slavery. Even when slavery was abolished by Western countries, imperial states, such as the United Kingdom, used compulsory labor in some colonial contexts. One notable example is Burma, where legislation from the British colonial era is now being used by the military regime for conscription of a significant part of the population into assisting the military and building infrastructure projects. Forced labor, however, is not only about economic exploitation. It is often used as a means of political and social control.[62] This was the basis for C 105 of 1957, and was addressed in ILO programs in the mid-20th century concerning compulsory labor of indigenous peoples in Asia and Latin America.[63] It can also once again be seen in the Burmese example, where minority groups are more likely to be subject to forced labor than the majority. The ILO has asserted that the widespread problem of forced labor in Burma may in part be due to structural factors, including ethnic marginalization, but that the most important

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tions (Italian trade unions and the Confederation of Italian Industry) rather than governments.

59 For an overview of IPEC activities in Nepal, particularly in respect of bonded labor, see http://www.ilo.org/public/english/standards/ipec/timebound/nepal.pdf.

60 Tucker, *supra* note 15. One example, see *id*. at 589, is the beedi, or cigarette-rolling, industry.

61 On the recruitment of children into the military as a form of child labor, see Chapter 3.

62 Betten, *supra* note 28, at 129.

63 ILO Global Report 2001, *supra* note 3, paras. 228–230.

factor is the lack of political will on the part of the military government to eradicate the practice of its own officials.[64]

The development of the prohibition on forced labor has been parallel to that of the prohibition on slavery.[65] The two categories have considerable overlap, as can be seen from the relevant international standards. The 1926 Slavery Convention includes a prohibition on forced labor, and forced labor provisions are capable of also covering slavery-like practices. The ILO has conventions specifically on forced labor, and the two main conventions were adopted close in time to the slavery conventions. C 29 on forced labor was adopted in 1930, and C 105 on forced labor was adopted in 1957. The definition of forced labor in C 29 demonstrates how a continuum can be drawn from slavery at one end to freely chosen labor at the other. As noted above, slavery entails some element of ownership over the subject person, whereas slavery-like practices look at the question of control. Forced labor moves from control to compulsion in Article 2(1) of C 29, where forced labor is "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 European Commission on Human Rights has likewise emphasized the overriding of the subject person's will as the essence of forced labor.[66]

Slavery-like practices, such as debt bondage or serfdom, usually imply a legal relationship that continues over a long period of time. Forced labor may involve only one act of involuntary labor and is therefore more inclusive than slavery-like practices. Due to the breadth of forced labor as a category, civil and political rights treaties often provide for exceptions to the prohibition on forced labor, such as military conscription. C 29 allows forced labor in the context of civil emergency and "normal civic obligations" (Article 2(2)(b)). There is a limited exception for prison labor. Much of C 29 is concerned with setting the framework in which such permissible forced labor may be executed. For example, Article 13 provides that the hours of work for forced labor must be the same as for voluntary labor.

In any event, forced labor may never be imposed on children. Article 11 of C 29 states that "only adult able-bodied males who are of an apparent age of not less than 18 and not more than 45 years may be called upon for forced or compulsory labor." No such provision appears in C 105, which contains a broad ban on forced labor for political purposes, without exceptions.[67] However,

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64 *Id*., para. 139.

65 *Id*., 9–12.

66 X v. Federal Republic of Germany, Application No. 4653/70, 46 D.R. 22 (1974).

67 Article 1 of Convention calls upon states to ban forced labor:

(a) As a means of political coercion or education or as a punishment for holding or expressing political views or views ideologically opposed to the established political, social or economic system;

C 105 supplements rather than replaces or revises the earlier Convention.[68] Therefore, the basic definition of forced labor for ILO purposes is that contained in C 29. Both C 29 and C 105 are core conventions mentioned in the ILO's 1998 Declaration on Fundamental Principles and Rights at Work. Under the terms of the Declaration, ILO member states are expected to commit themselves to support of the principles in the Declaration—freedom of association, non-use of forced labor, non-discrimination and non-use of child labor—even if they have not ratified the ILO conventions named in the Declaration. The ILO monitors how well states live up to these principles on a rolling basis.[69]

The ILO also has a number of conventions that indirectly support the prohibition on forced labor. C 122 of 1964 on Employment Policy enshrines the principle of freely chosen employment.[70] As noted above, the Protection of Wages Convention prevents practices that lead to debt bondage and other abuses. Other conventions, obliging states to have appropriate labor standards inspection, would also help to enforce the ban on forced labor.[71] Inspection, along with consultation of workers and their representatives, which is called for by C 144 of 1974 on Tripartite Consultation, improves transparency of labor practices and should help to prevent and eliminate forced labor practices. C 169 of 1989 on Indigenous and Tribal Peoples prohibits the exaction of compulsory services from indigenous groups, who are among the most vulnerable in this area.

Most civil and political rights treaties include a broad prohibition on forced labor, usually in addition to a ban on slavery or slavery-like practices,[72] although none of these instruments includes a definition of slavery.[73] Only the African Charter lacks a specific mention of forced labor, although this would arguably

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(b) As a method of mobilizing and using labor for purposes of economic development;

(c) As a means of labor discipline;

(d) As a punishment for having participated in strikes;

(e) As a means of racial, social, national or religious discrimination.

68 ILO Global Report 2001, *supra* note 3, at 122.

69 See, on child labor, ILO, *ILO Global Report 2006, The End of Child Labor: Within Reach: Global Report Under the Follow-Up to the ILO Declaration on Fundamental Principles and Rights at Work* (2006).

70 *Id*. Article 1 of the European Social Charter and Article 6 of the Additional Protocol to the American Convention on Human Rights (Protocol of San Salvador) contain similar provisions. ILO Conventions on migrant workers ban practices that might induce persons to migrate into situations of forced labor; *id*., 123.

71 *Id*.

72 *See* ICCPR art. 8; ECHR art. 4; ACHR art. 6.

73 Rassam, *supra* note 2, at 334, notes that the *travaux preparatoires* for the ICCPR indicate that the reference to slavery in that instrument was intended to be a limited concept, distinct from forms of servitude, as set out in the Supplementary Convention.

be covered by the broad language of Article 5 noted in Section C. In economic and social rights instruments, the ban on slavery or forced labor becomes a positive right freely to choose one's occupation. The International Covenant on Economic, Social and Cultural Rights (ICESCR) asserts the positive right to choose one's work in Article 6(1).[74] Again the African Charter is somewhat different. The provision on the right to work, Article 15, does not explicitly refer to the right freely to choose one's occupation. However, Article 15 does mention the right to work "under equitable . . . conditions," which could imply a right of free choice.

In the past two decades, the increasing concern over child labor has led to the recognition that forced labor issues have a substantial overlap with the worst forms of child labor.[75] As a result, Article 3 of C 182 makes specific reference to "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 labor, including forced or compulsory recruitment of children for use in armed conflict" as one of the worst forms of child labor. In fact, this is probably the least controversial of the categories of worst forms of child labor.[76]

Examples of forced labor are alarmingly frequent.[77] In some cases, traditions of participatory voluntary labor are corrupted into forced labor on public works. This has notably been the case in Burma/Myanmar, where the armed forces have abused forced labor throughout the country. The problem of state compulsion of labor, beyond compulsory military service, exists in other countries as well, although it may be regulated, and adequate employment protection and wages may be guaranteed.[78] Nonetheless, these practices are violations of ILO conventions and forced labor prohibitions in other international human rights treaties.

The saga of ILO attempts to secure compliance by Burma with its obligations under C 29 has implications both for the interpretation of forced labor norms and for the ILO's procedures. The ILO sent a Commission of Inquiry to Burma to investigate the claims. The Commission went on to produce a detailed report on how forced labor was being used by the military for its own benefit and for the development of Burma's infrastructure.[79]

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74 The equivalent provisions in regional human rights conventions are: European Social Charter art. 1 (this provision is repeated in the Revised European Social Charter) and Additional Protocol to the ACHR art. 6.

75 ILO Global Report 2001, *supra* note 3, at 12.

76 See Smolin, *supra* note 1, at 962–63.

77 ILO Global Report 2001, *supra* note 3.

78 *Id*., 19–20.

79 ILO, *Forced Labor in Myanmar (Burma)*, Report of the Commission of Inquiry Appointed Under Article 26 of the ILO Constitution to Examine the Observance by

The establishment of a Commission of Inquiry followed decades where Burma refused to acknowledge the existence of forced labor in its territory. The substance of the allegations against the government has remained remarkably similar over time, despite changes in regime. The legal foundation for the practice of forced labor lies in two laws from the era of British colonialism in Burma, the Villages Act 1908 and the Towns Act 1907.[80] These laws allow officials to compel local labor for a number of purposes. Despite recurrent undertakings to the ILO Committee of Experts to review and repeal these laws, they have remained in force.[81] In addition, there have been secret military directives that acknowledge the practice of forced labor and set conditions on its use.[82] The practice of forced labor has nonetheless been repeatedly denied by the Burmese government. Instead, it asserts that the labor is voluntary labor for communal purposes and that it must be seen in light of Burma's cultural traditions.[83] In a report on a Representation under Article 24 of the ILO Constitution in respect of Burma's alleged violations of C 29, the Committee of Experts concluded that the recruitment of porters by the military under the Villages Act and Towns Act was forced labor because of the threat of penalty if residents did not volunteer, and it could not be brought within the scope of any of the exceptions in Article 2(2) of the Convention.[84] The increased use of forced labor in public works projects, as the government pursued an agenda of rapid economic development, kept the issue of forced labor in Burma on the ILO's agenda and led to the complaint of 1996 that resulted in the establishment of the Commission of Inquiry.

The findings of the Commission of Inquiry echo those of the earlier report of the Committee of Experts. It concluded that Burma was in violation of C 29 first of all in maintaining in force the Villages Act and the Towns Act, which make failure to supply labor when requested a penal offense.[85] This is particularly the case because of the broad wording of these statutes, which means that

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Myanmar of the Forced Labor Convention, 1930 (No. 29), 81 OFF. BULL. (1998), Series B, *available at* http://www.ilo.org/public/english/standards/relm/gb/docs/gb273/myanmar.htm [hereinafter Commission of Inquiry Report]. *See also* Patrick Bolle, *Supervising Labor Standards and Human Rights: The Case of Forced Labor in Myanmar (Burma)*, 137 INT'L LAB. REV. 391 (1998).

80 Commission of Inquiry Report, *supra* note 79, paras. 104, 237–248.

81 *Id*., Part III *passim*.

82 *Id*., para. 104.

83 *Id*., paras. 144–145. The Committee of Experts has criticized the government for blurring the distinction between voluntary and forced labor; *id*., para. 164.

84 *Id*., paras. 148–150. On the scope of the exceptions, as set out in the Committee of Experts' General Survey of 1979, see paragraph 159: they must be minor services, and must be communal services.

85 *Id*., para. 470. In addition to the penal aspects of the law, the forced labor requisition regime leads to extortion and threats; *id*., para. 530.

"the labor and services that may be exacted under the Villages Act and the Towns Act are as indefinite as the needs of the Government."[86] The practice of forced labor is open—there is a system of call-up to requisition labor, which takes the form of orders specifying the number of persons required and the type of work to be performed.[87] The secret directives that guaranteed payment for persons doing forced labor did not eliminate the violation in the view of the Commission.[88] In any event, in most cases the forced labor was not in practice remunerated.[89] The fact that the penalties for illegal imposition of forced labor were relatively minor and were rarely enforced constituted a further violation of the Convention.[90]

The imposition of forced labor for the benefit of private actors, whether corporations or individuals within or outside the military, was a violation of Article 4(1) of the Convention.[91] The ILO has argued, therefore, that the principle of eliminating forced labor applies whether the state is engaging in the practice itself, as in Burma, or merely tolerating its use by non-state actors or failing to take appropriate action to stop it.[92] The Commission of Inquiry on forced labor in Burma concluded that "A State which supports, instigates, accepts or tolerates forced labor on its territory commits a wrongful act and engages its responsibility for the violation of a peremptory norm in international law."[93]

Forced labor was imposed particularly on the vulnerable, including children, which constitutes a violation of the Convention under its Article 11(1).[94] By virtue of Article 11, even the transitional arrangements in the Convention require the immediate cessation of forced labor by children. The Commission of Inquiry insisted that, when dealing with children, the fact of their having offered themselves voluntarily, even if this could be established in fact, was not an exempting factor.[95] Children are used for all forms of forced labor in Burma, including portering for the military, which results in them being subjected to

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86 *Id*., para. 471.

87 *Id*., para. 480. Usually, local officials decide who is to form part of the work party, sometimes by lottery, sometimes as punishment. In other cases, the military rounds up the persons to perform the work themselves. Contrary to the claims of the Burmese government, the work was not performed by volunteers.

88 *Id*., paras. 473–474.

89 *Id*., para. 532.

90 *Id*., paras. 478 and 514.

91 *Id*., para. 504.

92 ILO Global Report 2001, *supra* note 3, at 13–14.

93 Commission of Inquiry Report, *supra* note 79, para. 537.

94 *Id*., paras. 511 and 531. The Commission also noted that the burden falls particularly on minority groups; *id*. para. 534.

95 *Id*., para. 206.

very harsh prison-like treatment.[96] They are also used as minesweepers and human shields for the military[97] and on infrastructure projects, such as road construction.[98] Children are particularly badly affected by participation in forced labor. In the case of children, participation in forced labor often precludes school attendance, thereby exacerbating the violation of their rights.[99] Forced laborers are subjected to abuse and violence, and numerous threats to their health and safety, which will particularly affect children.[100]

The practice of forced labor in Burma, furthermore, could not be justified under any of the exceptions in Article 2(2) of the Convention.[101] The use of forced labor for public works could not be deemed a response to an emergency as set out in Article 2(2)(d), nor could the portering work compelled of some persons be seen as minor, as permitted by Article 2(2)(e).[102] Despite the fact that much of the work was for the military, it could not come into the category of compulsory military service or normal civil obligations permitted by Article 2(2)(a) and (b).[103]

Despite the difficulties encountered in securing Burma's compliance with the findings of the Commission of Inquiry,[104] the norms against forced labor in C 29 are still suitable for situations of forced labor in the 21st century. The range of norms on forced labor in ILO and U.N. treaties appear to be very nearly comprehensive in addressing the actual and potential situations of forced labor that present themselves. In some cases, however, states where forced labor, or even slavery, might be found are not parties to the relevant treaties. The question of the legal status of the prohibitions on slavery and forced labor outside treaty regimes therefore must be examined, along with related questions of the application of international rules on state responsibility.

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96 *Id*., paras. 300–350; on the use of children, see paras. 342–343.

97 *Id*., para. 375.

98 *Id*., para. 430—here, it is often a case of each family being required to supply one member to work, and the parents sending a child so that they may be able to continue ordinary work for the family's subsistence, usually agriculture.

99 *Id*., para. 533.

100 *Id*., para. 535. On the differential impact of health and safety risks on children, see H. Cullen, *The Right of Child Workers to Protection from Environmental Hazards, in* The Right of a Child to a Clean Environment 35–59 (Malgosia Fitzmaurice & Agata Fijalkowski eds., 2000).

101 A general discussion of the scope of these exceptions may be found at paragraphs 206–213 of the Commission of Inquiry's Report, *supra* note 79.

102 *Id*., paras. 486, 492, 494–495, 497–501.

103 *Id*., para. 487. In addition, the compulsory military service of persons including children, which was done outside the law, could not be covered by the exception in the Convention; *id*., para. 489.

104 Discussed in Chapter 6.

E. Slavery and State Responsibility Rules in International Law

Thinking about the prohibition on slavery in terms of a customary or peremptory norm, rather than referring to a specific treaty provision, makes definition and scope an acute problem. The problem of definition is one that has dogged international attempts to eliminate slavery and slavery-like practices since the League of Nations era.[105] In particular, we need to consider whether the norm includes only slavery, which entails some element of ownership over a person, or also slavery-like practices, such as debt bondage. The fact that several conventions include the definition of slavery from the 1926 Slavery Convention would identify this as the core of the prohibition. However, Diller and Levy suggest that the scope of the norm should include some circumstances of forced labor where there is no question of ownership, such as prison labor.[106] Since forced prostitution and trafficking for prostitution have been dealt with separately by international bodies and treaties until very recently, doubts have been raised as to whether these issues are within the customary international law norm on slavery, let alone the peremptory norm.[107] Nonetheless, recent practice by the United Nations may support the inclusion of, at a minimum, trafficking of persons for the purpose of forced prostitution as an act of slavery.[108]

In addition to the range of treaty provisions banning slavery and slavery-like practices set out in Section D, the prohibition of slavery is a norm of customary international law.[109] Establishing norms of customary international law in the area of human rights presents particular difficulties. In order for a customary norm to be proved, there must be consistent state practice, plus an *opinio juris* or acceptance that the practice arises from a binding norm. Where the norm relates to state behavior in respect of individuals, the question of what counts as state practice has been controversial. Most arguments in relation to the existence of customary norms of international human rights law rely on the inclusion of those rights in national legislation and the decisions of national and international tribunals, plus their inclusion in widely ratified international treaties.[110] However, the counter-argument relates to the fact that states often

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105 Weissbrodt, *supra* note 4, para. 6.

106 Janelle M. Diller & David A. Levy, *Child Labor, Trade and Investment: Toward the Harmonization of International Law*, 91 Am. J. Int'l L. 663, 688, 89 (1997).

107 Rassam, *supra* note 2, at 309–10 and 342–43. She argues, *id*. at 345–51, that only if a more inclusive approach is taken to the formulation of customary international law, which reflects the principle of non-discrimination, can these forms of slavery, which primarily affect women and girl children, be accepted as part of the customary norm on slavery.

108 *Id*., 339.

109 *Id*., 351–52.

110 One example is Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 Ga. J. Int'l & Comp. L. 287 (1995–1996).

violate human rights, despite their national law and treaty obligations. In this approach, the existence of legal measures guaranteeing human rights demonstrates only that these rights can constitute general principles of international law rather than customary norms.[111] The supporters of using laws as the primary source of state practice in this area reply in two ways. First, the existence of a customary international norm has never been dependent on universality of practice, but rather on generality of practice.[112] Second, general principles of international law do not have the same strength and therefore cannot function as an adequate alternative to customary norms.[113] The balance of the argument seems to be with those who take a more generous view of what counts as state practice. Certainly, the decision of the Special Court for Sierra Leone on the preliminary objection by the defendant in the *Norman* case,[114] recognizes a customary norm (that recruitment of children under the age of 15 as soldiers is contrary to international law) based on widely ratified treaties and national legal provisions rather than actual state practice.

In the case of slavery and forced labor, based on international treaties and national laws, there is a strong case for a customary norm. As at June 30, 2006, C 29 was ratified by 169 states, C 105 by 165 states and C 182 by 161 states.[115] The ICCPR, at the same date, had 156 states parties,[116] with no reservations or declarations entered in respect of Article 8.[117] The 1926 Slavery Convention has 95 parties.[118] The 1956 Slavery Convention has 119 parties, and no reservations are permitted.[119] In terms of national law, the recent compendium of state practice concerning customary humanitarian law demonstrates a strong tendency of states to criminalize enslavement or the use of forced labor.[120] This includes guidance in military manuals as well as national legislation.

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111 Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens and General Principles*, 12 Australian Y.B. Int'l L. 82 (1988–1989).

112 Jordan J. Paust, *The Complex Nature, Sources and Evidence of Customary Human Rights*, 25 Ga. J. Int'l & Comp. L. 147, 151, 162–64 (1995–96).

113 Richard B. Lillich, *The Growing Importance of Customary International Human Rights Law*, 25 Ga. J. Int'l & Comp. L. 1, 15–16 (1995–1996).

114 Prosecutor v. Sam Hinga Norman, Case No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), May 31, 2004. This decision is discussed in detail in Chapter 4.

115 *See* http://www.ilo.org/ilolex/english/convdisp1.htm.

116 *See* http://www.ohchr.org/english/countries/ratification/4.htm.

117 *See* http://www.ohchr.org/english/countries/ratification/4_1.htm.

118 *See* http://www.unhchr.ch/html/menu3/b/treaty3.htm.

119 *See* http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty4.asp.

120 2 Jean-Marie Henckaerts & Louise Doswald-Beck, Customary International Humanitarian Law 2231–40 (2005).

However, there is uncertainty as to the scope of the customary norm. For example, Rassam notes that the terms "slavery" and "slavery-like practices" are often used interchangeably, but are different categories, at least in treaties.[121] The drafting of standards on slavery and forced labor often overlap, with forced labor conventions addressing practices commonly included in slavery conventions and slavery conventions referring to forced labor. The International Military Tribunal at Nuremburg convicted major war criminals of enslavement on a definition that would seem more in keeping with forced labor, as it refers not to ownership but to conscription or force.[122] More confusingly, the decision in *Kunarac* at the International Criminal Tribunal for the Former Yugoslavia stated that enslavement at customary international law required incidents of ownership but found that the case had been made out based on detention and forced labor.[123] It appears, therefore, that there may be a merging of slavery and forced labor in the way the terms are applied, even if the abstract definitions create clear distinctions. The Statute of the International Criminal Court (ICC) makes enslavement a crime against humanity under Article 7(1)(c). In the Elements of Crime, enslavement is described as requiring the exercise of "any or all of the powers attaching to the right of ownership over one or more persons."[124]

Originally, there was a distinction at the institutional level, where the ILO dealt with issues of forced labor and the United Nations with slavery.[125] However, over the past decade, this institutional division of competence has broken down, particularly in respect of technical assistance programs dealing with child labor.[126] The problem of definition and distinction is even more acute for slavery as a peremptory norm of international law or *jus cogens*. It might not be the case that the entire content of slavery as a customary norm has reached the status of *jus cogens*. More states have criminalized slavery than have criminalized forced labor, for example, demonstrating perhaps a weaker level of support for the peremptory character of the prohibition on forced labor.[127]

The ILC Articles on State Responsibility make peremptory norms more significant in international law than they were before. Article 41 calls on states

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121 *Id*., 306.

122 Case of the Major War Criminals, IMT Nuremburg, Indictment, Counts 1, 3(E), 3(H) and 4, Judgment Nov. 20, 1945, Slave Labor Policy.

123 Prosecutor v. Kunarac et al., Case No. IT-96-23-T & IT-96-23/1-T, Judgment, ICTY TC (Feb. 22, 2001). See also the judgment in the case of *Prosecutor v. Krnojelac*, Case No. IT-97-25-T, Judgment, ICTY TC (Mar. 15, 2002).

124 International Criminal Court, Doc. ICC-ASP/1/3, B. Elements of Crimes, Sept. 9, 2002, at 117.

125 ILO Global Report 2001, *supra* note 3, at 67.

126 *Id*.

127 Henckaerts & Doswald-Beck, *supra* note 120, at 2232–40.

to cooperate to bring an end to serious breaches of obligations under peremptory norms of general international law, and not to recognize as lawful any situation created by such a breach.[128] The existence and scope of slavery as a peremptory norm is therefore important. The prohibition on slavery is often listed as a peremptory norm of international law.[129] Provisions on slavery and forced labor in international human rights treaties are usually non-derogable rights.[130] However, there does not seem to be any basis for equating non-derogable rights and rights constituting peremptory norms.[131] Nonetheless, the fact that a right is included in several treaties and has no exceptions may be evidence of the peremptory character of the right.[132] If this is the case, then slavery is uncontroversially a peremptory norm, but forced labor, which has several important exceptions, is not. This is arguably supported by the U.S. *Restatement on Foreign Affairs*, which refers only to the prohibition of slavery and the slave trade as among the fundamental norms of international law.[133] However, American courts have read slavery to include forced labor. The U.S. court of appeals in *Doe I v. Unocal Corporation* asserted that "[o]ur case law strongly supports the conclusion that forced labor is a modern variant of slavery."[134] This is largely based on the interpretation of the term "slavery" in the 13th Amendment of the American Constitution, not on the practice of states and international organizations in international human rights law.[135] As a result, the decisions of American courts on this point may be less useful as evidence of a broad *jus cogens* norm against slavery to include forced labor.[136]

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128 Articles on the Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission on Aug. 10, 2001: *Report of the International Law Commission*, 53d Sess., A/56/10, ch. IV, art. 41(1) and (2).

129 For example, James Crawford, in the commentaries to the Articles on State Responsibility, lists slavery among the norms covered by the chapter on serious breaches of peremptory norms of general international law; JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES 246 (2002) (Commentary on Article 40).

130 *See* ICCPR art. 4(2); ECHR art. 15(2) (only slavery is non-derogable, not the forced labor); ACHR art. 27(2).

131 On the problems of such a direct relationship between non-derogability and peremptoriness, see Iain Scobbie, *The Invocation of Responsibility for the Breach of "Obligations under Peremptory Norms of General International Law,"* 13 EUR. J. INT'L L. 1201, 1210–11 (2002).

132 CRAWFORD, *supra* note 129, Commentary on Article 40.

133 2 RESTATEMENT (THIRD) THE FOREIGN RELATIONS LAW OF THE UNITED STATES 161, para. 702 (American Law Institute 1987), *Customary International Law of Human Rights*, commentary (n), which lists "Slavery or slave trade."

134 Doe I v. Unocal Corp., 41 I.L.M. 1367, 1374 (9th Cir. 2002).

135 *Id*., 1375.

136 The majority in the *Doe* case, *id*. at 1376, defined *jus cogens* and its effects in a

Other sources have argued that the scope of the peremptory norm on slavery extends to forced labor. The Commission of Inquiry on forced labor in Burma, as noted in Section D, stated in its conclusions that the prohibition on forced labor was a peremptory norm of international law.[137] It further asserted that "any person who violates the prohibition of recourse to forced labor under the Convention is guilty of an international crime that is also, if committed in a widespread or systematic manner, a crime against humanity."[138] Its discussion of forced labor as a peremptory norm, however, treated slavery and forced labor as being essentially the same thing, or at least that forced labor was sufficiently similar to be included as a slavery-like practice.[139] As a result, it cites measures against slavery as part of its case that C 29 expresses a peremptory norm. In addition to international measures, the fact that many state Constitutions contain prohibitions on slavery is also cited as evidence of a peremptory norm.[140]

Most international law obligations affect only the parties involved, whether the norm derives from treaty or custom. Some norms, however, create obligations that are owed to all states (called *erga omnes* obligations), whether or not they are themselves injured by the breach of the norm, including injury to nationals of the state seeking to enforce the norm. The idea of *erga omnes* obligations appears first in the decision of the International Court of Justice in the *Barcelona Traction* case:

> an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising *vis-à-vis* another State in the field of diplomatic protection. By

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somewhat unorthodox way: "norms of international law that are binding on nations even if they do not agree to them . . . by definition, the law of any particular state is either identical to the *jus cogens* norms of international law, or it is invalid." Reinhardt, J., in his concurring opinion, provides a more orthodox approach, referring to Article 53 of the Vienna Convention of the Law of Treaties. He disagreed that *jus cogens* was even relevant, arguing that it was only necessary to demonstrate that the prohibition on forced labor was itself a customary norm; *id*., 1388–89. He left open the question of whether forced labor is included in slavery for the purposes of determining the scope of the peremptory international law norms against slavery or whether the prohibition on forced labor may itself be a peremptory norm.

137 Commission of Inquiry Report, *supra* note 79, paras. 203 and 537.

138 *Id*. This was based in part on the then-current draft of the International Law Commission's draft Articles on State Responsibility. The final version did not contain provisions on state crimes. However, at paragraph 204, the Commission of Inquiry also refers to forced labor as being an international crime which may be committed by individuals.

139 *Id*., para. 198: "the prohibition of recourse to forced labor has its origin in the efforts made by the international community to eradicate slavery, its institutions and similar practices, since forced labor is considered to be one of these slavery-like practices."

140 *Id*., para. 202.

> their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.[141]

This means that any individual state could potentially raise the responsibility of another that has breached such an obligation. In the case of human rights as *erga omnes* norms, however, the Court went on to state that this did not create a right of states to protect victims of violations of international human rights treaties irrespective of their nationality.[142] The ILC Articles on State Responsibility do not use the term obligations *erga omnes*, but they do use the language of the International Court of Justice in the reference to obligations "owed to the international community as a whole."[143]

The idea of *jus cogens* or peremptory norms of international law goes back further, at least to Article 53 of the Vienna Convention on the Law of Treaties.[144] These norms are generally seen as reflecting "international public policy."[145] The ILC Articles do not distinguish between *erga omnes* and *jus cogens* norms. This reflects the fact that there is certainly overlap between the two types of rules.[146] The prohibition on slavery has been mentioned in both contexts.

Although slavery is mentioned in the context of both *erga omnes* and *jus cogens* norms, there is no necessary coincidence between *erga omnes* obligations and *jus cogens* rules, and they may have different consequences—notably, Article 53 of the Vienna Convention on the Law of Treaties states that any treaty which conflicts with a *jus cogens* norm is invalid. The International Court of Justice suggested in the *Barcelona Traction* case that *erga omnes* obligations could be identified by their importance, and such importance leads to the necessity of effective enforcement that can only be achieved through giving all states individually rights to invoke the violation of such obligations.[147] *Erga omnes* obligations are not a separate source of law. They derive from existing customary norms and treaty rules.[148]

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141 Barcelona Traction, Light and Power Company, Limited, Second Phase,1970 I.C.J. 3, at 32, para. 33.

142 *Id*., 47, para. 91.

143 It has been suggested that this may include non-state actors; *see* Scobbie, *supra* note 131, at 1209.

144 According to Article 53, a peremptory norm is one "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

145 Scobbie, *supra* note 131, at 1210.

146 *Id*.

147 Dinah Shelton, *International Law and "Relative Normativity," in* International Law 159, 163 (Malcolm D. Evans ed., 2006).

148 *Id*.

The question of whether the prohibition of slavery in international law is a *jus cogens* norm or gives rise to obligations *erga omnes* has taken on new interest with the development of the ILC Articles on the Responsibility of States for Internationally Wrongful Acts.[149] The Articles include provisions on the consequences of violations of peremptory norms (*jus cogens*) and norms that are owed to the international community as a whole (*erga omnes*). They are a mixture of statements of existing customary international law and provisions embodying the progressive development of international law.[150] Insofar as they represent the development of international law of state responsibility, and this is the case concerning the provisions on collective interests in enforcement of state responsibility,[151] they are only soft law, as they have only been embodied in a General Assembly resolution, not a Security Council resolution or a treaty. As soft law, they may nonetheless have influence on state practice and the interpretation of international law by tribunals.[152] The main area of concern from the point of view of combating abusive child labor is that the ILC Articles provide a structure in which counter-measures may be taken against states that violate international law. However, there is much ambiguity in the Articles as to the extent to which the rules on counter-measures are available as a response by a state that is not directly injured by the activities of the violating state, but is instead attempting to promote the general interest in the respect for *erga omnes* or *jus cogens* norms of international law. A similar debate also arises in the context of the legality of trade sanctions against states that violate core labor standards.[153]

Commentators are divided about the potential for invoking the responsibility of states where the obligation is not owed to a state in particular or where it is not the victim state that invokes the responsibility. Human rights obligations may be owed to states as well as to individuals. The human rights obligations in the U.N. Charter are part of a complex of inter-state obligations and are not directed to individuals. In human rights treaties, however, the primary obligation for states is to secure the rights of individuals and, as a secondary obligation, to undertake whatever implementation measures are included in the treaty. The problem is that most human rights violations, even in the context of slavery and slavery-like practices as can be seen from the examples discussed in Sections C and D, are against nationals of the violating state, and therefore there will be no injured state to invoke the responsibility of the violating state. Invoking human rights as *erga omnes* obligations solves the problem of the lack

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149 *Supra* note 128.

150 Scobbie, *supra* note 131, at 1202.

151 *Id*., 1218.

152 Dinah Shelton, *Righting Wrongs: Reparations in the Articles on State Responsibility*, 96 Am. J. Int'l L. 833, 834 (2002).

153 *See* Chapter 7.

of a directly injured state by enabling any state to respond to the legal damage committed by the violating state. In principle, *erga omnes* norms are those where the obligations are owed to the international community as a whole rather than to specific other states, as would be the case in a trade treaty, for example. However, the question is whether the ILC Articles have effectively established the means and process by which state responsibility may be invoked where the invoking state is not a victim, nor are its nationals. The Commentary to Article 42 of the Articles, which deals with invocation, asserts that invocation is a formal process going beyond mere protest, involving international legal proceedings or the presentation of a claim.[154] Where the state has not been materially injured, but is instead concerned with the respect for important norms of international law, namely *erga omnes* and peremptory norms, Article 48 is relevant as well as Article 42:

Article 48

1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:
   (a) The obligation breached is owed to a group of States including that State and is established for the protection of a collective interest of the group; or
   (b) The obligation breached is owed to the international community as a whole.
2. Any State entitled to invoke responsibility under paragraph 1 may claim from the responsible State:
   (a) Cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and
   (b) Performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached.
3. The requirements for the invocation of responsibility by an injured State under articles 43,[155] 44,[156] and 45[157] apply to an invocation of responsibility by a State entitled to do so under paragraph 1.

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154 Crawford, *supra* note 129, at. 294–95. Scobbie, *supra* note 131, at 1206 and 1213, however, he argues that it may in practice be difficult to distinguish between protest and invocation of responsibility.

155 Article 43 deals with the form and content of the notice of claim by the injured state.

156 Article 44 deals with admissibility and requires exhaustion of local remedies where applicable and the application of the rules relating to nationality of claims. This issue is, to some extent, dependent on the outcome of another ILC project on diplomatic protection; *see* Scobbie, *supra* note 131, at 1216.

157 Article 45 deals with the loss of right to claim through waiver or acquiescence.

This is in addition to the responsibility of all states under Articles 41(2) not to recognize as lawful a serious breach of a peremptory norm. Article 48 applies to any *erga omnes* obligation, and it is therefore broader than Article 40's application to peremptory norms only. The possibility of raising collective interests of the international community in the context of the law of state responsibility is controversial. There is disagreement between states as to whether the right of an interested state to invoke responsibility survives if the injured state waives its right to reparation, for example.[158] In the case of human rights violations, waiver may not be an issue if it is only nationals of the violating state who are affected. However, the issue demonstrates the way that Article 48 challenges the orthodox approach to state responsibility, based on sovereign equality of states, and a conception of statehood that subsumes individuals into their national states.[159]

The problem of recognizing collective interests in state responsibility is most prominently reflected in Articles 49–54 on counter-measures.[160] The Articles set out the conditions in which counter-measures may be imposed and how they must be structured. Notably, Article 51 sets out the requirement that counter-measures must be proportionate to the injury caused and the gravity of the breach of international law.[161] The Articles continually refer to "the injured state" in this context, but Article 54 adds a saving clause for counter-measures by interested states:

> This chapter does not prejudice the right of any State, entitled under article 48, paragraph 1 to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or the beneficiaries of the obligation breached.

"Beneficiaries of the obligation breached" would include individuals who are victims of violations of human rights that constitute *erga omnes* obligations. Bederman argues that Article 54 constitutes "the most significant act of indirect progressive development among the countermeasure clauses," since this is an area with little state practice to guide the drafters.[162] Although, textually, Article 54 purports to be a savings clause, it has the effect, argues Bederman,

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158 Scobbie, *supra* note 131, at 1214.

159 D.J. Bederman, *Counterintuiting Countermeasures*, 96 Am. J. Int'l L. 817 (2002).

160 Denis Alland, *Countermeasures of General Interest*, 13 Eur. J. Int'l L. 1221 (2002), defines counter-measures as "responses to an internationally wrongful act. They are intrinsically unlawful, but are justified by the alleged initial illegality to which they were a response." *See also* art. 22 of the Articles.

161 On the problem of proportionality of counter-measures, see Bederman, *supra* note 159.

162 *Id*., 827–28.

of bolstering action taken by virtue of Article 48(1).[163] Alland, on the other hand, argues that if such is the case, then the result will be a "partial, biased and selective view" of what constitutes international public policy.[164] He considers that linking peremptory norms to state responsibility is a misunderstanding of their purpose. As set out in the Vienna Convention on the Law of Treaties, peremptory norms constitute a limit to the permissible content of treaties. In the context of state responsibility, however, they become substantive law whose violation constitutes an internationally wrongful act.[165] He therefore sees a clear distinction between *erga omnes* norms and peremptory norms, whereas the Articles see the two categories of norms as having considerable overlap. Koskenniemi notes that Article 54 was deliberately drafted in such a way as to leave unresolved the profound disagreements between states on the issue of counter-measures taken by interested, as opposed to directly injured, states.[166] However, the balance, on the basis of state practice to date, is on the side of there not yet being any general right to take counter-measures in the general, rather than individual, interest.[167] This does, however, create difficulties where the injured state is unable to act, or where, as in the case of human rights violations, there may be no state that can be regarded as injured.

In addition to international aspects of state responsibility, some national laws may provide for extraterritorial responsibility for human rights violations, allowing suits to be brought in one country for human rights violations perpetrated in another. National courts may therefore use extraterritorial jurisdiction to attack the practitioners or beneficiaries of forced labor. In *Doe I v. Unocal Corporation*,[168] villagers from the Tenasserim region of Burma brought a suit against Unocal, an American petroleum company that was building a pipeline in that region, under the Alien Tort Claims Act, an American federal statute. The main provision gives American courts jurisdiction over "any civil action by an alien for a tort only, . . . committed in violation of the law of nations."[169] The U.S. court of appeals, reversing a federal district court decision to dismiss the claims, found that there were serious questions to be tried, and the case was

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163 Similarly, see Shelton, *supra* note 151, at. 856, arguing that the Articles promote both the compliance interest of the international community and the individual interest of providing reparations to injured states.

164 Alland, *supra* note 160, at 1236. *See also* M. Koskenniemi, *Solidarity Measures: State Responsibility as a New International Order?*, BRITISH Y.B. INT'L L. 337, 343–44, 353–54 (2001), arguing that this demonstrates the difficulty of applying public law analogies to international law, where there is no centralized enforcement authority.

165 *Id*., 1237–39.

166 Koskenniemi, *supra* note 164.

167 *Id*., 346–47.

168 Koskenniemi, *supra* note 164.

169 28 U.S.C. § 1350.

settled in late 2004.[170] The court of appeals judgment ruled that forced labor and other human rights violations claimed by the plaintiffs constituted *jus cogens* norms of international law, and therefore under the Alien Tort Claims Act, there was no need to establish that the defendants were engaged in state action.[171] Liability could arise if Unocal could be found to be aiding and abetting the Burmese military government in its human rights abuses. Following the case law of the International Criminal Tribunal for the Former Yugoslavia, the court of appeals decided that aiding and abetting included practical assistance, encouragement or moral support, with actual or constructive knowledge that the actions will assist the crime, or, in this case, tort.[172]

Recent ILO practice has tended towards a fairly broad view of what is included in the relevant peremptory norm. In the 2001 *Global Report on the Declaration of Fundamental Principles and Rights at Work*, focusing on forced labor, the ILO asserted that slavery and slavery-like practices were covered, noting that the high level of ratification of the two conventions on forced labor indicated "a high degree of international acceptance."[173]

If a relatively narrow definition of slavery is adopted, rather than the more inclusive versions of the ILO and the American courts, the question of the status of the prohibition of forced labor arises. Certainly the 1926 Slavery Convention distinguished between slavery and forced labor. Article 5 of the Convention calls upon states to "take all necessary measures to prevent compulsory or forced labor from developing into conditions analogous to slavery" and to eliminate forced labor except for public purposes. Human rights treaties tend to include the prohibition on forced labor as a non-derogable right—in other words, one that must be observed even in times of war or other public emergency.[174] This would tend to support an argument that the prohibition on forced labor, as distinct from the prohibition on slavery, is at least a norm of customary international law and possibly a norm *erga omnes*. However, as noted

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170 *See* "Settlement of UNOCAL Case, December 2004," *at* http://www.laborrights.org/projects/corporate/unocal/settlement1204.htm.

171 *Id*., 1375.

172 *Id*., 1375–77. Reinhardt, J., concurring, disagreed with the majority on this basis of liability and suggested that instead possible bases derived from American federal common law would be joint venture, agency or reckless disregard; *id*., 1389–97.

173 ILO Global Report 2001, *supra* note 3, at 12.

174 Conscription is typically excluded from the definition of forced labor in human rights treaties. Therefore, there is no difficulty, in respect of positive international human rights law, where states impose wartime conscription. On the problem of characterizing conscription purely as a forced labor issue, see Holly Cullen, *The Feminization of the "Civilian": The Case of Conscientious Objection to Military Service, in* KRIEG/WAR: A PHILOSOPHICAL TREATISE FROM THE FEMINIST POINT OF VIEW 91 (Charlotte Annerl & Sophia Gabriel Panteliadou eds., 1997).

in Section D, the prohibition on forced labor is usually complicated by a range of exceptions, so that even if it is included as a non-derogable right, it is not an absolute one.

Recent developments in the international law of state responsibility have raised the question of the legal status of the prohibition on slavery and forced labor outside the context of international treaties. It seems likely that at least part of what is covered by slavery and forced labor would have the status of a peremptory norm of international law. A broader range of slavery-like practices and forced labor are probably included in the prohibition on slavery as an *erga omnes* norm. This will be enough, in many cases, to enable the international community as a whole to interest itself in situations of slavery or forced labor, even if wholly internal within a state. It would enable an interested, although not directly injured, state to demand cessation of the breach of the slavery-like practices or forced labor, and it could potentially take counter-measures within the scope of Articles 49–54 of the ILC Articles. This could include trade sanctions, as long as this did not run counter to the state's obligations under WTO agreements,[175] or financial sanctions, such as freezing of assets. There is also the possibility of taking extraterritorial criminal jurisdiction (except where state immunity applies). Such action might be taken by an individual state or by a group of states, such as the EU.

F. Conclusion

The Slavery Convention and the Supplementary Convention establish important norms of international law. However, their impact has been relatively little due to the relative informality of the reporting obligations contained within those conventions.[176] The Working Group on Contemporary Forms of Slavery (a working group of the U.N. Sub-commission on Human Rights that reviews current issues related to slavery) likewise receives information from states only on a voluntary basis.[177] Weissbrodt has identified the lack of monitoring body on slavery as a significant gap in the implementation of the relevant law, despite the fact that most civil and political rights treaties include a prohibition on slavery and forced labor.[178] Prohibitions on slavery and forced labor, however, can also be found in ILO conventions and civil and political rights treaties. These norms have attracted high levels of support from states. The ILO conventions on forced labor have high levels of ratification and are included among the core conventions listed in the 1998 Declaration on Fundamental Principles and Rights at Work. In civil and political rights conventions, prohibitions on slavery and

175 *See* Chapter 7.

176 *See* Weissbrodt, *supra* note 4, at 63 and 64.

177 *Id*., para. 75.

178 *Id*., para. 79.

forced labor are often non-derogable rights. This high level of support for the elimination of slavery and forced labor has also meant that the prohibition on slavery is considered a customary norm of international law and possibly a peremptory norm. High levels of support for the norm, however, do not necessarily lead to complete observance of the norm. Debt bondage and forced labor are still present in several countries, and despite national and international law banning the practices, enforcement may be weak or non-existent.

The prohibition of slavery and slavery-like practices is, not surprisingly, the least controversial aspect of the prioritization approach to child labor.[179] However, in international human rights law, slavery is prohibited whether children are involved or not. The question then is whether the inclusion of slavery as one of the worst forms of child labor in C 182 adds anything to the existing international law. The breadth of Article 3(a) would suggest that it goes beyond what is probably covered by the customary norm on slavery and somewhat beyond most treaty norms on slavery and forced labor. Slavery-like practices and forced labor are present in two of the sectors which are often cited as examples of abusive child labor: agriculture and domestic service.[180] It is important not to conflate child slavery with child labor, however. Child labor and even abusive and exploitative child labor may be present whether or not there is slavery.[181] This can be seen from the sudden attention given to child labor in the cocoa industry in West Africa after a documentary showed the use of child slavery on cocoa plantations in late 2000.[182] A little over a year later, an agreement was signed between chocolate manufacturers, non-governmental organizations and the Ivory Coast government to end the use of child slave labor.[183] However, research by the International Institute for Tropical Agriculture, based in Nigeria, failed to find evidence of slavery or forced labor amongst child workers on cocoa plantations.[184] This is an example where attempting to argue an issue solely on the basis of a consensus, such as that around the prohibition on slavery, may disguise the complexity of the problem. We see, therefore, the limits of the prioritization approach in this example.

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179 Smolin, *supra* note 1, agrees that this should be covered by child labor measures.

180 *See, e.g.*, ILO Global Report 2001, *supra* note 3.

181 Diller & Levy, *supra* note 106, for example, arguably include too high a proportion of child labor within the category of slavery-like practices.

182 *The Bitter Taste of Slavery*, BBC Online, Sept. 28, 2000, *at* http://news.bbc.co.uk/1/hi/world/africa/946952.stm.

183 *Pact to End African "chocolate slavery,"* BBC Online, May 2, 2002, *at* http://news.bbc.co.uk/1/hi/world/africa/1963617.stm.

184 *African Cocoa Slavery "Exaggerated,"* BBC Online, Aug. 20, 2002, *at* http://news.bbc.co.uk/1/hi/world/africa/2205741.stm. The researchers stated that the absence of slavery did not mean an absence of abuse, however.

Chapter 3
Child Labor and the Sexual and Criminal Exploitation of Children

A. *Introduction*

Child labor may be linked to criminal activities. This is particularly the case with child pornography, prostitution and the use of children in the drug trade. The use of child labor in these activities involves the type of abuse that understandably led to the inclusion of sexual and criminal exploitation of children as one of the worst forms of child labor. Outside of C 182, most of the measures on this type of abusive child labor protect children indirectly. Either they do not mention children specifically, or they address related issues, such as trafficking of children. The new Optional Protocol to the Convention on the Rights of the Child (CRC), however, directly addresses the abuse of children in the context of pornography, prostitution and trafficking.

A children's rights perspective on the question of commercial sexual exploitation of children, including child labor, demands a change from the approach of the early international instruments. These instruments treat trafficking and prostitution, in particular, as criminal law matters, and emphasize issues such as extradition. While effective criminal process is necessary in order to investigate and prosecute those who exploit children, the protection of the children themselves has often been ignored. Some countries have tended to treat the child victims as criminals themselves, particularly where they are over the age of consent.[1] The approach demanded by the more recent international measures is oriented more towards protection of children, and it is predicated on states refraining from prosecuting children for criminal offenses.[2] Furthermore, there are, in some parts of the world, taboos surrounding even the discussion of sexual exploitation of children, which make it difficult to progress these issues.[3]

Trafficking has a particularly close relationship with other forms of abusive child labor. Children may be trafficked into situations of slavery-like prac-

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1 ECPAT, *Report on the Implementation of the Agenda for Action against Commercial Sexual Exploitation of Children* 20–21 (2001–2002) [hereinafter ECPAT Report].

2 *Id*.

3 *Id*., 14.

tices. The same factors that may lead to a high incidence of debt bondage could also lead to families allowing their children to be trafficked.[4]

In examining sexual and criminal exploitation and trafficking of children, we see both the rationale for connecting child labor with the broader human rights agenda and the controversial nature of such a link. The inclusion of sexual and criminal exploitation in C 182 has been criticized on the grounds that these are not child labor issues, but rather issues of international criminal law.[5] Smolin argues that the International Labor Organization (ILO) should not have included this category of worst form of child labor in C 182, as it takes the ILO out of its field of expertise, labor regulation, into criminal law matters. He fails to recognize, however, that sexual and criminal exploitation of children is a multi-faceted problem that requires efforts in many directions in order to resolve it. These include both criminal law policies directed towards detecting and punishing those who abuse children and labor rights measures that give protection to children caught up in the abuse. An examination of the international law relating to sexual and criminal exploitation of children reveals that the instruments attacking this issue from a criminal law perspective often contain few obligations in relation to the protection and rehabilitation of child victims. The distinctive contribution of C 182, with its strong obligations in relation to rehabilitation of child workers in the worst forms of child labor, is to complement the criminal law instruments. Beyond the international standard setting, it is also important to note the role of ILO/IPEC (International Program for the Elimination of Child Labor) in protecting and rehabilitating children who have been involved in sexual or criminal exploitation.[6] Another justification for the inclusion of these issues in C 182 is the link, through the problem of trafficking in children, to slavery-like practices that are also included being worst forms of child labor.

ECPAT,[7] a non-governmental organization (NGO) specializing in issues of commercial sexual exploitation of children, emphasizes a distinction between

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4 UNICEF, Child Trafficking in West Africa, Policy Responses 13–15 (2002). Poverty and lack of awareness among families of what happens to children when they are given to traffickers are the main factors.

5 Notably by David M. Smolin, *Strategic Choices in the International Campaign Against Child Labor*, 22 Hum. Rts. Q. 942 (2000).

6 ECPAT Report, *supra* note 1, at 21. UNICEF is also involved in such projects. It is probably largely due to the activities of IPEC that sexual and criminal exploitation of children was included in C 182; International Labor Organization, Child Labor: Targeting the Intolerable (1996).

7 ECPAT stands for "End Child Prostitution, Child Pornography and Trafficking of Children for Sexual Purposes." This campaign was involved in the first World Congress against the Commercial Sexual Exploitation of Children in Stockholm in 1996. It has since become the main organization monitoring the implementing the Stockholm

commercial sexual exploitation and sexual abuse in general.[8] In particular, commercial sexual exploitation is recognized as a separate problem requiring specific solutions.[9] Commercial sexual exploitation is tied to some form of profit motive and will not include sexual abuse in familial situations.[10]

Beyond trafficking, which may involve either abduction or the sale of children without their consent, the inclusion of sexual and criminal exploitation as worst forms of child labor assumes that there is no possibility of consent. This category of the worst forms of child labor therefore demonstrates the continued relevance of the child welfare justification for children's rights, despite the CRC's introduction of the child agency concept into international human rights law. While participation in prostitution and pornography by adult women is a matter of great controversy—some argue that regardless of consent, these are forms of exploitation,[11] while others argue that adult sex workers should be legalized and protected—acceptance that the elimination of the commercial sexual exploitation of children is a priority is a matter of consensus. Protecting children from this form of abuse has therefore been the subject of several recent international instruments from the United Nations and regional organizations. The harms caused by sexual exploitation of children are well documented, and include serious health problems such as HIV/AIDS, psychological problems and substance abuse.[12]

International legal provisions on the commercial sexual exploitation of children are based on a child welfare view of children's rights, making the consent of the child, even where over the age of consent, irrelevant. In particular, the approach of international law at present is that children involved in pornography and prostitution should be considered victims rather than criminals. Nonetheless, the child agency viewpoint becomes relevant in the criminal process. Criminal proceedings against those who exploit children sexually, like most criminal procedures, are not child-centered.[13] In order to ensure that children's evi-

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Declaration and Agenda for Action, and it is a network of national organizations throughout the world. On the work of ECPAT generally, see http://www.ecpat.net/eng/index.asp.

8 ECPAT Report, *supra* note 1, at 22–23.

9 ECPAT Report, *supra* note 1, at 16 and 18–19.

10 *Id*., 18–19. Some states do not separate the two categories and refer to "sexual exploitation" without modification, which may or may not signify that a commercial element is present, in the view of ECPAT.

11 For an argument that prostitution, and related trafficking, is always exploitative of women, see Polly Toynbee, *Sexual Dealing*, GUARDIAN (LONDON), May 9, 2003, at 23.

12 ILO, A FUTURE WITHOUT CHILD LABOR, GLOBAL REPORT UNDER THE FOLLOW-UP TO THE ILO DECLARATION ON FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK, INTERNATIONAL LABOR CONFERENCE, 90TH SESSION 2002, REPORT I(B) 35 (2002) [hereinafter GLOBAL REPORT 2002].

13 Geraldine Van Bueren, *Child Sexual Exploitation and the Law, A Report on the*

dence is useful to criminal proceedings, the procedures need to be adjusted to enable such evidence to be properly obtained, presented and weighed.[14]

Sexual and criminal exploitation affects both girls and boys. However, girls and boys do not experience these abuses in the same way, and it is still the case that girls are affected in much higher numbers.[15] On the other hand, national laws often assume that boys are not victims of child prostitution.[16] At least in some parts of the world, girls are more likely to be trafficked for prostitution and domestic service, and boy are more likely to be trafficked into forced labor.[17] It is therefore essential to understand that while, in international law terms, these problems are often grouped together, the ways in which children experience these abusive forms of child labor is extremely diverse. As a result, focusing solely on the criminal law aspects of sexual and criminal exploitation and trafficking will not address the full range of human rights abuses experienced by child victims.

B. International Legal Provisions on Trafficking of Children

International concern about trafficking of human beings, particularly children, goes back to the early part of the 20th century. The International Convention for the Suppression of the White Slave Traffic of 1910 sought to eliminate the recruitment of girls under the age of majority into prostitution, even where consent was given.[18] In 1949, the 1910 Convention was consolidated into the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others. This Convention, which became the main international legal instrument on this issue until the new standard-setting measures of the past decade, only addresses trafficking for the purposes of prostitution. However, it requires states parties to criminalize the exploitation of others for the purpose of prostitution, even without an element of trafficking,[19] defined as to procure, entice or lead away a person for the purposes

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International Legal Framework and Current National Legislative and Enforcement Responses, Theme Paper for the Second World Congress against the Commercial Sexual Exploitation of Children. Yokohama 18 (Dec. 2001).

14 *Id*.

15 *Id*., 3.

16 *Id*., 15.

17 *See, e.g*., Human Rights Watch, Borderline Slavery: Child Trafficking in Togo (2003).

18 A similar convention was adopted in 1933 to prevent the trafficking of adult women, the International Convention for the Suppression of the Traffic of Women.

19 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, arts. 1–4.

of prostitution, whether or not the person consents.[20] Article 21 imposes an obligation on states parties to submit annual reports to the U.N. Secretary-General on measures taken to implement its provisions, but there is no provision for the type of monitoring of reports that characterizes most human rights treaties.[21]

Treaties dealing with women's and children's rights now include a prohibition on trafficking as a matter of course, although generally still linked to prostitution. Article 6 of the Convention on the Elimination of All Forms of Discrimination against Women requires states to take measures to suppress trafficking in women and the "exploitation" of prostitution of women. Article 35 CRC calls upon states parties to "take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form." This is the first provision on trafficking to generalize the ban beyond prostitution. Note also that, as with Article 34 CRC on the sexual exploitation of children, the obligations on states go beyond the requirement to bring their domestic law and practice into line with the Convention, but they also establish the necessary measures of international cooperation. A more limited ban on trafficking in children may be found in the 1995 Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption, which prohibits "improper financial or other gain from activity related to inter-country adoption."[22] The Organization of American States (OAS) has adopted a convention wholly concerned with the issue of trafficking in children, the Inter-American Convention on International Traffic in Minors.[23] It includes a clearer definition of trafficking: "the abduction, removal or retention, or attempted abduction removal or retention, of a minor for unlawful purposes or by unlawful means."[24] Like the CRC, the link between traf-

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20 *Id*., art. 1(1).

21 David Weissbrodt, *Updated Review of the Implementation of and Follow-Up to the Conventions on Slavery*, Working Paper for the United Nations Working Group on Contemporary Forms of Slavery, E/CN.4/Sub.2/2000/3 para. 76 (May 26, 2000). On the role and effectiveness of such monitoring mechanisms when dealing with child labor, see Chapter 6.

22 Convention of 29 May 1993 on Protection of Children and Cooperation in Respect of Intercountry Adoption, concluded May 29, 1993, art. 32.1, entered into force May 1, 1995.

23 Adopted on Mar. 18, 1994, entered into force on Aug. 15, 1997; OAS Treaty Series No. 79. As of March 31, 2007, there were 13 parties to this Convention; *see* http://www.oas.org/juridico/english/Treaties/b-57.html.

24 Inter-American Convention on International Traffic in Minors art. 2(b). Inter-American Convention on International Traffic n Minors art. 2(d) defines "unlawful means" to include "among others, kidnapping, fraudulent or coerced consent, the giving or receipt of unlawful payments or benefits to achieve the consent of the parents, persons or institution having care of the child, or any other means unlawful in either the State of the minor's habitual residence or the State Party where the minor is located."

ficking and prostitution is removed in favor of a broader scope: the definition of unlawful purpose "includes, among others, prostitution, sexual exploitation, servitude or any other purpose unlawful in either the State of the minor's habitual residence or the State Party where the minor is located."[25] The Convention aims to establish a regime of mutual cooperation in both the civil and criminal aspects of combating trafficking in children. The Council of Europe's Convention on Action against Trafficking in Human Beings calls on states parties to adopt child-sensitive policies in relation to the prevention of trafficking, to take special measures for child victims and not to return children to their home countries where that would be against their best interests.[26]

Trafficking is once again linked with sexual exploitation of children in the recent Optional Protocol to the CRC. The term trafficking is not used. Instead the Optional Protocol addresses the sale of children, which appears to be a somewhat narrower concept.[27] The definition of sale of children in Article 2 of the Optional Protocol, discussed in Section C, would likely cover many situations of trafficking, although only in the context of sexual exploitation. Article 3 lists the offenses in relation to sale of children that must be made subject to criminal law by states parties.[28] These offenses include sale for the purposes of sexual exploitation and also for the purposes of transfer of organs for profit or forced labor. Improperly inducing consent for adoption in violation of applicable international instruments is also to be made an offense in relation to the sale of children. The CRC Optional Protocol, therefore, although it is seen as addressing sexual exploitation of children, also addresses some broader trafficking and child labor issues.

The first comprehensive instrument on trafficking is the U.N. Protocol to Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the U.N. Convention against Transnational Organized Crime (the Trafficking Protocol) of November 15, 2000.[29] Its main innovation is to elab-

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25 Inter-American Convention on International Traffic in Minors art. 2(c).

26 ETS No. 197, not yet in force, arts. 5, 10, 12, 14.

27 In early reports, the Special Rapporteur on the sale of children, child prostitution and child pornography uses the term "sale of children" to cover all types of child trafficking issues, including trafficking for labor purposes; *see, e.g.*, E/CN.4/1994/84 (Jan. 14, 1994). However, by the latter stages of the drafting of the Optional Protocol, the Special Rapporteur uses the term "sale *and trafficking* of children" (emphasis added), implying that the two terms are not co-extensive: E/CN.4/1999/71 (Jan. 29, 1999). In the 1999 Report, the two terms are defined in separate sections; *id*., paras. 29–47.

28 There was a deliberate decision by the working group drafting the protocol to separate the definitions and the offenses, in order to make the latter as precise as possible: Report of the working group on a draft optional protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography on its fifth session, E/CN.4/1999/74 (Mar. 25, 1999).

29 U.N. Doc. A/RES/55/25, Annex II, entered into force Dec. 25, 2003.

orate a comprehensive definition of trafficking.[30] Article 3 defines trafficking as follows:

> For the purposes of this Protocol:
>
> (a) "Trafficking in persons" shall mean the recruitment, transportation, transfer, harboring 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 labor 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, harboring 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.

The three elements of trafficking under the Trafficking Protocol are therefore: (1) recruitment, transportation, harboring or receipt of persons; (2) the use of coercive methods; and (3) exploitation.[31] Consent of the victim is irrelevant. Furthermore, as a result of subparagraph (c), for the first time, the particular situation of children is recognized in relation to trafficking. The comprehensive definition of trafficking in this Protocol is further illuminated by the fact that smuggling of persons is covered by a separate protocol. Trafficking, therefore, involves the person as commodity, whereas smuggling involves the person as consumer.[32]

Possibly because trafficking has been linked, in the past, almost exclusively, with prostitution, no comprehensive definition of trafficking can be found in the relevant instruments until the Trafficking Protocol. Certain issues have been left open in those conventions, particularly whether trafficking requires cross-

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[30] Anne Gallagher, *Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis*, 23 HUM. RTS. Q. 975, 1004 (2001).

[31] Sandhya Drew, *Human Trafficking: A Modern Form of Slavery?*, EUR. HUM. RTS. L. REV. 481, 486 (2002).

[32] *Id*., 484.

border movement or can refer to movements wholly within one state.[33] Article 3 of the Trafficking Protocol is likewise silent on this matter, but given the level of detail in the Article, one would presume that a condition of cross-border movement would have been included if it had been intended. Article 4 of the Protocol, however, limits its application to situations of international trafficking involving an international criminal group, which resolves the question at least for the purposes of the Protocol. The inclusion of this provision would suggest, however, that there is nothing inherent in the concept of trafficking that would exclude internal situations. There is also a question of whether coercion is necessary to constitute trafficking. The instruments on trafficking for prostitution would seem to imply that consent is irrelevant. Article 3 of the Trafficking Protocol, following extensive disagreement during the drafting process,[34] states that consent is irrelevant where any of the prohibited means "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," have been employed. Certainly in the case of children, consent would not be considered determinative, given the abusive nature of the practice. Indeed, paragraph (c) of Article 3 of the Trafficking Protocol removes the necessity of proving the existence of coercive or abusive means where the trafficking involves children.

The definition of trafficking is further complicated by the fact that the terminology in different language versions appears to imply different concepts. Until recently, in English versions of treaties on trafficking, the word "traffic" is used, whereas in French, the same instruments use the term "*traite*," and in Spanish, "*trata*."[35] These terms are the same as the word "trade" in English, as in the slave trade. The French and Spanish terms, therefore, could be read as implying that an economic benefit must be obtained from the movement of the subject person, whereas the movement of the person may not provide, in itself, any economic benefit.[36] This linguistic ambiguity has at last been recognized

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33 *See* Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, *Contemporary Forms of Slavery: Updated Review of the Implementation of and Follow-up to the Conventions on Slavery, Addendum, Forms of Slavery*, E/CN.4/Sub.2/2000/3/Add.1, para. 25 (May 26, 2000) [hereinafter Commission on Human Rights Report]. The Report argues, however, at paragraph 31, that cross-border movement is not necessary to constitute trafficking.

34 *See* Gallagher, *supra* note 30, at 984–85.

35 Commission on Human Rights Report, *supra* note 33, at n.30.

36 However, the Slavery Convention itself, in Article 1(2), defined the slave trade as including any act of trade or transport in slaves, that is, any movement, even if it does not, in itself, create any economic benefit for the person transferring the slaves.

and eliminated in the Trafficking Protocol, at least with regard to French, where the term traffic is translated literally as "*trafic de personnes*."[37]

Despite the move in the CRC and other instruments to remove the gender and prostitution links from the definition of trafficking, the links persist. Trafficking has been given as a particular example of violence or abuse of women in instruments dealing with the rights of women.[38] Linking trafficking to violence against women is understandable, but it is less defensible to introduce an exclusive gender element into definitions of trafficking. The first attempt at a comprehensive definition of trafficking, in General Assembly Resolution 49/166, contains such a restriction:

> the illicit and clandestine movement of persons across national and international borders, largely from developing countries and some countries with economies in transition, with the end goal of forcing women and girl children into sexually or economically oppressive and exploitative situations for the profit of recruiters, traffickers and crime syndicates, as well as other illegal activities related to trafficking, such as forced domestic labor, false marriages, clandestine employment and false adoption.[39]

This definition moves away from the exclusive link with prostitution but relies on a gender element. Similarly, the Council of Europe Parliamentary Assembly adopted a Recommendation 1325 (1997) on Traffic in Women and Enforced Prostitution, which defined traffic in women as "any legal or illegal transporting of women and/or trade in them, with or without their initial consent, for economic gain, with the purpose of subsequent forced prostitution, forced marriage or other form of forced sexual exploitation." This is not a very helpful definition of trafficking, and it does not address the problem of trafficking in children, which includes boys and girls.

The move to the Trafficking Protocol, which eliminates even the gender limitation, was inspired in part by concerns about trafficking in migrants.[40] However, it also finds its origins in concerns about trafficking in children and frustration at the delays in adopting the Optional Protocol to the CRC.[41] It also represents a preference for international criminal law approaches to the problem of trafficking rather than international human rights law approaches. The interest in children's rights and child protection, which forms part of the background to the Trafficking Protocol, largely disappeared during the drafting

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37 Commission on Human Rights Report, *supra* note 33, at n.30.

38 Notably in the Declaration on the Elimination of Violence against Women, G.A. Res. 48/104, art. 2, U.N. Doc. A/RES/48/104 (Feb. 23, 1994).

39 U.N. Doc. A/RES/49/166 (Feb. 24, 1995).

40 Commission on Human Rights report, *supra* note 33, para. 36.

41 Gallagher, *supra* note 30, at 982.

process.[42] Pressure from U.N. bodies such as UNICEF ensured that the special needs of children were recognized. However, proposals to make an explicit link to the worst forms of child labor as defined by C 182 failed.[43] Nonetheless, just as C 182 itself links with broader human rights concerns rather than just international labor law priorities, the Trafficking Protocol represents an attempt to integrate international criminal law and international human rights law.[44]

IPEC has made much of the links between trafficking and all forms of abusive child labor.[45] It argues that trafficking of children is "a result of unmet demand for cheap and malleable labor in general and of demand for young girls and boys in the fast-growing commercial sex sector in particular."[46] In particular, trafficked children may move, sometimes being deliberately manipulated, from general labor in the informal sector, such as street trading, to work in the sex trade.[47] There is also a close link between children trafficked for domestic work and forms of sexual exploitation including those of a commercial nature.[48] In Angola and Sierra Leone, children have been trafficked by non-state armed forces for general labor, military service and sexual exploitation within the group.[49]

Most treaties on trafficking require states to criminalize the acts that count as trafficking in that particular instrument. However, the Trafficking Protocol goes further and, in its Article 6, requires that states consider assisting victims of trafficking, including rehabilitation measures and legal assistance. Articles 7 and 8, respectively, provide for the possibility for trafficked persons to remain in the state party or to be repatriated to their home country.[50] This is a new focus of international instruments against trafficking: the immigration implications. However, too close a link with immigration policy leads to anti-trafficking measures, which focus on border controls, and loses sight of the need to protect and assist the victims of trafficking, particularly children.[51]

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42 *Id*., 988–89.

43 *Id*., 989.

44 *Id*. 982. *See also id*., 1001, where Gallagher notes that the negotiation process involved NGOs to a far greater extent than is usual for criminal justice measures at the United Nations, particularly the Commission on Crime Prevention and Criminal Justice.

45 ILO/IPEC, UNBEARABLE TO THE HUMAN HEART: CHILD TRAFFICKING AND ACTION TO ELIMINATE IT (2002). This has also been noted by the Special Rapporteurs on the sale of children, child prostitution and child pornography, in their annual reports, *passim*.

46 *Id*., xi.

47 *Id*., 15–16, 23.

48 *Id*., 19–20.

49 *Id*., 21.

50 UNICEF, *supra* note 4, at 3. On the implementation problems relating to the Trafficking Protocol, see Section F.

51 *See* Drew, *supra* note 31, at 489–92.

International standards on trafficking are an essential part of eliminating the sexual and criminal exploitation of children. Trafficking standards, particularly the Trafficking Protocol, emphasize the international dimension of the problem. A single country cannot address fully the problems of sexual and criminal exploitation of children, which means that obligations of international cooperation are essential. On the regional level, as in the European Union (EU), it may be possible to develop a general framework for international cooperation on police and criminal justice matters. On a broader scale, subject-specific measures are more likely to attract support.

IPEC has included, among its projects in the field of eliminating abusive child labor, several initiatives on trafficking and sexual exploitation.[52] The experience of these projects led to sexual and criminal exploitation of children being included in C 182. There has also been a recognition of how trafficking and sexual exploitation is linked to other areas of concern in child labor, such as child soldiers and child domestic workers. The lessons learned have been daunting in terms of a recognition that the phenomenon of commercial sexual exploitation of children is highly complex and that the initial tendency to target only children living in poverty has been incorrect.

While there are numerous international standards, and many regional instruments and initiatives on trafficking, the goals are sometimes ambiguous. The criminal justice and immigration aspects are often defined in most detail. However, from the point of view of the victims, there is much less clarity. Trafficking may be connected with sexual exploitation or with other forms of abusive child labor.[53] The international instruments are only beginning to recognize the human rights, especially children's rights, dimensions of the problem.

C. *International Legal Provisions on Sexual Exploitation of Children*

As noted above, the provisions on trafficking have generally been closely related to those on prostitution. For example, Article 1 of the Suppression of Traffic Convention requires states to criminalize those who exploit persons for the purpose of forced prostitution.[54] Initially, the international legal instruments on trafficking for the purposes of sexual exploitation focused on forced prostitution, possibly because those instruments were primarily concerned with adult women.[55] In addition, the issue of forced prostitution was considered to be a

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52 ILO/IPEC, THEMATIC EVALUATION ON TRAFFICKING AND SEXUAL EXPLOITATION OF CHILDREN (2001).

53 UNICEF, *supra* note 4, at 7.

54 On acts which count as prostitution, see Commission on Human Rights Report, *supra* note 33, paras. 45–47.

55 *Id*., paras. 47–52. This includes, more recently, the ICC Statute, Article 7(1)(g),

matter of international concern only when it involved trafficking.[56] The only measures concerning children, the CRC and its Optional Protocol and C 182, make no distinction between forced and consensual acts of prostitution.

The CRC addresses specifically the issue of the sexual exploitation of children rather than trafficking.[57] Article 34 CRC provides that:

> States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:
>
> (a) the inducement or coercion of a child to engage in any unlawful sexual activity;
>
> (b) the exploitative use of children in prostitution or other unlawful sexual activity;
>
> (c) the exploitative use of children in pornographic performances and materials

Although this appears to be a comprehensive ban on the sexual exploitation of children, there has been some concern that paragraph (b) does not prohibit an adult paying for sex with a child above the local age of consent but does not allow anyone to profit from it.[58] In other words, Article 34(b), by using the phase "*exploitative* use" (emphasis added), which may imply a profit motive, calls upon states to prevent and punish those who employ child prostitutes but not those who are consumers of child prostitution. However, it is equally, if not more, plausible to argue that the word "exploitative" is not restricted to commercial exploitation. The prohibition in Article 3(b) of C 182 is broader if the restrictive interpretation of Article 34(b) CRC is correct, defining as one of the worst forms of child labor "the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances," without using the modifier "exploitative."

Concern about the international dimensions of the sexual exploitation of children has grown over the past decade. In 1992, the U.N. Commission on Human Rights adopted a Program of Action for the Prevention of the Sale of

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criminalizing sexual violence as part of a widespread or systematic attack against any civilian population. On the related issue of sexual slavery, particularly in situations of armed conflict, see *id*., paras. 54–58.

56 A. Yasmine Rassam, *Contemporary Forms of Slavery and the Evolution of the Prohibition of Slavery and the Slave Trade Under Customary International Law*, 39 VA. J. INT'L L. 303, 337 (1999).

57 Van Bueren, *supra* note 13, at 3, lists the provisions of the CRC which are relevant to different aspects of the problem of sexual exploitation.

58 Commission on Human Rights Report, *supra* note 33, para. 53.

Children, Child Prostitution and Child Pornography. Two World Congresses against the Sexual Exploitation of Children have been held, in 1996 (Stockholm) and 2001 (Yokohama). These were organized by the host governments, Sweden and Japan, respectively, UNICEF, ECPAT and the NGO Group for the Convention on the Rights of the Child. The Stockholm Declaration and Agenda for Action explicitly describes commercial sexual exploitation of children as a violation of their rights.[59] However, it had no specific provision for follow-up. Instead, NGOs, led by ECPAT, have researched and monitored national and international progress. However, it has been argued that the level of consensus, which the Stockholm Agenda has attracted, has given it a high political status.[60] The Stockholm Declaration and Agenda for Action not only raised the profile of issues surrounding the commercial sexual exploitation of children, it moved the debate onto the ground of children's rights, based on the CRC.[61] While states were called upon to strengthen their criminal laws and the enforcement of those laws, they were also asked to look at prevention and rehabilitation of child victims of commercial sexual exploitation. In addition, the importance of participation of children in the elimination of commercial sexual exploitation of children was emphasized. States were asked to develop national plans of action, although few did so in the subsequent years.[62] The other innovation of the Stockholm Declaration and Agenda for Action was the frequent references to the role of non-state actors including the business community.

This point was emphasized even more in the context of the Second World Congress against Commercial Sexual Exploitation of Children in Yokohama in 2001. The Yokohama Commitment does not develop the substance of the undertakings of states from the Stockholm Agenda. Instead, its main achievement is to create a greater sense of partnership. More states were involved, and closer links have been fostered with NGOs.[63] The Yokohama Global Commitment begins with the words "We, representatives from governments, intergovernmental organizations, the private sector, and members of civil society."[64] As with the Stockholm Declaration, at least equal emphasis is placed on preven-

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59 Declaration and Agenda for Action, 1st World Congress against Commercial Sexual Exploitation of Children, Stockholm, Sweden,Aug. 27–31, 1996, *available at* http://www.csecworldcongress.org/PDF/en/Stockholm/Outome_documents/Stockholm%20Declaration%201996_EN.pdf.

60 ECPAT Report, *supra* note 1, argues that the Agenda has the status of a "quasi-treaty." This could only be an index of political, not legal status. It does not argue that the Agenda represents customary international law.

61 *Available at* http://www.ecpat.net/eng/Ecpat_inter/projects/monitoring/Declaration.asp.

62 ECPAT Report, *supra* note 1.

63 *Id*., 13.

64 The full text of the Global Commitment is *reproduced at* http://www.ecpat.net/eng/Ecpat_inter/projects/monitoring/wc2/yokohama_commitment.asp.

tion issues and the protection of child victims as on the criminal process issues.[65] In particular, Yokohama represents a real attempt to realize the participation rights of children. This comes out of some of the regional pre-Congress preparatory consultations.[66] It is also evident in the inclusion of the "Final Appeal of Children and Young People" attached to the Yokohama Global Commitment.[67] The Final Appeal largely reflects the concerns expressed in the Global Commitment. It is more directly critical of governments, noting the problem of corruption as a barrier to eliminating commercial sexual exploitation of children. It also contains a pledge to "build a network of children and young people across the globe" to ensure the international dimension of child participation in combating commercial sexual exploitation of children.

This international concern about the sexual exploitation of children has resulted in an Optional Protocol to the CRC on the sale of children, child prostitution and child pornography, which came into force on January 18, 2002.[68] The basic dispositive provision is Article 1, which requires that "States parties shall prohibit the sale of children, child prostitution and child pornography as provided for by the present Protocol." Like the Trafficking Protocol, the CRC Optional Protocol has elements both of criminal law and human rights law, and like the Trafficking Protocol, the majority of the provisions relate to criminal law rather than the protection of children.

Article 2 defines the ills to be addressed by the Optional Protocol, before Article 3 lists the acts that must be made subject to states parties' criminal jurisdiction. Article 2 therefore sets out the following definitions:

(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;

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65 The criminal law issues are nonetheless still controversial. Iran, see the explanatory statement attached to the Yokohama Global Commitment, *id*., expressed reservations to the idea of extraterritorial criminal jurisdiction, where states criminalize and prosecute acts that took place outside their territory. On the other side of the argument, Van Bueren, *supra* note 13, has criticized the continued use of the double criminality criterion (the need for the act is the subject matter of the extradition request to be a crime both in the requesting state and in the state where the extradition request is heard), which makes extradition of those accused of activities related to commercial sexual exploitation of children excessively difficult and allows them to escape prosecution.

66 *Id*., 20.

67 *See* http://www.ecpat.net/eng/Ecpat_inter/projects/monitoring/wc2/final_appeal_of_young_people.pdf.

68 Adopted by G.A. Res. A/RES/54/253 (May 25, 2000).

(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.

It is worth noting that evidence of a commercial element is necessary, except in the case of pornography. Under Article 3, paragraph (1), the following must be made criminal offenses, "whether such offences are committed domestically or transnationally or on an individual or organized basis:"

(a) In the context of sale of children as defined in Article 2:

  (i) Offering, delivering or accepting, by whatever means, a child for the purpose of:

    a. Sexual exploitation of the child;

    b. Transfer of organs of the child for profit;

    c. Engagement of the child in forced labor;

  (ii) Improperly inducing consent, as an intermediary, for the adoption of a child in violation of applicable international legal instruments on adoption;[69]

(b) Offering, obtaining, procuring or providing a child for child prostitution, as defined in Article 2;

(c) Producing, distributing, disseminating, importing, exporting, offering, selling or possessing for the above purposes child pornography as defined in Article 2.[70]

It is important to note the scope of the offenses in relation to child pornography does not include possession for personal use. To have included possession for personal use would potentially conflict with freedom of expression principles enshrined in the Constitutions of many states.[71]

The Optional Protocol addresses the issue of the bases upon which states may take jurisdiction over offenses in considerable detail. This is a significant aspect of the Optional Protocol, as the sexual exploitation of children presents jurisdictional challenges. In many states, crimes may only be prosecuted if the alleged offense took place in the territory of the state (called the territorial principle of jurisdiction). In the case of commercial sexual exploitation, this lim-

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[69] Article 3(5) requires that states parties take measures to ensure that all persons involved in inter-state adoptions act in accordance with the applicable international legal instruments.

[70] Article 3(2) requires that attempts or complicity in the offenses listed in paragraph 1 also be made criminal offenses.

[71] For example, the Supreme Court of Canada, in *R. v. Sharpe*, [2001] 1 S.C.R. 45, [2001] 10 B.H.R.C. 153, read a limited exception for possession of child pornography, for personal use only, into the Canadian Criminal Code.

ited scope of jurisdiction may be inadequate in cases where the person who committed the offense was only in the territory of the state for a short period of time, such as in the case of child sex tourism. In response to issues such as this, states increasingly have changed their laws to allow them to prosecute their own nationals for sexual offenses committed in other states.[72] This is referred to as the nationality principle of jurisdiction.[73] Article 4 of the Optional Protocol, however, goes still further and requires states to take jurisdiction where the *victim* is a national of that state (called the passive personality principle) and where the offender is habitually resident in the state. Article 4 specifically requires states parties to take measures to enable them to take jurisdiction over the offenses in Article 3, paragraph 1, in language very similar to that used in Article 5 of the Convention against Torture.[74] Article 5 of the Optional Protocol requires states parties to ensure that the offenses in Article 3, paragraph 1, are extraditable offenses, whether under treaty or otherwise. Article 5 does not go as far as Article 7 of the Convention against Torture, which sets out a general obligation either to extradite or to prosecute alleged offenders, but paragraph 5 of Article 5 does require states parties to "take suitable measures to submit the case to its competent authorities for the purpose of prosecution" where the reason for refusing extradition is the nationality of the offender. Article 6 of the Optional Protocol sets out the obligations of international cooperation for the purposes of investigating, prosecuting and punishing the offenses in Article 3, paragraph 1, although this obligation is phrased in general terms. Article 7

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72 Paul Arnell, *The Case for Nationality Based Jurisdiction*, 50 INT'L & COMP. L.Q. 955 (2001). At page 958 he notes that the Sex Offenders Act 1997 allows the United Kingdom to prosecute sex offenses on the ground of the British nationality of the offender.

73 The different theories of jurisdiction are clearly set out in Vaughan Lowe, *Jurisdiction, in* INTERNATIONAL LAW 335 (Malcolm Evans, ed., 2d ed. 2006).

74 Article 5 of the Convention against Torture provides that:

> 1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases:
>
> (a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;
>
> (b) When the alleged offender is a national of that State;
>
> (c) When the victim is a national of that State if that State considers it appropriate.
>
> 2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph I of this article.
>
> 3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.

requires states to take measures to seize and confiscate material used in the commission of an offense or the proceeds derived from such offenses. The aim of these provisions is to ensure that alleged offenders cannot escape prosecution because the state where they are present is unable to take jurisdiction over them nor to extradite them to a state that wishes to prosecute them.

The correct scope of the prohibition on child pornography attracts a variety of positions among states. It has become a concern in the international context partly because of the growth of child pornography on the Internet, which requires a co-coordinated international response.[75] Because of concerns about freedom of expression, states may be worried about the proportionality of laws banning child pornography. There does not seem to be much controversy in principle, but the scope could be problematic.[76] One problem is with the depiction of simulated sex acts.[77] A further problem is the representation of a person who appears to be a child but is not. The definition of child pornography in Article 2 of the CRC Optional Protocol is somewhat vague on this point, perhaps reflecting unresolved concerns arising in the drafting process.[78] If the stricter approach to child pornography, which was supported by the Special Rapporteur on the sale of children, child prostitution and child pornography,[79] is followed, this could create difficulties of reconciliation with freedom of expression principles.[80]

As would be expected for a Protocol to the CRC, the obligations in respect of protection and support of child victims in the criminal process are defined with greater specificity than in the Trafficking Protocol.[81] Article 8, paragraph

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[75] It has therefore been the subject of specialized conferences, in addition to the international legal measures discussed in this chapter; *see, e.g.*, UNESCO Expert Meeting on Sexual Abuse of Children, Child Pornography and Paedophilia on the Internet: An International Challenge (Paris, Jan. 18–19, 1999), *at* http://unesdoc.unesco.org/images/0011/001194/119432eo.pdf.

[76] Van Bueren, *supra* note 13, at 16.

[77] *See Report of the Working Group on Contemporary Forms of Slavery on Its Twenty-Fourth Session*, E/CN.4/Sub.2/1999/17, paras. 53–60 (July 20, 1999).

[78] *Id*.

[79] *Id*., para. 98.

[80] *See, e.g.*, Ashcroft v. The Free Speech Coalition (00–795), 535 U.S. 234 (2002). The U.S. Supreme Court held that a statute criminalizing the depiction of sexual conduct engaged in by persons who were or appeared to be children was unconstitutional, as it was an overbroad restriction of expression. The restriction on freedom of expression could not extend, in the view of the court, to depictions of persons who appeared to be but were not minors, as this would exclude works of artistic merit. Nor was a restriction on depictions of persons who appeared to be children necessary to protect children from abuse.

[81] In this respect, Article 8 of the CRC Optional Protocol appears to go further than the UNHCHR Guidelines, *infra* note 137.

1, requires states to adopt measures to protect the rights and interests of child victims, including—but not limited to—the following:

(a) Recognizing the vulnerability of child victims and adapting procedures to recognize their special needs, including their special needs as witnesses;

(b) Informing child victims of their rights, their role and the scope, timing and progress of the proceedings and of the disposition of their cases;

(c) Allowing the views, needs and concerns of child victims to be presented and considered in proceedings where their personal interests are affected, in a manner consistent with the procedural rules of national law;

(d) Providing appropriate support services to child victims throughout the legal process;

(e) Protecting, as appropriate, the privacy and identity of child victims and taking measures in accordance with national law to avoid the inappropriate dissemination of information that could lead to the identification of child victims;

(f) Providing, in appropriate cases, for the safety of child victims, as well as that of their families and witnesses on their behalf, from intimidation and retaliation;

(g) Avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting compensation to child victims.

However, paragraph 6 of Article 8 subjects these guarantees to the right of the accused to a fair trial, which could have the effect of undermining the protection intended for child victims, by requiring them to be cross-examined in open court in the presence of the accused.[82] Article 8 also requires that the best interests principle be followed and that those working with child victims receive appropriate training. The obligations of general protection of child victims and their rehabilitation are much weaker than those relating to the criminal process. States are only obliged, "in appropriate cases" to adopt protective measures for those dealing with child victims, including their protection and rehabilitation. Article 10 also contains obligations in respect of the protection of child victims and the prevention of sexual exploitation of children and sale of children, but these obligations are only to promote international cooperation. The obligations in C 182 are stronger in this respect, where Article 7, paragraph 2, requires states

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[82] The decision of the United Kingdom House of Lords in *R. v. A*., [2001] U.K.H.L. 25 placed a greater priority on the protection of the rights of the accused to a fair trial than on the privacy rights of adult rape victims, by using the right to a fair trial, guaranteed by Article 6 of the European Convention on Human Rights and incorporated into U.K. law by the Human Rights Act 1998, to reduce substantially the statutory protection for rape victims against abusive cross-examination, particularly in respect of sexual reputation.

to "take effective and time-bound measures to . . . provide the necessary and appropriate direct assistance for the removal of children from the worst forms of child labor and for their rehabilitation and social integration."

D. *Regional Measures on Sexual Exploitation and Trafficking of Children*

When we consider Europe as a region, we are considering two organizations primarily: the European Union and the Council of Europe. The European Union's measures on sexual exploitation and trafficking of children are generally legally binding and intended to influence directly the laws and policies of member states. The Council of Europe tends to adopt soft law measures, but it has broad monitoring of the problems. Both organizations have become active in the issue of sexual exploitation of children, and the related problems of trafficking, over the past decade. As the ILO has noted, the problem of trafficked children has only recently been acknowledged as a widespread problem, particularly in the destination countries in Western Europe and North America. In Europe, the problem has been exacerbated by the economic and social dislocation accompanying the transitions being experienced in Eastern European countries.[83] Even without the trafficking aspect, commercial sexual exploitation of children is a growing problem. As a result, from 1991, when the Council of Europe began to look to a unified Europe after decades of division, the issues of sexual exploitation and trafficking in children began to appear on the agenda.

The first such measure was Recommendation R(91) 11 concerning sexual exploitation, pornography and prostitution of, and trafficking in, children and young adults, adopted by the Committee of Ministers of the Council of Europe.[84] The Recommendation took a broad approach to the problem and addressed issues of public awareness, criminal justice, welfare of children and the need to adhere to the relevant international instruments. There were, however, no monitoring mechanisms set up, and the recommendations are considered only soft law.

This issue was revisited ten years later in another recommendation. In the interim, however, the issues of sexual exploitation of children and trafficking in children had become a higher priority, and new international instruments, such as the Trafficking Protocol, the CRC Optional Protocol and C 182, have set out clearer obligations on states in these areas. Recommendation (2001) 16 is therefore more detailed than its predecessor.[85] It also puts children's rights

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83 Global Report 2002, *supra* note 12, at 32–33.

84 *See* https://wcd.coe.int/com.instranet.InstraServlet?Command=com.instranet.CmdBlobGet&DocId=597996&SecMode=1&Admin=0&Usage=4&InstranetImage=43409.

85 *See* https://wcd.coe.int/com.instranet.InstraServlet?Command=com.instranet.CmdBlobGet&DocId=223760&SecMode=1&Admin=0&Usage=4&InstranetImage=62091.

and child protection, rather than criminal justice, at the centre of the Recommendation. The Recommendation, in fact, reads more like a hard law measure, with detailed definitions of terms. The definition of trafficking is much briefer than that in the Trafficking Protocol, which is, at present, the definitive one. However, it is drafted in non-exhaustive language: "trafficking in children includes recruiting, transporting, transferring, harboring, delivering, receiving or selling of children for purposes of sexual exploitation."[86] The definition of child pornography, and the offenses associated with it, is more detailed than that in the CRC Optional Protocol and again is non-exhaustive:

> The term child pornography shall include material that visually depicts a child engaged in sexually explicit conduct, a person appearing to be a child engaged in sexually explicit conduct or realistic images representing a child engaged in sexually explicit conduct. Child pornography includes the following conducts committed intentionally and without right, by any means:
>
> — producing child pornography for the purpose of its distribution;
>
> — offering or making available child pornography;
>
> — distributing or transmitting child pornography;
>
> — procuring child pornography for oneself or for another;
>
> — possessing child pornography.[87]

The definition of child prostitution is very close to that in the CRC Optional Protocol. As with the 1991 Recommendation, the measures that states are called upon to take include raising public awareness, criminal justice (including international cooperation) and child protection. The public awareness measures are set out in far greater detail than in 1991 and include specific provisions relating to the Internet.[88] The general child protection provisions address prevention and the rights of victims during the criminal process. However, measures relating to assistance and rehabilitation relate only to children involved in prostitution. It is regrettable that there are no protection measures relating to trafficked children, particularly rights of repatriation and family reunion. However, the Recommendation exhorts states to ratify C 182 and the CRC Optional Protocol, which include more wide ranging obligations, beyond the criminal process, in

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86 *Id*., art. 2(e). Article 3, however, provided that nothing in the Recommendation shall prevent the application of rules more favorable to child protection, which would enable states parties to the Trafficking Protocol to use that definition, whose precision would likely render it more useful as a basis for legislative drafting.

87 *Id*., art. 2(c).

88 *See also* Convention on Cybercrime art. 9, ETS No. 185 (Nov. 23, 2001), entered into force July 1, 2004, which requires states to criminalize producing, disseminating or possessing child pornography through a computer system.

relation to protection and rehabilitation of children who have been victims of commercial sexual exploitation. The Recommendation is also notable for its emphasis on a multi-agency approach to problems of sexual exploitation of children and involving relevant private sector bodies, such as the tourism industry.

Recommendation (2001) 16, along with the Budapest preparatory conference to Yokohama[89] and the Yokohama Plan of Action, forms the basis for the work of the Council of Europe expert committee, the Committee of Experts on the Protection of Children against Sexual Exploitation and Abuse.[90] This group audits and reviews updated country reports, originally submitted to the Budapest preparatory conference, to identify best practice and needs for technical assistance. It also cooperates with other relevant international organizations and NGOs. Primarily, however, it is an information clearinghouse, where information will be gathered and available for sharing.

On trafficking generally, the Council of Europe has focused on the region of Southeastern Europe, with its Project LARA, a technical assistance program that is based on the Trafficking Protocol.[91] The project, similar to the Group of Specialists on sexual exploitation of children, relates to information gathering, dissemination, expert review of legislation, consultancy and workshops. The main Council of Europe measure is Recommendation (2000) 11 of the Committee of Ministers.[92] The Recommendation, on action against trafficking in human beings for the purpose of sexual exploitation, recognizes that women and children are the primary victims of trafficking.[93] It takes a human rights, as well as criminal justice, approach to the problem.[94] It contains extensive detail on the protection of trafficked persons, both in the criminal process and

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89 Council of Europe, Preparatory Conference for the 2d World Congress against Commercial Sexual Exploitation of Children, Europe and Central Asia, (Budapest, Nov. 20–21, 2001), Budapest Commitment and Plan of Action, *at* http://www.coe.int/t/e/legal_affairs/legal_co-operation/fight_against_sexual_exploitation_of_children/3_conferences/Budapesy_Commitment_and_Plan_of_Action.pdf. The Preparatory Conference was attended by representatives of governments, NGOs, inter-governmental organizations and individuals, including young people. Its purpose was to review progress made on issues of commercial sexual exploitation of children since the First World Congress against the Commercial Sexual Exploitation of Children in 1996 in Stockholm.

90 For the Committee's terms of reference, see http://www.coe.int/t/e/legal_affairs/legal_co-operation/fight_against_sexual_exploitation_of_children/1_PC-ES/PC-ES%20Terms%20of%20reference%20-%20nov%202006.pdf.

91 *See* http://www.coe.int/T/E/Legal_Affairs/Legal_co-operation/Combating_economic_crime/Project_LARA/.

92 *See* https://wcd.coe.int/com.instranet.InstraServlet?Command=com.instranet.CmdBlobGet&DocId=212804&SecMode=1&Admin=0&Usage=4&InstranetImage=62085.

93 *Id*., Appendix, para. 2.

94 *Id*., Explanatory Memorandum, comments to paras. 1–5 of the Appendix.

generally.[95] It discusses social and occupational rehabilitation. However, there is little specific provision for children. The Recommendation's definition of trafficking makes consent irrelevant for all victims, unlike the Trafficking Protocol, which only does so for children.[96] The Recommendation tends to call upon states to take into account the position of women and children,[97] but it could benefit from more specific recognition of the particular difficulties faced by children, such as family reunion. It could also benefit from reference to C 182, adopted a year before the Recommendation. The Explanatory Memorandum to the Recommendation notes that trafficked persons may be in situations of debt bondage, which could complicate their reintegration into their countries of origin.[98] It seems odd that this C 182 has not been referred to,[99] nor, even in the Explanatory Memorandum, the work at the United Nations that would soon culminate in the Trafficking Protocol and the CRC Optional Protocol.

As noted in Section C, the Council of Europe has opened for signature a regional convention on trafficking, the Council of Europe Convention on Action against Trafficking in Human Beings, which follows the broad outlines of the U.N. Trafficking Protocol. However, it attracted only one ratification during the first year after its conclusion, and several key states, including the United Kingdom, had not even signed it.[100] By early 2007, there were five ratifications, but this is still only halfway to the ten ratifications necessary for it to come into force.

The EU has adopted binding measures concerning cooperation on trafficking and sexual exploitation of children. Increasingly, these measures constitute regional implementation of international treaties such as the Trafficking Protocol. Ironically, although the EU measures, unlike many, explicitly recognize these issues as matters of human rights, the EU only has the competence to deal with the criminal law aspects.[101] The introduction, in the Treaty on

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95 *Id*., paras. 2–3 and 26–41 of Appendix to Recommendation No. R(2000) 11.

96 *Id*., para. 1 of Appendix to Recommendation No. R(2000) 11.

97 *Id*. The Explanatory Memorandum includes among the examples of types of behavior covered by the phrase "*inter alia* by means of coercion, in particular violence or threats, deceit, abuse of authority or of a position of vulnerability," "the seduction of children in order to use them in paedophile or prostitution rings, . . . abuse of the vulnerability of an adolescent."

98 *Id*., Explanatory Memorandum to paras. 39–41 of Appendix to Recommendation R(2000) 11.

99 This is particularly regrettable, since the Recommendation, at paragraph 56 of Appendix to Recommendation No. R(2000) 11, calls on states to consider signing and ratifying relevant international treaties, including the CRC.

100 Council of Europe, Convention on Action against Trafficking in Human Beings, status as of June 30, 2006, *at* http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=197&CM=1&DF=7/30/2006&CL=ENG.

101 On the problem of the lack of legal bases in the European Union treaties enabling

European Union (TEU), of the so-called Third Pillar, concerning justice and home affairs, gave the EU the legal basis to adopt measures on some aspects of criminal justice. The relevant provision is Article 29 TEU, which allows the EU to take action on several transnational criminal justice issues, including trafficking in persons and offenses against children. The first relevant measure taken under the TEU was Council Joint Action 97/154/JHA of January 24, 1997, concerning action to combat trafficking in human beings and sexual exploitation of children.[102] The Joint Action calls on EU member states to ensure that trafficking and acts related to it are criminal offenses in their domestic law, to take jurisdiction over these acts and to ensure that there are adequate penalties imposed on offenders.

The trafficking aspects of the Joint Action have been replaced by Council Framework Decision 2002/629/JHA of July 19, 2002, which is designed to complement the U.N. Trafficking Protocol and to introduce many of its provisions into EU law.[103] It therefore uses a definition of trafficking that follows that of the Trafficking Protocol closely.[104] Applying this definition, it calls on member states to criminalize trafficking for the purpose of labor exploitation as well as for sexual exploitation.[105] In accordance with the limited competence of the EU, it calls on member states to criminalize activities relating to trafficking in persons, in largely the same terms as the Trafficking Protocol, but it only

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the implementation of children's rights, see Holly Cullen, *Children's Right, in* THE EUROPEAN UNION CHARTER OF FUNDAMENTAL RIGHTS: POLITICS, LAW AND POLICY (Steve Peers & Angela Ward eds., 2004).

102 O.J. 1997 No. L63/2.

103 O.J. 2002 No. L203/1.

104 *Id*., art. 1. The European Community has signed the Trafficking Protocol; *see* Council Decision 2001/87/EC (Dec. 8, 2000), on the signing, on behalf of the European Community, of the U.N. Convention against Transnational Organized Crime and its Protocols on combating trafficking in persons, especially women and children, and the smuggling of migrants by land, air and sea, O.J. 2001 No. L30/44. In the Communication accompanying the proposal for the new Framework Decision, the Commission noted that "where appropriate, its proposals have taken on board the work reflected at international level by the United Nations protocol on trafficking in human beings and by the Cybercrime Convention developed within the Council of Europe." Communication from the Commission to the Council and the European Parliament, Combating trafficking in human beings and combating the sexual exploitation of children and child pornography, COM (2000) 854 final/2, at 4–5 (Jan. 22, 2001).

105 *Id*., art. 1(1) "for the purpose of exploitation of that person's labor or services, including at least forced or compulsory labor or services, slavery or practices similar to slavery or servitude." The original proposal, COM (2000) 854, had a wider, but vaguer definition of labor exploitation: "where the fundamental rights of that person have been and continue to be suppressed for the purpose of exploiting him or her in the production of goods or the provision of services in the infringement of labor standards governing working conditions, salaries and health and safety."

addresses the question of protection of victims in the context of the criminal process.[106] However, in relation to children, the obligation of protection and assistance extends to the victim's family.

The aspects of the 1997 Joint Action concerning the sexual exploitation of children are still in force and require member states to criminalize the sexual exploitation of children even where it is not for gain.[107] Again, the protection of children is limited to the criminal process and does not include rehabilitation measures.[108] In late 2003, a Council Framework Decision was adopted to combat sexual exploitation of children and child pornography.[109] The measure was influenced by the CRC Optional Protocol and follows the provisions of the Council of Europe's Cybercrime Treaty.[110] The definition of child pornography is similar to that in the CRC Optional Protocol, and the offenses in relation to child pornography are similar to those in Article 9 of the Cybercrime Convention. The offenses in relation to other forms of sexual exploitation go beyond those covered by the CRC Optional Protocol, as they are not limited to child prostitution and not limited to actions with a gainful purpose. The Framework Decision, and the Cybercrime Convention also, controversially, require states to make simple possession of child pornography an offense. The Framework Decision calls on member states to criminalize the activities listed and, in particular, to regard the involvement of very young children, under ten years of age, as an aggravating factor.[111] The protective measures are, as always, limited to the criminal process.[112] Between the adoption of the 1997 Joint Action and the Framework Decision, the Council adopted, under Article 34(2) of the TEU, a Decision to combat child pornography on the Internet.[113] This Decision contains no definition of child pornography, nor defines any crimes in relation to it, but it calls on member states to encourage Internet users and service

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106 *Id*., art. 7.

107 Joint Action 97/154/JHA, tit. I, para. B, and tit. II, para. A (Feb. 24, 1997) adopted by the Council on the basis of Article K.3 of the Treaty on European Union concerning action to combat trafficking in human beings and sexual exploitation of children, O.J. L63 (Mar. 4, 1997). In the case of adults, there must be "gainful purposes."

108 *Id*., tit. II, paras. F–H.

109 Council Decision 2004/68/JHA, O.J. L13/13 (Jan. 20, 2004). The implementation deadline was January 20, 2006.

110 Convention on Cybercrime, CETS 185, opened for signature Nov. 23, 2001, entered into force July 1, 2004. As of March 31, 2007, there were 19 states parties to this Convention.

111 *See* art. 5 of the proposal, COM (2000) 854, *supra* note 104. Other aggravating factors are that the offense involves particular ruthlessness or violence, it generates substantial proceeds or that it is committed in the framework of a criminal organization.

112 *Id*., art. 8.

113 Council Dec. 2000/375/JHA, O.J. 2000 No. L138/1.

providers to cooperate with law enforcement agencies to combat child pornography, and to ensure cooperation between member states on this issue.

The Inter-American Convention on International Traffic in Minors,[114] whose broad definition of trafficking was noted in Section B, extends the concept of international cooperation on trafficking to civil aspects as well as criminal. Articles 12-22 relate to civil law issues, primarily those associated with the repatriation of trafficked children. This goes further than other conventions in respect of the detail with which the mechanisms of international cooperation to ensure the location and return of trafficked children. There is, however, little on the protection of trafficked children and nothing on rehabilitation. Article 6 sets out a general obligation on ratifying states to protect the interests of the trafficked child "with a view to ensuring that all procedures applied pursuant to the present Convention shall remain confidential." Article 18 stipulates that the best interests of the child shall be taken into account when dealing with the potential annulment of an international adoption of a trafficked child.[115]

In Africa, there are no regional treaties, but there are several frameworks for regional cooperation that are based on the relevant international documents. The Economic Community of West African States (ECOWAS) adopted a Declaration and Plan of Action against Trafficking in Persons in December 2001.[116] This strategy calls on states to ratify the Trafficking Protocol and the CRC Optional Protocol. Whether or not they take on the international obligations, the Declaration and Plan of Action calls on states to criminalize trafficking in persons and to provide protection and support for trafficked persons. The main point of the Plan of Action, however, is coordination, starting with the call to establish National Task Forces to coordinate policy development in this area, with a Coordination Unit to be established within the ECOWAS Executive Secretariat. The Plan of Action will lead to research and the exchange of information that will support national policymaking and the work of international agencies like INTERPOL. A more action-oriented strategy was formulated in the Libreville 2000 Common Platform for Action.[117] The Platform proposes seven basic strategies: advocacy, legal and institutional framework, care for victims, enhanced knowledge and monitoring, strengthened international cooperation, strengthened inter-agency cooperation within states and ensuring follow-up. States are expected to develop National Plans of Action,

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114 Adopted at Mexico City, Mar. 18, 1994, at the Fifth Inter-American Specialized Conference on Private International Law, OAS Treaty Series, No. 79. The Convention entered into force on August 15, 1997. The text of the Convention is *available at* http://www.oas.org/juridico/english/Treaties/b-57.html.

115 Article 19 provides that the same conditions apply to care or custody proceedings in relation to a trafficked child.

116 UNICEF, *supra* note 4, at 3.

117 *Id*., 4.

establishing repatriation procedures and law enforcement cooperation agreements. However, few countries have yet fully established their plans of action. Most are only in the draft stage.[118] Protection measures for trafficked children are particularly weak.[119] However, there is support from UNICEF, the ILO/IPEC and the International Organization for Migration.[120]

One example of the failures in West Africa to address the protection aspects of child trafficking is Togo, which has adopted criminal laws but has not developed adequate programs for repatriation and rehabilitation of trafficked children.[121] The children who have been reintegrated have been those who have escaped their situation and reported themselves to the authorities. There are agreements between Togo and other countries in the region on repatriation of trafficked children, which should ensure that children are returned, but there are serious problems from this point onwards. The government has not established shelters for trafficked children and has even imprisoned them, although this is formally illegal. The shelters that exist are operated by NGOs, and there is a lack of coordination between NGOs and the relevant government agencies. In particular, there are difficulties in ensuring sufficient judicial control of the processes.[122] In addition, the resources available to assist in locating children's families are insufficient, as are resources for counseling and medical care.

The South Asian Association for Regional Cooperation (SAARC), an intergovernmental organization focusing on economic and social development of its member states, has adopted a limited treaty on sexual exploitation, focusing on trafficking for prostitution. The SAARC Convention on Preventing and Combating Trafficking in Women and Children for prostitution was opened for signature on January 5, 2002.[123] Despite the fact that the text of the SAARC Convention was concluded after the adoption of the Trafficking Protocol, C 182 and the CRC Optional Protocol, the Preamble makes no reference to these instruments, although the structure follows that of the CRC Optional Protocol. In particular, the definitions of prostitution and trafficking do not appear to be based on those in these recent treaties. In Article I, trafficking is defined as "the moving, selling or buying of women and children for prostitution within

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118 *Id*., 10. Mali was the first country in the region to establish a National Plan of Action.

119 *Id*., 18. A particular problem is that the protection role is usually entrusted to the police, whose main concern is border control.

120 *Id*., 22–24.

121 Human Rights Watch, *supra* note 17, at 36–38.

122 *Id*., comments of Judge Emanuel Edorh, chief magistrate of the children's court, Togo.

123 Published on the Web site of the Coalition Against Trafficking in Women, *at* http://action.web.ca/home/catw/readingroom.shtml?sh_itm=996380b3c1b538862ddaacced30ea5f4.

and outside a country for monetary or other considerations with or without the consent of the person subjected to the trafficking." This definition seems to prohibit a wider range of actions than that in the Trafficking Protocol. Prostitution is defined as "the sexual exploitation or abuse of persons for commercial purposes." This is arguably a narrower definition than in the CRC Optional Protocol, as it requires that there be a commercial purpose rather than merely demonstrating that remuneration or other consideration in fact was passed. Most of the SAARC Convention is devoted to aspects of international cooperation on the criminal justice aspects of trafficking. However, Article IX sets out obligations in relation to protection and rehabilitation, which are more specific than those in the CRC Optional Protocol, but do not go as far as C 182. The main obligation is repatriation of the trafficked persons to their countries of origin. Pending repatriation, states parties are obliged to "make suitable provisions for their care and maintenance. The provision of legal advice and health care shall also be made available to such victims."[124] States are further obliged to establish protective homes or shelters for rehabilitation of trafficked persons, which may be operated by NGOs.

Although the illegality of child prostitution is uncontroversial,[125] it is worth noting that the inclusion of prostitution within the contemporary forms of slavery is controversial. Some NGOs argue that the problem of exploitative treatment of prostitutes arises because of the illegality of the practice itself, whereas others argue that the sex trade is inherently exploitative and abusive.[126]

Although there are now several instruments dealing with commercial sexual exploitation of children, there remain serious problems of coverage. Although virtually every state is a party to the CRC, the more specific treaties on trafficking have been slow to acquire crucial signatories. Thailand, for example, only acceded to the CRC Optional Protocol in 2006 and has been accused of failing to prosecute those exploiting prostitutes.[127]

E. *International Legal Provisions on Criminal Exploitation of Children*

This area has relatively little in the category of international legal provisions and is comparatively under-researched in terms of the factual context.[128]

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124 South Asian Association for Regional Cooperation (SAARC) art. IX, para. 2.

125 Report of the Working Group on Contemporary Forms of Slavery on its Twenty-Fourth Session, E/CN.4/Sub.2/1999/17, paras. 82–87 (July 20, 1999).

126 *See, e.g.*, the discussion in the 1999 Report of the Working Group on Contemporary Forms of Slavery; *id*., paras. 13–34.

127 Rassam, *supra* note 66, at 325–26.

128 Global Report 2002, *supra* note 12, at 36.

The most often-cited example is the use of children in producing and trafficking drugs, which is usually found in countries with serious problems of the drugs trade.[129]

It is difficult to examine the problem of the use of children in the illicit drugs trade without also considering the use of such drugs by children.[130] This is reflected in Article 33 CRC:

> States Parties shall take all appropriate measures, including legislative, administrative, social and educational measures, to protect children from the illicit use of narcotic drugs and psychotropic substances as defined in the relevant international treaties, and to prevent the use of children in the illicit production and trafficking of such substances.

Initially the exploitation of children in criminal activities was intended to be part of the same provision as that covering sexual exploitation. The ILO Secretariat argued that adding "illegal activities" to the clause went beyond the issues of child pornography and prostitution, since the intention was that these activities should be covered by the Convention regardless of their status under domestic law, whereas activities that were illegal under domestic law should also fall into the category of abusive child labor.[131] Although drug production and trafficking was the main issue of concern, the intention of the Secretariat was that it could include organized crime activities, such as smuggling and gambling.[132] Ultimately, it was felt that illegal activities were a separate issue from commercial sexual exploitation of children, and the reference was dropped, and reintroduced as a separate provision.[133] The draft presented to the second discussion of C 182 changed the term "illegal" to "illicit." Some governments initially objected to the change on grounds of drafting precision but withdrew their proposed amendment to revert to the term "illegal."[134] There was no further discussion of what type of illicit activities should constitute worst forms of child labor for the purpose of the Convention. There was some illumination in discussions relating to R 190. Paragraph 11 of the Recommendation addresses issues of international cooperation in respect of criminal law matters in the worst forms of child labor:

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129 Noted for example by the Special Rapporteur on the sale of children, child prostitution and child pornography; *see* 1999 Report, *supra* note 27, paras. 70–71.

130 *See, e.g.*, GLOBAL REPORT 2002, *supra* note 12, at 36, which notes that problems of drug use overlap with that of street children, who are often child workers in the informal economy.

131 International Labor Conference, 86th Sess., *Committee on Child Labor, Report*, para. 134 (Geneva, 1998).

132 *Id.*

133 *Id.*, para. 138.

134 International Labor Conference, 87th Sess., *Committee on Child Labor, Report*, para. 166 (Geneva, 1999).

> Members should, in so far as it is compatible with national law, cooperate with international efforts aimed at the prohibition and elimination of the worst forms of child labor as a matter of urgency by:
>
> (a) gathering and exchanging information concerning criminal offenses, including those involving international networks;
>
> (b) detecting and prosecuting those involved in the sale and trafficking of children, or in the use, procuring or offering of children for illicit activities, for prostitution, for the production of pornography or for pornographic performances;
>
> (c) registering perpetrators of such offences.

Paragraph 12 calls on states to make the use of children in the worst forms of child labor criminal offenses:

> Members should provide that the following worst forms of child labor are criminal offences:
>
> (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 labor, 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; and
>
> (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, or for activities which involve the unlawful carrying or use of firearms or other weapons.

The inclusion of a specific reference to activities involving firearms was the result of an amendment proposed by the Worker representatives at the second discussion of the Recommendation in 1999.[135]

C 182 and R 190 introduced the idea of exploitation of children in criminal activities, other than the sex trade, as a worst form of child labor. However, other than production and trafficking of drugs, there seems to be little clarity as to what this prohibition is supposed to cover. The discussions leading to the adoption of these measures provide some examples. However, it would seem to be difficult to delimit the scope of Article 3(c) of C 182—it could potentially have a complete overlap with juvenile justice issues.

The Trafficking Protocol does not eliminate the ambiguity. Article 3 prohibits trafficking for the purposes of "exploitation," which includes, "at a minimum," sexual exploitation, forced labor or removal of organs. There are no examples of exploitation in criminal activities that are not covered by sexual exploitation or slavery/forced labor.

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[135] *Id*., paras. 336–338.

While it is understandable that exploitation of children in the context of the drugs trade, smuggling, gambling or arms trade should be considered equally exploitative as commercial sexual exploitation, the provisions in international legal instruments do not give very helpful guidance as to what exactly is covered and therefore the scope of state obligations, particularly under C 182.

F. *Problems with the Scope of Obligations*

The international legal measures concerning trafficking of children and the sexual and criminal exploitation of children are often not backed up by clear state obligations, as compared, for example, with obligations concerning the recruitment and use of child soldiers. The obligations in the Trafficking Protocol are not defined in terms of results to be achieved but only oblige states to take best efforts.[136] In particular, the protective obligations towards trafficked persons, as contained in Article 6, are not specific, particularly in relation to rehabilitation.[137] The only unconditional obligations are: (1) in paragraph 6(6), to ensure that there are legal procedures available to trafficked persons to enable them to obtain compensation; and (2) in paragraph 9(1)(b), to establish a comprehensive policy to prevent the revictimization of trafficked persons. In respect of children, states are only required, under paragraph 6(4), to take into account their special needs.

The best hope is that states will have regard to the guidelines prepared by the Office of the High Commissioner for Human Rights on the implementation of the Trafficking Protocol.[138] The High Commissioner, in essence, recommends that the human rights of trafficked persons be given primacy rather than the criminal law and migration aspects of the Protocol.[139] The guidelines, if followed, would put a greater obligation on states in respect of children, integrating general principles of children's rights:

> Children who are victims of trafficking shall be identified as such. Their best interests shall be considered paramount at all times. Child

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136 Gallagher, *supra* note 30, at 990–91.

137 Paragraph 6(3) only requires that states "consider" implementing measures for the recovery of trafficked persons; *see* Muireann O'Briain, *Children and the UN Trafficking Protocol*, 42 ECPAT Int'l Newsletter, Jan. 1, 2003.

138 *Id*. The guidelines are published as *Recommended Principles and Guidelines on Human Rights and Human Trafficking, Report of the United Nations High Commissioner for Human Rights to the Economic and Social Council*, E/2002/68/Add.1 (May 20, 2002) [hereinafter, UNHCHR Guidelines], especially Guideline 6 on protection and support for trafficked persons.

139 UNHCHR Guidelines, *id*., Guideline 1. In the Trafficking Protocol itself, the majority of the articles are devoted to migration issues, such as documentation and criminal justice cooperation.

> victims of trafficking shall be provided with appropriate assistance and protection. Full account shall be taken of their special vulnerabilities, rights and needs.[140]

Guideline 8 on special measures for the protection and support of child victims of trafficking recommends that children be dealt with separately from adults when dealing with victims of trafficking. In addition to the general recommendations for the protection of trafficked persons, Guideline 8 suggests:

- ensuring that domestic legal and policy definitions of trafficking follow Article 3 of the Trafficking Protocol;
- ensuring rapid identification of children;
- ensuring that trafficked children are not subject to criminal law;
- trying to facilitate family reunification;
- where family reunification is impossible or inadvisable, to establish adequate care arrangements;
- allowing children to express their views and to take those views into account;[141]
- providing appropriate physical, psychosocial, legal, educational, housing and health-care assistance;
- protecting the rights of trafficked children during any criminal proceedings against alleged traffickers, and during claims for compensation;
- protecting the privacy and identity of trafficked children;
- training persons working with trafficked children.

The clearest obligations in the Trafficking Protocol are in relation to the criminalization of trafficking itself. Article 5 requires states to adopt "legislative and other measures as may be necessary to establish as criminal offence the conduct set forth in Article 3" where the conduct is intentional. States may also establish as criminal offenses, attempts, participating as an accomplice and organizing or directing other persons in relation to the conduct in Article 3.[142] The Protocol does not address jurisdictional issues, but Article 1(2) states that the provisions of the Convention against Transnational Organized Crime apply to the Protocol. Article 15 of the Convention against Transnational Organized Crime requires states to take jurisdiction over the crimes set out in the Convention, and by means of Article 1(2) of the Protocol to the crimes in the Protocol as well, where the crime was committed on the state party's territory,[143]

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[140] *Id*., paragraph 10 of the recommended principles on human rights and human trafficking.

[141] This point uses language very similar to CRC Article 12.

[142] Trafficking Protocol art. 5(2).

[143] Article 15 takes a broad approach to territorial jurisdiction, including within its

where the accused or the victim is a national of the state party or where the victim is a stateless person having habitual residence in the state party. It also requires states adopt the necessary measures to take jurisdiction over an alleged offender who is within their territory and it will not extradite solely on the ground that the alleged offender is a national, and to coordinate actions where several states are investigating or prosecuting the same conduct.

G. Conclusion

This area is probably the most difficult to integrate into our general ideas of child labor as a human rights problem. In the words of Article 32 CRC, abusive child labor is usually thought of as a matter of "economic exploitation." Older international standards on child labor expressed it as a type of employment regulation—the setting of a minimum age for employment. With the sexual and criminal exploitation of children, there is an economic element. Individuals do profit from pornography, prostitution and the drug trade. However, the definition of the problem and the measures necessary in order to address it require us to use the language of criminal law rather than labor law. Smolin has noted this, and criticized C 182 on these grounds.[144] Nonetheless, to identify sexual and criminal exploitation of children and trafficking of children purely as criminal law issues provides an incomplete picture of the problem. As there is an element of economic exploitation involved in sexual and criminal exploitation of children, the inclusion of these categories can be defended as being child labor issues. The remedies, however, may not always be the measures that are applied in all child labor cases. The prosecution and punishment of those who engage in the exploitation will be more of a priority in this area than in other areas of abusive child labor. Rehabilitation of children, as with all forms of child labor, will be essential, and is not sufficiently addressed in instruments that derive from the criminal law sphere, such as the Trafficking Protocol. The protective aspects of the human rights perspective, which now informs the approach to child labor, has a value that justifies the inclusion of these categories as worst forms of child labor.

There has been a recent flurry of new international standards. The goal now is to ensure implementation. First, there needs to be a campaign for the ratification of the relevant standards by as many countries as possible. There does not seem to be a high-profile NGO campaign in this area, as there has been in relation to the CRC Optional Protocol on children in armed conflict.

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scope a vessel flying the state party's flag, an aircraft registered under the laws of the state party and crimes committed outside the state party's territory but with a view to the commission of a serious offense within the state party.

144 Smolin, *supra* note 4.

In addition, the diversity of areas of international law, which are relevant to the question of sexual and criminal exploitation of children, requires a joined-up approach. UNICEF, the ILO and the International Organization for Migration have achieved this to some extent on the question of trafficking of children in West Africa. It is an example that needs to be followed and extended.

Chapter 4
Child Soldiers

A. Introduction

The Coalition to Stop the Use of Child Soldiers (CSC) reported in 2004 that soldiers under 18 have been used in conflicts in 21 countries.[1] This is a reduction from the figure cited in 2001, where children were fighting in 36 armed conflicts, spread out over every continent except Australia and Antarctica.[2] During the period between 2001 and 2004, the Optional Protocol to the Convention on the Rights of the Child (CRC) on Children in Armed Conflict came into force. However, it is unwise to deduce any causal relationship between the change of international law and the reduction in cases where child soldiers are being used. As the CSC notes, while the use of child soldiers is almost universally condemned in principle, recruitment, even forcible recruitment, of children is still widespread. In 2005, the U.N. Secretary-General's Special Representative for armed conflict estimated that the rights of children were being violated in over 30 conflicts.[3]

Furthermore, some countries accept the principle of non-recruitment of children, yet still recruit young persons under 18, notably the United Kingdom. Like the United States until 2000,[4] the United Kingdom allowed under-18s to be sent into conflict zones until 2003.[5] This included sending young recruits

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1 Coalition to Stop the Use of Child Soldiers (CSC), Global Report 2004 13 (2004) [hereinafter Global Report 2004].

2 CSC, Global Report 2001 (2001), *available at* http://www.child-soldiers.org/ [hereinafter Global Report 2001]. Although Australia is not itself a site of use of child soldiers, child soldiers are being used in nearby countries with close political ties to Australia, such as Indonesia.

3 *Report of the Special Representative of the Secretary-General for Children and Armed Conflict*, U.N. Doc. A/60/335, para. 5 (Sept. 7, 2005) [hereinafter Otunnu Report 2005].

4 Human Rights Watch, *New Treaty Bans Children in Combat* (Jan. 22, 2000), *available at* http://www.hrw.org/press/2000/01/child0121.htm. The United States changed its policy after the adoption of the Optional Protocol to the Convention on the Rights of the Child on Children in Armed Conflict; Amnesty International, *Child Soldiers: Governments Agree to Ban Use of Child Combatants but Treaty Fails to Prohibit All Recruitment of Under-18s* (Jan. 21, 2000), *available at* http://www.amnesty.org/news/2000/I5100200.htm.

5 Global Report 2001, *supra* note 2; 50 U.K. soldiers under 18 served in the KFOR

on peacekeeping missions despite the U.N. Secretary-General's request that no state use under-18s on such missions, and that, preferably, only soldiers over 21 be deployed.[6] The United Kingdom's resistance to accepting a minimum age of 18 for voluntary recruitment of children into the armed forces contrasts with its leading role among donor countries in integrating issues of children affected by armed conflict, including former child soldiers, in its development policies.[7]

The issue of child soldiers can be examined from a number of perspectives. It can be contextualized, as it is in C 182, as one of the worst forms of child labor. It can also be seen as part of a wider international humanitarian law concern with children caught up in the effects of armed conflicts.[8] Considering it as part of child labor has certain consequences. In child labor conventions, there is an emphasis on prescribing a minimum age for participation and defining soldiering as an activity that is inappropriate for childhood. It highlights the fact that often the motivation of children for becoming soldiers, whether or not this decision is made in the context of a surrounding armed conflict, is economic. As with the other worst forms of child labor, the children who become child soldiers are often from the most economically and socially marginal groups.[9]

The question of child soldiers has become a pressing issue for international law because of the evolution of armed conflict in recent years. Civilians are more likely to be targeted than ever before.[10] While humanitarian law has developed during the 20th century to try to address the increasing vulnerability of

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peacekeeping force in Kosovo. In 2003, the United Kingdom undertook not to use under-18s in operations outside the United Kindom except humanitarian operations where no hostile forces are involved; *see* GLOBAL REPORT 2004, *supra* note 1.

6 GLOBAL REPORT 2001, *supra* note 2; *Children and Armed Conflict: Report of the Secretary-General*, U.N. Doc. A/55/163, para. 40 (July 19, 2000) [hereinafter Secretary-General's Report 2000].

7 *Protection of Children Affected by Armed Conflict*, U.N. Doc. A/54/430, para. 146 (Oct. 1, 1999) [hereinafter Otunnu Report 1999].

8 This has been the approach of the United Nations, starting with the study ordered by the General Assembly on the impact of armed conflict on children in 1993, in Resolution 48/157 of December 20, 1993, U.N. Doc. A/RES/48/157 (Mar. 7, 1994). The report of Grac'a Machel, *Impact of Armed Conflict on Children*, UN Doc. A/51/1996 (Aug. 26, 1996) [hereinafter Machel Report], has been a foundation for much of the work done on this subject over the subsequent years. *See also*, generally, the Web site of the Children and Armed Conflict Unit of Essex University, *at* http://www.essex.ac.uk/armedcon/.

9 Machel Report, *supra* note 8.

10 *Id*., para. 24. On the historical development of total war where the distinction between combatants and civilians is eroded, see GWYNNE DYER, WAR (1986).

civilians,[11] the practice of armed conflict has eroded the distinction between combatants and civilians. The line between pervasive terrorist activity and internal armed conflict may be difficult to draw in practice, as civilians who see themselves as targets engage in reactive violent acts.[12] The former Special Representative on Children and Armed Conflict, Olara A. Otunnu,[13] concerned himself with this distinction and visited countries where, at least internally, the violence was considered the result of terrorism.[14] Armies target civilians, then civilians become caught up in the conflict and react with violence. The result is children, sometimes willingly, sometimes not, becoming active in state or non-state armed groups. Finally, because many armed conflicts last for years, such conflicts can become a normal part of children's reality, lasting a whole childhood.[15]

The technology of weaponry has encouraged this trend, with the easy availability of light weapons that can be handled even by young children.[16] Small arms are often difficult to trace, and therefore continue to circulate even after a conflict is over. In situations like Afghanistan, where one conflict has followed another, the availability of small arms has arguably been a factor in exacerbating violence and conflict.[17] In Angola, small arms became a form of currency.[18] In 2001, the U.N. Conference on Illicit Trade in Small Arms and Light Weapons in All its Aspects agreed a Program of Action, based in part on

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11 Geoffrey Best, War and Law Since 1945 (1994).

12 The most obvious example of this problem is in the occupied territories in the context of the intifada, which may or may not be a form of internal armed conflict; Philip Veerman & Hephzibah Levine, *Protecting Palestinian Intifada Children: Peaceful Demonstrators, Child Soldiers or Child Martyrs?*, 9 Int'l J. Children's Rts. 71 (2001).

13 Appointed by the Secretary-General of the United Nations in 1997 with mandate renewed for three years from September 2000; *Protection of Children Affected by Armed Conflict*, U.N. Doc. A/55/442, paras. 2–4 (Oct. 3, 2000) [hereinafter Otunnu Report 2000]. The Office of the Special Representative is funded through voluntary contributions of U.N. member states; *id*., para. 6.

14 *See, e.g., Protection of Children Affected by Armed Conflict*, U.N. Doc. A57/402, paras. 17–19 (Sept. 25, 2002) [hereinafter Otunnu Report 2002], concerning a country visit to Northern Ireland, including discussion of the need to improve the socio-economic situation to prevent the recruitment of young people into paramilitary groups. Another example, from the same report, paragraph 32, is a country visit to Russia.

15 Machel Report, *supra* note 8, para. 30.

16 *Id*., para. 27. This has led to the development of the Coordinating Action on Small Arms; *see* Secretary-General's Report 2000, *supra* note 6, para. 21. *See also* Julia Freedson, *The Impact of Conflict on Children—The Role of Small Arms*, Disarmament Forum, No. 3, 37 (2002).

17 Freedson, *supra* note 15, at 40.

18 *Id*., 41.

a concern about the effects of the small arms trade on the incidence of forcible recruitment of child soldiers.[19]

The issue of child soldiers, perhaps more than any other area of child labor, highlights the need for the coherence and integration of different regimes of international law. Here, it is not only different human rights bodies and regimes, such as refugee law, that are involved. As well, there is an important parallel body of legal rules from international humanitarian law, which, although considered by some to be complementary, is underpinned by different assumptions. These bodies of law need to be reconciled. In some cases, particularly arising from the new Optional Protocol to the Convention on the Rights of the Child (CRC) on Children in Armed Conflict (the CRC Optional Protocol), the potentially different demands of human rights law and humanitarian law must, as a first step, be acknowledged. In addition, the demands of justice within international criminal law, where child soldiers are potential defendants, may conflict with the demands for rehabilitation in the context of the human rights.

One of the main actors, beyond states, international organizations and nongovernmental organizations (NGOs), in ensuring the integration of the various norms concerning child soldiers, and the larger question of children in armed conflict, has been the U.N. Secretary-General's Special Representative for Children and Armed Conflict.[20] This focus also demonstrates another approach to the issue of child soldiers as part the broader issue of children affected by armed conflict. As noted above, as civilians are increasingly targeted in warfare, children are more vulnerable than was previously the case. They become both victims and perpetrators of war crimes, which presents serious challenges to any system that seeks to respect children's rights while ensuring justice in conflict and post-conflict situations.

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[19] U.N. Doc. A/CONF.192/L.5/rev.1, discussed by Freedson, *id*., at 42–43. Security Council Resolutions, 1261 (1999), 1314 (2000) and 1379 (2001) on children and armed conflict all mention the link between small arms and the incidence of child soldiers. On preparations for this conference, see *Protection of Children Affected by Armed Conflict*, U.N. Doc. A/56/453, para. 56 (Oct. 9, 2001) [hereinafter Otunnu Report 2001].

[20] *See* the Reports of the Special Representative for Children and Armed Conflict to the General Assembly, *Protection of Children Affected by Armed Conflict*, U.N. Doc. A/53/482 (Oct. 12, 1998) [hereinafter Otunnu Report 1998]; Otunnu Report 1999, *supra* note 7; Otunnu Report 2000, *supra* note 13, Otunnu Report 2001, *supra* note 19; Otunnu Report 2002, *supra* note 14, and his report to the Commission on Human Rights, E/CN.4/2003/77 (Mar. 3, 2003) [hereinafter Otunnu Report 2003]; Otunnu Report 2005, *supra* note 3. *See also* Secretary-General's Report 2000, *supra* note 6; *Children and Armed Conflict: Report of the Secretary General*, U.N. Doc. A/56/342 (Sept. 7, 2001) [hereinafter Secretary-General's Report 2001]; *Children and Armed Conflict: Report of the Secretary General*, U.N. Doc. S/2002/1299 (Nov. 26, 2002) [hereinafter Secretary-General's Report 2002].

B. *International Law Provisions*

Despite a long history of children's participation in armed conflict, there were no provisions of positive international law on this issue until the 1977 Protocols to the 1949 Geneva Conventions. Before the adoption of the Protocols, the relevant provision for the protection of children caught up in internal armed conflict would have been common Article 3 of the four 1949 Geneva Conventions, which provides that, in non-international armed conflicts, persons taking no part in hostilities should be treated humanely and not be subject to "outrages upon personal dignity, in particular humiliating or degrading treatment."[21] In addition, child combatants would be protected in the same way as adults if injured (the First and Second Geneva Conventions of 1949) or taken prisoner (the Third Geneva Convention of 1949). No distinct protection for children was contemplated.[22]

International humanitarian law measures, such as the Geneva Conventions, distinguish between international and non-international armed conflicts. Common Article 3, as noted above, provides for a minimum coverage of humanitarian law principles where no more extensive guarantees apply.[23] The First of the 1977 Protocols deals with international armed conflicts and the Second with non-international armed conflicts. Provisions dealing with international conflicts tend to be more detailed and only apply to state armed forces. International human rights, criminal and labor law provisions do not explicitly distinguish between international and non-international armed conflicts, but they sometimes do distinguish between state and non-state forces.

1. Protocol I Additional to the Geneva Conventions of August 12, 1949 (1977)

Article 77

(1) Children shall be the object of special respect and shall be protected against any form of indecent assault. The Parties to the conflict shall provide them with the care and aid they require, whether because of their age or for any other reason.

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21 Ann Sheppard, *Child Soldiers: Is the Optional Protocol Evidence of an Emerging "Straight-18" Consensus?*, 8 INT'L J. CHILDREN'S RTS. 37, 41–42 (2000).

22 MATTHEW HAPPOLD, CHILD SOLDIERS AND INTERNATIONAL LAW 55 (2005), states that the exclusion of children from the 1949 Geneva Conventions was due to states' conviction that children's participation in hostilities was an internal matter.

23 *See, e.g.*, the decision of the U.S. Supreme Court in *Hamdan v. Rumsfeld, Secretary of Defense, et al.*, 548 U.S.—, 126 S. Ct. 2749 (2006), *available at* http://www.supremecourtus.gov/opinions/05pdf/05-184.pdf.

> (2) The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, the parties to the conflict shall endeavor to give priority to those who are oldest.
>
> (3) If, in exceptional cases, despite the protection of paragraph 2, children who have not attained the age of fifteen take a direct part in hostilities and fall into the power of an adverse Party, they shall continue to benefit from the special protection accorded by the Article, whether or not they are prisoners of war.
>
> (4) If arrested, detained or interned for reasons related to the armed conflict, children shall be held in quarters separate from the quarters of adults, unless where families are accommodated as family units as provided in Article 75, paragraph 5.
>
> (5) The death penalty for an offence related to the armed conflict shall not be executed on persons who had not attained the age of eighteen years at the time the offence was committed.

Here the obligation to refrain from recruiting children is set down in a treaty for the first time. Implicitly, Article 77(2) defines "child" as a person under 15 years, since "persons" between 15 and 17 may be recruited.[24] No distinction is made between compulsory and voluntary recruitment in this provisions although, as will be discussed in detail in Section D.3, the scope of the word "recruitment" can be controversial. In addition to the low minimum age for recruitment, the main weakness of this provision is that it does not put an absolute obligation on states not to deploy children in armed conflict situations but only an obligation to "take all feasible measures."[25] Finally, the obligation only relates to direct participation in hostilities.[26] In relation to children aged 15–17, the obligation is deliberately weak and amounts only to a recommendation.[27] Such older children also benefit from special protection accorded to children under the Protocol and immunity from the execution, although not necessarily the imposition, of the death penalty.

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24 However, HAPPOLD, *supra* note 22, at 58–59, argues that since the Article uses two threshold ages, 15 and 18, it is possible to see the overall definition of child in the Article as meaning persons under 18 but that older children may be recruited.

25 See ILENE COHN & GUY S. GOODWIN-GILL, CHILD SOLDIERS: THE ROLE OF CHILDREN IN ARMED CONFLICTS 61 (1994). They argue, however, *id*. at 63, that a strict interpretation of Article 77(2) would make the obligation close to absolute. *See also* HAPPOLD, *supra* note 22, at. 61.

26 COHN & GOODWIN-GILL, *supra* note 25, at 61–62.

27 *Id*., 63.

2. Protocol II Additional to the Geneva Conventions of August 12, 1949 (1977)

Article 4(3)

(c) children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities.

(d) the special protection provided by this Article to children who have not attained the age of fifteen years shall remain applicable to them if they take a direct part in hostilities despite the prohibitions of subparagraph (c) and are captured.

Protocol II applies to non-international armed conflicts. As with the First Protocol, the threshold age is 15 rather than 18, but there is no provision for 15- to 17-year-olds at all. Again, no distinction is made between compulsory and voluntary recruitment. An innovation is that Article 4(3)(c) applies equally to state and non-state armed forces. In general, international obligations apply only to states and their agents. Protocol II, however, attempts to regulate civil wars and similar armed conflicts and therefore, to be effective, must contemplate the behavior of non-state forces as well as government forces. In terms of the text of the provision itself, the obligation is absolute, and, notably, relates to direct and indirect participation in hostilities. However, the special protection for captured child soldiers only applies if they are participating directly in hostilities, creating an important gap in humanitarian law protection. Common Article 3, which uses much more general language, is potentially of greater value in protecting child soldiers if a generous interpretation of its requirements is made.

However, the threshold issues of the Protocol may limit the utility of Article 4(3)(c) in practice. Protocol II only applies, according to Article 1(1), where the conflict occurs in the territory of a state party to the Protocol, the state's own armed forces are involved, the non-state forces are under responsible command and those forces are capable of and in fact exercising territorial control so that they are capable of implementing the obligations under the Protocol. Furthermore, it is, in practice, necessary for the parties, both state and non-state, to acknowledge the applicability of the Protocol in order to implement its provisions successfully. Non-international armed conflicts may be complex, and it is often difficult to determine when the hostilities reach the stage of armed conflict. In addition, the requirement that the non-state forces control territory will have the effect of excluding many conflicts, at least in their early stages.[28]

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28 *Id*., 65–66, on the difficulties in applying Protocol II in the Philippines.

3. Convention on the Rights of the Child (1989)

Article 38

(1) States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.

(2) States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.

(3) States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavor to give priority to those who are oldest.

(4) In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by armed conflict.

The CRC follows Protocol I to the 1949 Geneva Conventions and therefore reduces the protection of children in non-international armed conflict compared with Protocol II, although Article 41 CRC contains a non-regression clause so states parties to both Protocol II and the CRC will still be bound by the higher standard.[29] This is reinforced by Article 38(1) CRC itself, which calls upon states to respect applicable international humanitarian law. In the case of Protocol II, the protection is higher, because it covers direct and indirect participation in hostilities and because it applies to non-state forces. Article 38 CRC clearly draws on the existing humanitarian law provisions, providing a bridge between humanitarian law and human rights law.[30] It is therefore important that unlike other human rights instruments, the CRC contains no derogation clause for times of public emergency, meaning that Article 38 applies equally during armed conflict and in the normal recruitment processes of peacetime. Article 38(4) could potentially be read as an obligation to ensure the rehabilitation and reintegration of child soldiers, but the specific reference to obligations relating to civilians would negate such an interpretation. As a result, it is not clear that Article 38, paragraph (4), adds much to paragraph (1), and it is less specific than Article 77 of Protocol I.

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29 On the background to Article 38 CRC, see Sheppard, *supra* note 21, at 43–44, and COHN & GOODWIN-GILL, *supra* note 25, at 68–69.

30 Sheppard, *supra* note 21, at. 42.

Therefore, by 1989, there was a clear agreement on excluding children from armed conflict up to age 15.[31] There was dissatisfaction with the CRC provision, notably because Article 38 CRC is the only provision of that Convention that stipulates an age for the end of childhood that is lower than 18, although it must be noted that Article 32 on child labor calls on states to set a minimum age for employment rather than to ban employment for children. Machel has argued that the fact that Article 38 CRC reflects, at least in part, the norms in the two 1977 Geneva Protocols demonstrates the complementarity of humanitarian law and human rights law.[32] Going further down this line of argument, Cohn and Goodwin-Gill argued that humanitarian law presumed an exclusion of all children from participation in armed conflict so that humanitarian law was useless unless accompanied by an age limit of 18 for participation in hostilities.[33] Furthermore, unless a recruitment ban was also imposed on under-18s, there would be no culture change in armed forces, and children would continue to be at risk of exposure to armed conflict.[34]

The Committee on the Rights of the Child, charged with monitoring implementation of the CRC, has been assisted in monitoring the implementation of Article 38 CRC by reports submitted by NGOs, UNICEF, the U.N. High Commissioner for Human Rights and the Special Representative on Children and Armed Conflict, particularly in respect of countries emerging from conflict, such as Sierra Leone and Colombia.[35] The monitoring is of course limited by the scope of the provisions of the CRC. In the case of Article 38, the problems have been noted above. The Committee on the Rights of the Child itself, spurred on by NGO critiques,[36] expressed dissatisfaction with the implementation of the rights of children in armed conflict as early as 1992 and the need to revise the norms on child soldiers to a more protective level than that provided by Article 38 CRC.[37] By 1994, the U.N. Commission on Human Rights decided to establish and open-ended inter-sessional working group to draft an optional protocol to the CRC on children in armed conflict.[38] In 1998, the Committee on the Rights of the Child adopted a General Recommendation on

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31 On the drafting history of Article 38 CRC, COHN & GOODWIN-GILL, *supra* note 25, at 72–74.

32 FIONA ANG, A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD: ARTICLE 38 12–13 (2006).

33 COHN & GOODWIN-GILL, *supra* note 26, at 147.

34 Sheppard, *supra* note 21, at 46.

35 Otunnu Report 2000, *supra* note 13, para. 42.

36 *See* Claire Breen, *The Role of NGOs in the Formulation of and Compliance with the Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflict*, 25 HUM. RTS. Q. 453, 461 (2003).

37 CRC/C/10, 2d Sess., paras. 61–77 (Oct. 5, 1992).

38 Breen, *supra* note 36, at 465.

Children in Armed Conflict, which expressed frustration with the inability of the working group on the draft CRC Optional Protocol to reach agreement on a consensus text. The General Recommendation again demonstrated the Committee's dissatisfaction with the content of Article 38 CRC[39] and with the political deadlock over the straight-18 rule in the working group:

> [The Committee]
>
> . . .
>
> 2. Recalls that the function of optional protocols is to promote the progressive development of international law by enabling those States that are willing to adopt more demanding standards to do so;
>
> 3. Reaffirms its belief that this new legal instrument is urgently needed in order to strengthen the levels of protection ensured by the Convention;
>
> 4. Stresses the special responsibility of States parties to the Convention on the Rights of the Child in the search for the most protective solutions, guided by the best interests of the child;
>
> 5. Recalls its major recommendation on the fundamental importance of raising the age of all forms of recruitment of children into the armed forces to eighteen years and the prohibition of their involvement in hostilities;
>
> 6. Also recalls that the adoption of the optional protocol will provide an opportunity for States parties that are in a position to do so, and them alone, to accept its provisions by ratification or adherence;
>
> 7. Expresses the hope that States that are not yet in a position to accept the eighteen-year age limit will not prevent the adoption of the optional protocol by other Governments;[40]

The CRC also recognizes the need for rehabilitation of children affected by armed conflict, which would include child soldiers, in Article 39 CRC:

> 39. States parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment that fosters the health, self-respect and dignity of the child.

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39 ANG, *supra* note 32, at 41–42, argues that the Committee has consistently applied a straight-18 approach despite the more limited rule in Article 38 CRC.

40 CRC/C/80, 19th Sess. (Sept. 1998).

4. African Charter on the Rights and Welfare of Children[41]

Article 22(3)

(1) States Parties to this Charter shall undertake to respect and ensure respect for the rules of international humanitarian law applicable in armed conflicts which affect the child.

(2) States Parties to the present Charter shall take all necessary measures to ensure that no child shall take a direct part in hostilities and refrain in particular, from recruiting any child.

(3) States Parties to the present Charter shall, in accordance with their obligations under international humanitarian law, protect the civilian population in armed conflicts and shall take all feasible measures to ensure the protection and care of children who are affected by armed conflicts. Such rules shall also apply to children in situations of internal armed conflicts, tension and strife.

Article 2 of the Charter defines a child as "every human being below the age of 18 years."

The African Charter was the first international law instrument to set 18 as the minimum age for recruitment and use of children in armed forces. Although the Charter only came into force in 1999, most African states had set 18 as the minimum age in their laws.[42] However, the CSC found that these laws have often not been applied fully, due to inadequacy of birth registration systems, failure of government-sponsored militias to apply to the law, use of military schools as a form of disguised recruitment, cross-border recruitment of children or exceptions for national emergency.[43] Most non-state forces do not apply the African Charter standards.[44] Countries that have attempted to move from conscript to volunteer professional armies have faced difficulties in retaining volunteers and have, as a consequence, often dropped the minimum age for volunteering.[45]

In addition to extensive protection in terms of minimum age for recruitment, Article 22(3) may extend the scope of states' obligations by applying to all internal conflicts, whereas Protocol II limits its application to internal conflicts where non-state forces are sufficiently organized to "carry out sustained and concerted military operations and to implement this Protocol."[46]

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41 OAU Doc. CAB/LEG/24.9/49 (1990), entered into force Nov. 29, 1999, *available at* http://www1.umn.edu/humanrts/africa/afchild.htm.

42 Global Report 2001, *supra* note 2.

43 *Id*.

44 *Id*.

45 *Id*.

46 Art. 1(2). *See* Happold, *supra* note 22, at 84–85.

5. Statute of the International Criminal Court (1998)

> *Article 8(2)(b)*
>
> For the purpose of this Statute, "war crimes" means:
>
> . . .
>
> (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:
>
> . . .
>
> (xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.[47]

Article 8(2)(e)(vii) applies the same prohibition to non-international armed conflicts.

The International Criminal Court (ICC) Statute, like the Geneva Convention Protocols and the CRC, set an age threshold of 15 for the recruitment of children. One advance in clarity is that there is no doubt here that the Statute does not distinguish between compulsory or voluntary recruitment ("conscripting or enlisting"). It also appears that no distinction is made between state or non-state forces, since there is a reference back to applicable international humanitarian law. Unlike the Geneva Convention Protocols and the CRC, the statute does not specify use of children in direct participation in hostilities as being the prohibited act. Therefore, presumably, both direct and indirect participation may be within the scope of the offence. Of course, the main point of the ICC Statute, and the main innovation, is the establishment of a framework for individual criminal responsibility for violation of international norms. The Statute of the Special Court for Sierra Leone also makes the conscription or enlistment of children under 15 a crime.[48]

This provision has been applied by the ICC in its investigations of the situation in Uganda. In 2005, warrants for the arrest of senior members of the Lord's Resistance Army (LRA) were unsealed, with a number of charges relating to the enlistment and abuse of children.[49] Requests have been made to

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47 A similar provision is contained in the statute for the Special Court for Sierra Leone; *see* Secretary-General's Report 2001, *supra* note 20, para. 64.

48 Article 4(c). On the background to Article 4, see HAPPOLD, *supra* note 22, 120–21.

49 Notably, Doc. No. ICC-02/04-01/05, Warrant of Arrest for Joseph Kony issued on July 8, 2005, as amended on Sept. 27, 2005. On Kony, see *After 20 Years on the Run, Africa's Enemy No. 1 says "'I'm Man of Peace,"* GUARDIAN UNLIMITED, May 26, 2005, *available at* http://www.guardian.co.uk/international/story/0,,1783372,00.html.

Sudan to arrest the accused.[50] However, the initiation of peace talks between the LRA and the Ugandan government has raised doubts about whether the prosecutions will go ahead after all.[51] Another investigation, relating to the Democratic Republic of Congo, is also likely to lead to charges of illegally enlisting children.[52]

6. ILO Convention No. 182 on the Worst Forms of Child Labor (1999)[53]

> *Article 3*
>
> For the purposes of this Convention, the term the worst forms of child labor comprises:
>
> (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 labor, including forced or compulsory recruitment of children for use in armed conflict[.]

Article 2 of the Convention sets out that the term "child" includes all persons under 18. C 182 therefore goes beyond the CRC and the Geneva Convention Protocols, but it only applies to forced or compulsory recruitment of children for use in armed conflict. Such use, however, is not restricted to direct participation in hostilities. The International Labor Organizaton (ILO) has defined a child soldier as "any person under 18 years of age who is part of any kind of regular or irregular armed force or armed group in any capacity, including but not limited to cooks, porters, messengers and those accompanying such groups, other than purely as family members. It includes girls recruited for sexual purposes and forced marriage."[54] It therefore, in its practice, does not distinguish between direct and indirect participation in hostilities.

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50 Doc. No. ICC-02/04-01/05-35-US-Exp 28-09-2005 1/8 SL, Request to the Republic of Sudan for the Arrest and Surrender of Joseph Kony, Sept. 27, 2005.

51 The Ugandan government now wants the warrants quashed; *see African Search for Peace Throws Court into Crisis*, GUARDIAN UNLIMITED, Jan. 9, 2007, *available at* http://www.guardian.co.uk/frontpage/story/0,,1986047,00.html.

52 HAPPOLD, *supra* note 22, at 120.

53 On the background to this provision, see Holly Cullen, *Child Labor Standards: From Treaties to Labels*, in CHILD LABOR AND HUMAN RIGHTS: MAKING CHILDREN MATTER 87 (Burns H. Weston ed., 2005); HAPPOLD, *supra* note 25, at 82–84.

54 ILO, International Program on the Elimination of Child Labor, *Fact Sheet, "New ILO Convention Outlaws Child Soldiers as Worst Form of Child Labor," available at* http://www.ilo.org/public/english/standards/ipec/about/factsheet/facts03pr.htm.

7. *Optional Protocol to the Convention on the Rights of the Child on Children in Armed Conflict (2000)*

As noted in Section B.3, Article 38 CRC had been criticized as being against the spirit of the CRC as a whole, given that it set 15 as the minimum age for recruitment of children into the armed forces rather than excluding all children as defined by Article 1 CRC. The Optional Protocol to the Convention on the Rights of the Child on Children in Armed Conflict (the CRC Optional Protocol) was the result of a long negotiating process. The intention was to develop the law progressively beyond the base of Article 38. Many participants in the negotiations sought a "straight-18" rule in the CRC Optional Protocol drafting process, particularly NGOs.[55] Despite a strong effort by NGOs and some states, the CRC Optional Protocol does not fully embrace the "straight-18" approach. Although ratifying states must increase the minimum age for compulsory recruitment to 18, they need only raise the minimum age for voluntary recruitment to an age higher than 15. Whether despite this compromise or because of it, the CRC Optional Protocol has attracted significant support from states. The Optional Protocol, opened for signature in 2000, came into force on February 12, 2002. The number of parties as of February 12, 2007 was 110.[56]

The provisions of the CRC Optional Protocol are quite detailed and worth setting out in detail. Provisions that relate to the procedure for reporting and other technical matters are not reproduced here.

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[55] *See* Sheppard, *supra* note 21; Breen, *supra* note 36.

[56] For details of ratifications see the Web site of the Office of the High Commissioner for Human Rights, *at* http://www.unhchr.ch/html/menu2/6/crc/treaties/status-opac.htm. The United Kingdom signed the Optional Protocol on September 7, 2000 and ratified it on June 24, 2003. The text of its interpretative declaration on Article 1 is included on the High Commissioner's Web page for declarations. The declaration states that:

> The United Kingdom of Great Britain and Northern Ireland will take all feasible measures to ensure that members of its armed forces who have not attained the age of 18 years do not take a direct part in hostilities.
>
> The United Kingdom understands that article 1 of the Optional Protocol would not exclude the deployment of members of its armed forces under the age of 18 to take a direct part in hostilities where:—
>
> a) there is a genuine military need to deploy their unit or ship to an area in which hostilities are taking place; and
>
> b) by reason of the nature and urgency of the situation:—
>
> i) it is not practicable to withdraw such persons before deployment; or
>
> ii) to do so would undermine the operational effectiveness of their ship or unit, and thereby put at risk the successful completion of the military mission and/or the safety of other personnel.

Article 1

States Parties shall take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities.

Article 2

States Parties shall ensure that persons who have not attained the age of 18 years are not compulsorily recruited into their armed forces.

Article 3

(1) States Parties shall raise the minimum age for the voluntary recruitment of persons into their national armed forces from that set out in article 38, paragraph 3, of the Convention on the Rights of the Child, taking account of the principles contained in that article and recognizing that under the Convention persons under 18 are entitled to special protection.

(2) Each State Party shall deposit a binding declaration upon ratification of or accession to this Protocol that sets forth the minimum age at which it will permit voluntary recruitment into its national armed forces and a description of the safeguards that it has adopted to ensure that such recruitment is not forced or coerced.

(3) States Parties that permit voluntary recruitment into their national armed forces under the age of 18 shall maintain safeguards to ensure, as a minimum, that:

(a) Such recruitment is genuinely voluntary;

(b) Such recruitment is done with the informed consent of the person's parents or legal guardians;

(c) Such persons are fully informed of the duties involved in such military service;

(d) Such persons provide reliable proof of age prior to acceptance into national military service.

(4) Each State Party may strengthen its declaration at any time by notification to that effect addressed to the Secretary-General of the United Nations, who shall inform all States Parties. Such notification shall take effect on the date on which it is received by the Secretary-General.

(5) The requirement to raise the age in paragraph 1 of the present article does not apply to schools operated by or under the control of the armed forces of the States Parties, in keeping with articles 28 and 29 of the Convention on the Rights of the Child.

Article 4

(1) Armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years.

(2) States Parties shall take all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalize such practices.

(3) The application of the present article under this Protocol shall not affect the legal status of any party to an armed conflict.

Article 6

(3) States Parties shall take all feasible measures to ensure that persons within their jurisdiction recruited or used in hostilities contrary to this Protocol are demobilized or otherwise released from service. States Parties shall, when necessary, accord to these persons all appropriate assistance for their physical and psychological recovery and their social reintegration.

Article 7

(1) States Parties shall cooperate in the implementation of the present Protocol, including in the prevention of any activity contrary to the Protocol and in the rehabilitation and social reintegration of persons who are victims of acts contrary to this Protocol, including through technical cooperation and financial assistance. Such assistance and cooperation will be undertaken in consultation with concerned States Parties and relevant international organizations.

(2) States Parties in a position to do so shall provide such assistance through existing multilateral, bilateral or other programs, or, inter alia, through a voluntary fund established in accordance with the rules of the General Assembly.

The Special Representative on Children and Armed Conflict, NGOs and some U.N. member states pressed for a comprehensive instrument on the basis of a "straight-18" rule—in other words, there should be a ban on all forms of recruitment and participation in hostilities by children under 18.[57] However, many states, including the United States and the United Kingdom, objected to this approach and wanted different ages for forced and voluntary recruitment. The United States, for example, argued that there was an existing consensus that 17 should be the minimum age and that this should be the basis for the Optional Protocol.[58] Ultimately, the Optional Protocol is not a "straight-18"

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57 Otunnu Report 2000, *supra* note 13, paras. 13–14.

58 Sheppard, *supra* note 21, at 53.

document, but is oriented towards a progressive raising of the minimum age from the limit of 15 set in Article 38 CRC. It is also worth noting that Article 2 moves away from the "all feasible measures" language of many of the earlier standards and imposes an absolute obligation not to recruit children under 18 compulsorily into state armed forces.

The CRC Optional Protocol does represent a progressive development in the standards relating to child soldiers, and it places child soldiers at the heart of the U.N. human rights agenda.[59] Nonetheless, Sheppard argues that the Optional Protocol has several weaknesses: it does not set a minimum age for indirect participation in hostilities, it exempts military schools from the minimum age requirement and it allows states to set a minimum age for voluntary recruitment as long as it is over 15.[60] Arguably, it is also a weakness that Article 3 sets out an incomplete obligation. It is completed by each state's declaration upon ratification. The clear majority of states that have ratified the Optional Protocol have set 18 (in a few cases, such as the Holy See and Monaco, higher) as the minimum age for voluntary recruitment.[61] Many of the states that have set 16 or 17 are Western states: Austria, Canada, Italy, Malta and New Zealand.[62] Non-Western states that have ratified the Optional Protocol but have set a minimum age of 16 or 17 under Article 3 include: Azerbaijan, Bangladesh, Cape Verde, El Salvador and Viet Nam.[63] Where the ratifying state sets a minimum age for voluntary recruitment of 16 or 17, it must also set out the measures it takes to ensure that the enlistment is genuinely voluntary. These declarations will obviously form the basis of the monitoring process by the Committee on the Rights of the Child on the Optional Protocol.

The CRC Optional Protocol also develops the obligations in relation to the reintegration and rehabilitation of child soldiers from the rather general obligation in Article 39 CRC. In international humanitarian law, there are provisions relating the protection of children, which can be applied, at least in some cases, to child soldiers.[64] In addition to the obligations in relation to reporting

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59 The Secretary-General included the CRC Optional Protocol in the list of core human rights treaties that he urged U.N. member states to ratify during the Millennium Assembly; Otunnu Report 2000, *supra* note 13, para. 15.

60 Sheppard, *supra* note 21, at 62.

61 There are also a few states, such as Iceland, which have no national armed forces. A declaration to that effect has been made upon ratification instead of a declaration of minimum age for voluntary recruitment; *see* the High Commissioner for Human Rights' Web site page for declarations and reservations on the Optional Protocol, *at* http://www.unhchr.ch/html/menu2/6/crc/treaties/declare-opac.htm.

62 *Id*.

63 *Id*.

64 *See* COHN & GOODWIN-GILL, *supra* note 25, at. 121–32. Some protective provisions only apply to civilians and therefore would not be available to child soldiers, who would

on implementation of the substantive rules in the CRC Optional Protocol, Articles 6 and 7 contain obligations in relation to repairing the damage caused to children deployed in armed conflict. Article 6(3) imposes a direct obligation on states to demobilize children recruited and used in contravention of the Optional Protocol and to provide assistance for rehabilitation and reintegration.[65] However, some of the terms in this provision, including the idea of demobilization itself, have not been defined.[66] Article 7 imposes a more indirect obligation of international cooperation and assistance to support the implementation of the Optional Protocol, including rehabilitation and reintegration. These obligations are similar to, but more precisely drafted than, the obligations of international cooperation contained in C 182.[67] The obligation in Article 7 could be among the most significant elements of the CRC Optional Protocol, particularly taking into consideration the fact that the duty to cooperate is an obligation of result.[68] Without international support and funding, work to rehabilitate and reintegrate child soldiers in states affected by armed conflict is unlikely to be successful. UNICEF's work with child soldiers in Sierra Leone was threatened by a lack of funding, as states' attention moved away from that conflict.[69]

In addition to treaty law, the United Nations has addressed the prohibition on child soldiers in its measures. The Security Council has begun to include reference to child protection in its statements. Notably, Security Council Resolution 1332 (2000), concerning the Democratic Republic of Congo, calls on all parties to the conflict to cease the recruitment and use of child soldiers.

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likely be considered combatants. In addition, Article 77 of the Geneva Protocol I requires that child soldiers (under 15) who are captured should be held separately from adult prisoners. While this does not guarantee protective measures, it should make it easier for any attempts to rehabilitate former child soldiers to identify them and, importantly, to prevent their rerecruitment. Article 4 of Geneva Protocol II sets out protective provisions that apply to all children, even child soldiers.

65 *See also* the reporting guidelines for this provision for an indication of the measures which states are expected to take, *at* http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CRC.OP.AC.1.En?Opendocument.

66 Tiny Vandewiele, A Commentary on the United Nations Convention on the Rights of the Child: Optional Protocol on the Involvement of Children in Armed Conflict 51 (2006).

67 In relation to child victims of trafficking and sexual exploitation, obligations of international cooperation relate primarily to criminal law matters: see Articles 6 and 7 of the CRC Optional Protocol on sale of children, child prostitution and child pornography, and discussion in Chapter 3.

68 Vandewiele, *supra* note 66, at 57.

69 "Peace process falters for child soldiers of Sierra Leone," UNICEF Press Release, July 22, 2003, *available at* http://www.unicef.org/media/media_12200.html.

Subsequent to this resolution, 165 child soldiers were handed over to UNICEF.[70] Normally, however, Security Council resolutions on specific conflicts have tended to refer more broadly to child protection concerns rather than the use of child soldiers in particular.[71]

C. *Is the Prohibition Customary?* [72]

After decades of silence on the issue of child soldiers, the international community has, in the past few years, demonstrated a rapid building of consensus around the issue. Noted below are agreements achieved through the intervention of the Special Representative on Children and Armed Conflict in situations of conflict to cease recruitment of child soldiers.[73] In addition to these examples are statements made in various international forums demonstrating the emergence of consensus around a ban on the recruitment and use of child soldiers. However, if there is, as a result of this state practice and evidence of *opinio juris*, a customary norm banning child soldiers, it is not one that reflects the sought-after straight-18 approach, despite the fact that a clear majority of countries set at least 18 as the minimum age for recruitment.[74] It is evident from the drafting of the CRC Optional Protocol and ILO C 182, that there is insufficient agreement that voluntary recruitment of older adolescents is a human rights violation. Even a ban on forced recruitment going up to age 18 is a recent development in the CRC Optional Protocol and ILO C 182, and it is not reflected in the ICC Statute. Any customary norm, therefore, only covers recruitment of the under-15s. Even the CSC has asserted that the standard minimum age of 15, as set out in Article 38 CRC, embodies customary international law, but nothing beyond that.[75]

There is, nonetheless, evidence to support such a limited customary norm. The Secretary-General, in his 2002 report to the Security Council on children in armed conflict, stated that a minimum age of 15 for recruitment of soldiers was "the widely accepted minimum international standard,"[76] and given the virtually universal ratification of the CRC, used the standard set out in Article 38 CRC as the "minimum international standard to which all Member States on the list [of conflicts in which child soldiers are being used] are held."[77]

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70 Secretary-General's Report 2001, *supra* note 47, para. 24.

71 *Id*.

72 A more detailed analysis of this issue can be found in HAPPOLD, *supra* note 22, at 87–99 and 124–32.

73 *See* notes 193–198, and accompanying text.

74 GLOBAL REPORT 2001, *supra* note 2.

75 CSC, *Optional Protocol Update*, CHILD SOLDIERS NEWSLETTER No. 5, at 1 (Sept. 2002).

76 Secretary-General's Report 2002, *supra* note 20, para. 31.

77 *Id*., para. 30.

The involvement of the Security Council in the child soldiers debate has been identified as a factor that contributed to the eventual success of the negotiations for the CRC Optional Protocol.[78] From 1998, the Security Council has paid attention to the issue of children in armed conflict as a distinct issue, holding its first debate on the subject in that year.[79] In 1999, the Security Council adopted Resolution 1261 (1999) on children affected by armed conflict. This Resolution included an exhortation to states to cease to recruit and to use child soldiers contrary to international law, and called for the demobilization and rehabilitation of child soldiers. This was followed by Resolution 1314 (2000), Resolution 1379 (2001) and Resolution 1460 (2003). In the debate leading to the adoption of Resolution 1379 (2001), the Security Council heard from a former child soldier from Sierra Leone.[80] Resolution 1379 (2001) requested the Secretary-General to compile a list of parties to armed conflict that recruit or use child soldiers. The CSC drafted a parallel report on the issue for the Security Council debate in December 2002.[81] Resolution 1460 (2003),[82] which follows on the Secretary-General's report requested in Resolution 1379 (2001), notably uses the language developed by the Special Representative on the need for an "era of application" now that the relevant international standards have been adopted and have come into force. In 2004 and 2005, the Security Council's efforts were directed to the development of a monitoring mechanism concerning the use of child soldiers and the establishment of a Working Group on Children and Armed Conflict.[83]

The Security Council resolutions express the emergence of the ban on child soldiers as an important human rights norm.[84] However, the scope of the norm within the resolutions reflects the state of the law pre-1999. Resolution 1261 (1999), for example, "calls upon all parties concerned to comply strictly with their obligations under international law, in particular . . . the Additional Protocols [to the 1949 Geneva Conventions] of 1977 and the U.N. Convention on the Rights of the Child of 1989" and "urges States and all relevant parts of the United Nations system to intensify their efforts to ensure an end to the recruit-

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78 Sheppard, *supra* note 21, at 58–59.

79 Otunnu Report 1998, *supra* note 20, paras. 104–106.

80 Otunnu Report 2002, *supra* note 14, para. 7.

81 CSC, CHILD SOLDIERS 1379 REPORT, submission to Security Council (2002).

82 S.C. Res. 1460, U.N. Doc. S/RES/1460 (Jan. 30, 2003).

83 S.C. Res. 1539, U.N. Doc. S/RES/1539 (Apr. 22, 2004); S.C. Res. 1612, U.N. Doc. S/RES/1612 (July 26, 2005).

84 For example, in the debates leading to the adoption of Resolution 1261, only the representative of China rejected the Security Council's jurisdiction to consider the issue of child soldiers; "Security Council strongly condemns targeting of children in situations of armed conflict, including their recruitment and use as soldiers," Press Release SC/6716 (Aug. 25, 1999).

ment and use children in armed conflict *in violation of international law*."[85] It refers to C 182, which bans forced recruitment of child soldiers up to the age of 18, only in the Preamble. Resolution 1314 (2000) has somewhat broader coverage and "urges all parties to armed conflict to respect fully international law applicable to the rights and protection of children in armed conflict, in particular . . . the Additional Protocols [to the 1949 Geneva Conventions] thereto of 1977, the United Nations Convention on the Rights of the Child of 1989 and the Optional Protocol thereto of 25 May 2000, and to bear in mind the relevant provisions of the Rome Statute of the International Criminal Court."[86] However, this statement could be seen as implying that the relevant international law provisions are only treaty based. Similarly, Resolution 1379, in its paragraph 16, seeks to monitor the use of child soldiers, in violation of the international law obligations that apply to each particular country participating in an armed conflict.[87] Resolution 1460 (2003), emphasizing application of norms, simply calls upon "*all parties to armed conflict*, who are recruiting or using children *in violation of the international obligations applicable to them*" to immediately cease doing so.[88] The rest of the Resolution constitutes expressions of support for the work of the Secretary-General and the Special Representative and pledges to work with them, including the integration of concerns about children into peacekeeping and the trade in small arms.

Despite the concern of the Security Council in general with the impact of armed conflict on children,[89] particularly the illegal recruitment and use of child soldiers, it has been less assiduous in mentioning children in resolutions on specific conflict situations. In a review of Security Council resolutions from August 2000–October 2002, the NGO Watchlist on Children and Armed Conflict found that of 75 country-specific resolutions on conflict situations, the Security Council only addresses issues of children's protection in nine.[90] Of these, four related to the Democratic Republic of Congo, four to Sierra Leone and one to Angola. The resolution relating to Angola, which referred to children, did not make any mention of child soldiers, while many of the other resolutions make explicit mention of illegal recruitment of children and the need to ensure the

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85 S.C. Res. 1261, U.N. Doc. S/RES/1261, paras. 3 and 13 (Aug. 30, 1999) (emphasis added).

86 S.C. Res. 1314, U.N. Doc. S/RES/1314, para. 3 (Aug. 11, 2000).

87 S.C. Res. 1379, U.N. Doc. S/RES/1379 (Nov. 20, 2001).

88 S.C. Res. 1460, U.N. Doc. S/RES/1460, para. 3 (Jan. 30, 2003) (emphasis added). In paragraph 8, it calls upon states to respect fully the relevant provisions of humanitarian law, but it does not mention human rights standards.

89 *See* the review of developments in the Security Council between 1997–2000; Otunnu Report 2000, *supra* note 13, para. 91.

90 Watchlist on Children and Armed Conflict, "Protecting Children: Implementation of UN Security Council Resolution 1379," Annex A (Jan. 2003).

reintegration and rehabilitation of former child soldiers.[91] As a result, it may be argued that Security Council practice is ambiguous in terms of support for a limited customary norm.

Regional and national bodies have also made statements accepting the binding character of at least a limited ban on child soldiers. The Inter-American Commission on Human Rights adopted a recommendation for eradicating the recruitment of children and their participation in armed conflicts in 1999, noting the developments in international law and the fact that most Organization of American States (OAS) member states had established a minimum age of 18 for recruitment of soldiers, although practice did not always live up to the law.[92] This was followed in 2000 by an OAS Summit Declaration on Children and Armed Conflict.[93] This Declaration was less explicit, calling generally on all parties to armed conflicts "to respect the provisions of international humanitarian law that protect children."[94] The Decision of the Organization of African Unity (now the African Union) of 1999 is even less satisfactory in terms of expressing a view about the current state of international law, urging member states "to adopt and promote norms in respective countries prohibiting recruitment and use as soldiers, children under 18 years of age."[95] The Commonwealth's Durban Communiqué of November 1999 also condemned the recruitment and use of child soldiers.[96]

While several Western states retain minimum ages for recruitment of 16 or 17, their statements have tended to support the idea of a binding international norm banning child soldiers at least to age 15.[97] The U.S. Congress in 1999 condemned the abduction and forced recruitment of children in Uganda and indicated its non-opposition to the adoption of an Optional Protocol to the CRC

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91 Not surprisingly, the Secretary-General has been more active in highlighting the needs of children in his work: of 74 reports on conflict situations between January 2001 and September 2002, 50 mentioned children, including 13 with separate sections on child protection issues: Watchlist 1379 report, *id*., Annex B.

92 Recommendation of Apr. 13, 1999, IACHR Annual Report 1999, ch. IV, *at* http://www.cidh.org/annualrep/99eng/Chapter6a.htm.

93 OEA/Ser.P, AG/RES. 1709 (XXX-O/00) (June 5, 2000), *at* http://www.oas.org/juridico/english/agres_1709_xxxo00.htm.

94 *Id*., para. 3.

95 Organization of African Unity, Council of Ministers, CM/Dec.482(LXX), Decision on the African Conference on the Use of Children as Soldiers, Algiers, Algeria, July 8–10, 1999.

96 Otunnu Report 2000, *supra* note 13, para. 34.

97 Cohn & Goodwin-Gill, *supra* note 25, at. 70. Note the acceptance by U.S. officials, as early as 1989, of the potential for Article 77 of the Geneva Protocol I to be customary law.

setting 18 as the minimum age for "participation in conflict."[98] The European Parliament, in 1998, adopted a resolution supporting a minimum age of 18 for both recruitment and deployment.[99] However, it must be noted that at that stage, only four European Union member states set 18 as a minimum age for recruitment.[100] Subsequently, the ACP-EU Assembly, established under the Lomé Convention framework, adopted a resolution on child soldiers.[101] In December 2003, the General Affairs Council of the Council of the European Union adopted Guidelines on Children Affected by Armed Conflict, intended to promote respect for the relevant international standards by the EU-led missions and by third countries and non-state actors.[102]

There is probably enough evidence to support the existence of a customary norm of international law that the recruitment and use of children under 15 as soldiers is contrary to international law. However, as Happold notes, the problem with establishing the existence of a customary norm is not so much with establishing a consistency of state practice, but rather the necessary *opinio juris*, or acceptance by states that the practice stems from a binding obligation under international law.[103] He ultimately resolves the question in favor of the existence of a customary norm banning the recruitment of children under 15. He does so through an examination of the *travaux preparatoires* of Article 77(2) of the First Additional Protocol to the Geneva Conventions, which attracted wide participation by states.[104] He argues that the acceptance of this provision by consensus suggests that the non-recruitment of children under 15 was considered the "lowest common denominator" and not subject to regression.[105] He further argues that Article 38 CRC can be seen as giving recognition to a rule of customary international law that pre-dated the treaty, and the only debate in the drafting process was whether the rule should be strengthened.[106]

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98 Appropriations for the Department of Defense for Fiscal Year 1999, Section 8128(a) of the Conference Report Accompanying H.R. 4103, *available at* http://www.hrw.org/campaigns/crp/congress.htm.

99 Resolution B4-1078, passed December 17, 1998, *available at* http://www.hrw.org/campaigns/crp/euro-parl.htm.

100 *Id*.: Belgium, Denmark, Spain and Sweden.

101 Otunnu Report 2000, *supra* note 13, para. 30.

102 *See* http://www.consilium.europa.eu/uedocs/cmsUpload/GuidelinesChildren.pdf. An implementation strategy for these guidelines was adopted in 2006; Council of the European Union, *Implementation Strategy for Guidelines on Children and Armed Conflict*, Doc. 8285/01/06 (Apr. 25, 2006).

103 HAPPOLD, *supra* note 22, 88–89.

104 *Id*., 89.

105 *Id*.

106 *Id*., 90.

The Special Court for Sierra Leone has also recently stated that the non-recruitment of children under 15 was a rule of customary international law but on the basis of the wide support for the relevant treaty provisions.[107] Rejecting a preliminary motion arguing that the Court had no jurisdiction to prosecute the defendant for the recruitment of child soldiers, because the alleged acts took place before the adoption of the Statute of the Special Court, and there was no international crime of child recruitment before that date, the Special Court was unanimous that a customary norm prohibiting the recruitment of children under 15 pre-dated the Statute. The review of state practice in the area was contributed largely by UNICEF and by the University of Toronto Human Rights Clinic, both of which participated in the proceedings. This practice included domestic legislation and wide ratification of the relevant treaties, and it noted the increasing tendency of non-state forces to commit themselves to the non-use of child soldiers. The Special Court did not discuss the issue of *opinio juris* as a separate issue from consistency of state practice.

Among international NGOs, a consensus around the straight-18 ban is clear, although this does not help to establish the existence of the customary norm. Several international conferences have issued statements supporting an international law ban on the recruitment and use of child soldiers, beginning with the consultations undertaken by Machel in the process of preparing her 1996 report.[108] Five major regional conferences organized by the CSC subsequently issued declarations supporting some form of ban on the use of child soldiers, usually the straight-18 ban:[109]

- Amman Conference on the Use of Children as Soldiers, April 2001;
- European Conference on the Use of Children as Soldiers, Berlin, October 1999;
- Latin American and Caribbean Conference on the Use of Children as Soldiers, Montevideo, July 1999;
- Asia-Pacific Conference on the Use of Children as Soldiers, Kathmandu, May 2000;
- African Conference on the Use of Children as Soldiers, Maputo, April 1999.

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107 Prosecutor v. Sam Hinga Norman, Case No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), paras. 17–24 (May 31, 2004) [hereinafter *Norman*]. On the debate on the particular difficulties of establishing a customary norm of international law in the area of human rights, see Chapter 2.

108 Machel Report, *supra* note 8, Annexes I–VII.

109 The statements may be found on the CSC Web site, *at* http://www.child-soldiers.org/resources/themed-reports?root_id=158&category_id=162.

In addition, the Assembly of the World Council of Churches issued its Statement on Child Soldiers, in Harare, in December 1998, in similar terms.[110]

The consequences of a customary rule may not be significant at first glance, given that all states except the United States and Somalia have ratified the CRC and are therefore bound by a treaty rule setting minimum age for recruitment and use of child soldiers at 15. However, it could be relevant in refugee law. It has been argued that, as a result of the state of international law on child soldiers, child asylum-seekers under 15 who are fleeing military service or the possibility of it should be granted asylum.[111]

A related problem to the establishment of the customary norm itself is the question of whether recruitment of children under 15 is a crime at international law. The Special Court for Sierra Leone in *Prosecutor v. Sam Hinga Norman* was unanimous in accepting that there was a customary norm on non-recruitment of children under 15 but disagreed as to whether it constituted a crime at customary international law. The majority were of the view that recruitment of children constituted a crime at customary international law at the relevant time. They relied again on provisions of widely ratified international treaties and on Security Council resolutions and statements by the U.N. Secretary-General, in particular relying on interpretations of common Article 3 of the 1949 Geneva Conventions.[112] They argued that in the drafting process for the ICC Statute, states did not believe that they were creating a new crime.[113] There was some state practice of criminalizing child recruitment before the ICC, but most states had only done so after ratifying the ICC Statute.[114]

Justice Robertson, dissenting, argued that the majority was, in essence, relying on the same materials to establish the existence of a crime as it had in establishing the customary norm, whereas these should be entirely separate processes.[115] He also argued that only some examples of child recruitment, involving force or threats, could be considered a crime within common Article 3 of the 1949 Geneva Conventions, not voluntary recruitment.[116] He was less willing than the majority to accept widely ratified human rights treaties as sup-

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110 World Council of Churches, 8th Assembly, Harare, Dec. 3–14, 1998, Statement on Child Soldiers, *at* http://www.wcc-coe.org/wcc/assembly/child-e.html.

111 Michael S. Gallagher, *Soldier Boy Bad: Child Soldiers, Culture and Bars to Asylum*, 13 Int'l J. Refugee L. 310 (2002)

112 *Norman, supra* note 107, paras. 28–51.

113 *Id*., para. 33.

114 *Id*., paras. 45–48. The majority relied on some non-specific criminal offenses in addition to states, such as Ireland and Norway, which had adopted specific criminal offenses.

115 *Id*., paras. 10, 20, 32–33, dissenting opinion of Justice Robertson.

116 *Id*., para. 4 of the dissent.

porting the existence of an international crime and was of the view that only specific criminalization of child recruitment should be counted towards the existence of a consistent state practice.[117] Happold supports this dissenting view, although he argues that even the more limited crime recognized by Justice Robertson does not fall within the scope of common Article 3 of the 1949 Geneva Conventions.[118] However, the wide acceptance of the ICC Statute (139 signatories, 104 ratifications),[119] coupled with the fact that, as noted by Justice Robertson himself, states parties are increasingly adopting legislation to criminalize child recruitment as a consequence of ratification of the Statute, would tend to indicate that the customary law position of the crime of child recruitment is now more secure.

D. Problems in Defining the Scope of the Prohibition

Even where international treaty norms, rather than customary norms, are relied upon, there can be definitional problems in relation to the prohibition on the use and recruitment of child soldiers. There are different levels of the prohibition. First, and most narrow, is a ban on forced recruitment or conscription to the armed forces before age 18—even narrower is a ban only on sending underage soldiers into battle. Second, there may be a ban on all recruitment, whether forced or voluntary, of those under 18. Finally, there may a be a ban not only on recruitment of children into state armed forces but an obligation to ensure that non-state forces do not recruit children, including that such recruitment be made a criminal offense.

As is evident from the review of international treaty provisions above, the definition of "child" for the purposes of norms concerning child soldiers does not always include all persons under 18. Until ILO C 182, international law only banned the use of soldiers under the age of 15. The CRC's use of 15 as the minimum age for recruitment into the military was an exception to its general rule that childhood ends at 18. The Optional Protocol largely, but not entirely, eliminates that exception for its states parties. The problem of the lower minimum age is exacerbated by the fact that many states have poor or non-existent birth registration systems, making it virtually impossible to ascertain the true age of a young soldier, particularly if the military authorities have belatedly "registered" the child as being 18.[120] In Sub-Saharan Africa, it is estimated that 71 percent of births are not registered, and in South Asia 56 percent are not

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117 *Id*., paras. 33–44.

118 HAPPOLD, *supra* note 22, at 131–32.

119 *See* Multilateral Treaties Deposited with the Secretary General, *at* http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty11.asp.

120 *See* Machel Report, *supra* note 8, para. 36.

registered.[121] With no birth registration, those attempting to monitor compliance with international law must rely on the apparent age of the children. Inevitably, it is difficult to challenge an assertion that a child has met the relevant age if they appear to be within a couple of years of the age. As a result, a ban on under-18s may in fact only catch those over 15, and a ban on under-15s may not catch children as young as 12.[122]

1. Armed Conflict

The limitation of international humanitarian law is that it applies only in the event of armed conflict, unlike the international human rights or international labor law instruments, which address the issue of recruitment in peacetime as well. Article 1(2) of Geneva Protocol II stipulates that "This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts." The result of this exclusion is that there are many low-intensity conflicts that fall entirely outside international humanitarian law, preventing the application of the relatively strict provisions of Article 4(3) of Geneva Protocol II.[123]

Article 1 of the CRC Optional Protocol also appears to require the existence of an armed conflict, despite arguments made by some NGOs during the drafting process for the use of the term "hostilities" instead.[124] The advantage of this term is that it is broader and does not yet have a clear international law definition. In internal conflict situations, the question of the existence of an armed conflict may be highly debatable. For example, the Intifada in the Occupied Territories may or may not be an armed conflict, and the children involved may or may not be considered as taking part in hostilities.[125] In 1998, the government of the Federal Republic of Yugoslavia objected to the visit of the Special Representative for Children and Armed Conflict on the ground that the situation in Kosovo was not one of armed conflict, but rather of terrorism committed by the Kosovo Liberation Army.[126]

A related definitional issue is that of who are the "parties" to the armed conflict. In some contexts, such as Geneva Protocol I, it appears that the term

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121 UNICEF, *State of the World's Children 2003*, at 76 (2002).

122 Global Report 2001, *supra* note 2.

123 Cohn & Goodwin-Gill, *supra* note 25, at 149; this point has been made, in particular, by Theodor Meron, in *On the Inadequate Reach of Humanitarian Law and Human Rights Law and the Need for a New Instrument*, 77 Am. J. Int'l L. 589 (1983).

124 Breen, *supra* note 36, at 467.

125 Veerman & Levine, *supra* note 12.

126 Otunnu Report 1998, *supra* note 20, para. 85.

"parties to the armed conflict" refers to states, since that treaty concerns itself with international armed conflicts. It must be remembered, however, that some international armed conflicts will have an internal dimension as well, involving non-state forces. In Security Council Resolution 1379, paragraph 16, however, both the Secretary-General and the CSC have interpreted "parties" as including non-state forces.[127] This approach has also been followed by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor v. Tadic*, where armed conflict was held to include "resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State."[128] However, the decision in *Tadic* also demonstrates the difficulty of distinguishing between international and internal (or non-international) armed conflicts, in that the Appeals Chamber decided that some parts of the conflict in the former Yugoslav territory were international and others internal.[129] The context of each legal provision will therefore have to be considered. If non-state forces are included, then difficult issues of international law are raised. These are discussed in Section D.4.

2. Direct Versus Indirect Participation in Hostilities

The Special Representative for Children and Armed Conflict has noted the various ways in which child soldiers are deployed in hostilities: combatants, cooks, messengers, porters, mine clearance, spying and suicide bombing.[130] The CSC, following the practice of the Secretary-General, considers the following to be covered by the prohibition: "both direct participation in combat and also active participation in military activities linked to combat such as scouting, spying, sabotage and the use of children as decoys, couriers or at military checkpoints [but not] activities clearly unrelated to the hostilities such as food deliveries to an airbase or the use of domestic staff in an officer's married accommodation."[131] All of these activities are clearly of use to armed groups in the context of armed conflict.

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127 S.C. Res. 1460, U.N. Doc. S/RES/1460, para. 3 (Jan. 30, 2003) again uses the phrase "all parties to armed conflict" should cease recruiting and using child soldiers in contravention of international law, whereas paragraph 8 calls upon states specifically to respect fully the provisions of humanitarian law applicable to the protection of children in armed conflict.

128 Prosecutor v. Tadic, IT-94-1-R, Decision on Defense Motion for Interlocutory Appeal on Jurisdiction, para. 70 (Oct. 2, 1995).

129 See discussion by Christoper Greenwood, *International Humanitarian Law and the Tadic Case*, 7 EUR. J. INT'L L. 265 (1996).

130 Otunnu Report 1998, *supra* note 20, para. 19.

131 GLOBAL REPORT 2001, *supra* note 2.

However, the tendency of the international legal provisions on child soldiers is to distinguish between direct and indirect participation in hostilities and to prohibit only the former.[132] Nonetheless, it is worth noting that the use of the term "hostilities" rather than "armed conflict" does result in a broader scope than might otherwise be the case if the latter term had been used.[133] Article 1 of the CRC Optional Protocol prohibits children under 18 from taking direct part in hostilities. However, it was impossible to achieve consensus on what counts as direct participation.[134] Presumably, direct participation in hostilities is broader than being a combatant within the meaning of international humanitarian law.[135] The Committee on the Rights of the Child's reporting guidelines for the Optional Protocol, however, suggest that states have some discretion on how "direct participation in hostilities" is defined.[136] Of the list of activities provided by the Special Representative, combat, spying and suicide bombing would probably be uncontroversially considered as direct participation.[137] Mine clearance would be more problematically direct participation, but it still involves direct exposure to harm. Acting as cooks, messengers or porters and, in the case of girls, as so-called camp followers (a euphemism for sexual slavery),[138] may not directly contribute to the killing of the enemy, but it contributes to the effectiveness of armed forces and may put children in circumstances of physical danger.

The line, therefore, between direct and indirect participation is difficult to determine. If the basis of prohibiting the participation of children in a military activity is to prevent their exposure to danger beyond that which would be experienced by any civilian in the location of hostilities, then there are several activ-

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132 This goes back to Article 43(2) of the first Additional Protocol of 1977.

133 See VANDEWIELE, *supra* note 66, at 22.

134 Sheppard, *supra* note 21, at 50. Breen, *supra* note 36, at 467, notes that the Friends World Committee argued for the deletion of the word "direct" from the draft Article 1 of the CRC Optional Protocol. The restriction of the scope of this article to direct participation is therefore the result of a compromise; *see* VANDEWIELE, *supra* note 66, at 21.

135 The Friends World Committee argued during the drafting process that the effect of the CRC Optional Protocol, by allowing voluntary recruitment at ages 16–17, but prohibiting direct participation in armed conflict, created an ambiguous category of members of the armed forces who are not entitled to be combatants, which would have the effect of undermining the fundamental distinction in international humanitarian law between civilians and combatants; *see* Breen, *supra* note 36, at 478.

136 VANDEWIELE, *supra* note 66, at 23–24.

137 *Id*., 24–25, states, on the contrary, that the majority of academic opinion would consider spying indirect participation, but that UNICEF does include it.

138 On the abuses faced by girls recruited by armed forces, see "Girls with Guns: An Agenda on Child Soldiers for 'Beijing Plus Five'," CSC briefing, *at* http://www.essex.ac.uk/armedcon/story_id/000050.pdf.

ities beyond active combat that should be prohibited. Merely being present at a military base may be sufficient to render children a legitimate military target.[139] As a result, the best way of defining direct participation in hostilities would be to include as a form of direct participation *any activity* that might make a child a legal target for enemy military force, *regardless of the legality of such targeting*. This would, in practice, include most forms of indirect participation, including domestic duties such as cooking.

The distinction between direct and indirect participation in hostilities is therefore virtually impossible to draw if the goal is to ensure the protection of children caught up in armed conflict. Not surprisingly, some commentators have indeed argued for no distinction to be made. Sheppard argues that in a situation of emergency, the temptation will always exist to use all military resources available, including child recruits, and further that any participation of children is likely to create a situation of danger for all children; even those not part of the armed forces.[140] Although in some important respects, ILO C 182 is narrower in its protection than the CRC Optional Protocol, it does not distinguish between direct and indirect participation in hostilities. The International Program on the Elimination of Child Labor (IPEC) is of the opinion that C 182 bans the use of child soldiers "in any capacity, including but not limited to cooks, porters, messengers and those accompanying such groups, other than purely as family members."[141]

One problem that emerged in the drafting of both the CRC Optional Protocol and ILO C 182 was military schools. Once Article 3(a) of C 182 was limited to forced recruitment, the problem ultimately disappeared.[142] In the case of the CRC Optional Protocol, an exception to Article 3 on increasing the age for voluntary recruitment was drafted. Article 3(5) states that "The requirement to raise the age in paragraph 1 of the present article does not apply to schools operated by or under the control of the States Parties, in keeping with articles 28 and 29 of the Convention on the Rights of the Child."[143]

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139 *See* Breen, *supra* note 36, at 471.

140 Sheppard, *supra* note 21, at 51–52. She notes that Human Rights Watch has advanced similar arguments.

141 International Program on the Elimination of Child Labor, Fact Sheet, supra note 64.

142 Report IV (2A), *Child Labor*, 87th Sess., International Labor Conference (1999); *see, e.g.*, comments from the employer group from Canada and the government of Ecuador. The United Kingdom and the United States, among others, objected to the inclusion of children in the armed forces in the Convention at all, and other states argued for a broader drafting to cover all use of children in "military activities." The restrictive drafting, covering only forced and compulsory recruitment, represented a compromise between these two views.

143 CRC Articles 28 and 29 deal with the right to education.

A further complication is that some instruments do not use the term direct participation, but rather "active" participation. This broader, term is used in common Article 3 of the 1949 Geneva Conventions, and notably in the ICC Statute.[144] Although the term is not fully defined in the Statute, Happold suggests that active participation may cover all forms of participation, both direct and indirect.[145]

The less detailed provisions in international humanitarian law are, in some respects, more protective than the Optional Protocol. Article 4(3)(c) of the second Additional Protocol of 1977 prohibits all participation of children under 15 in hostilities. A similar prohibition only applies to non-state forces under Article 4 of the Optional Protocol.

3. Recruitment

Usually, the term "recruitment" refers to all forms of securing the membership of an individual in the armed forces. However, in some instruments, such as the CRC Optional Protocol, different provisions apply to compulsory and voluntary recruitment. The CSC suggests that compulsory recruitment should be divided further into compulsory recruitment, which refers primarily to conscription, and forcible recruitment, which refers to the use of force outside the law such as abduction.[146] This distinction may be derived from Article 3 of C 182, which mentions both forced and compulsory recruitment.

The two Geneva Protocols refer to "recruitment" only of child soldiers, unlike the CRC Optional Protocol, which deals with compulsory and voluntary recruitment in separate articles, and Article 3(a) of ILO C 182, which clearly mentions only forced recruitment. Because the 1949 Geneva Convention IV distinguishes between recruitment and voluntary enlistment, there has been some dispute as to whether the two Geneva Protocols include both forced and voluntary recruitment in their prohibitions.[147] Many states, including the United Kingdom, have a minimum age of 18 for conscription but allow voluntary enlistment at an earlier age, so there is some state practice supporting a clear distinction between recruitment (compulsory) and enlisting (voluntary). However, it has also been argued that the ordinary meaning of the term recruit does not permit such a distinction between compulsory and voluntary recruitment.[148]

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144 HAPPOLD, *supra* note 22, at 97–98.

145 *Id*.

146 CSC, 1379 report, *supra* note 81, at 7.

147 Sheppard, *supra* note 21, at 49–50; Justice Robertson, in his dissenting opinion in *Norman, supra* note 107, para. 27, was of the view that the term "recruitment" in Additional Protocol II of 1977 covered only methods of joining which involved some force or pressure.

148 HAPPOLD, *supra* note 22, at. 64–65.

Similarly, Ang argues that Article 38 CRC covers all forms of recruitment whether compulsory or voluntary.[149]

Furthermore, as with the distinction between direct and indirect participation in hostilities, NGOs have challenged the arguments made by states that recruit under-18s on a voluntary basis that these younger soldiers will not be exposed to hostilities until they are adults. In practice, Human Rights Watch and others have argued that under-18s are put in situations where they may be targeted even if they are not combatants.[150]

In the drafting process of the CRC Optional Protocol, there was much discussion of voluntary recruitment of children under 18. The Working Group on the Optional Protocol was of the view that it was difficult to ensure that parental consent in such circumstances was genuine and that it took into account the child's best interests, which is a fundamental principle of the CRC under its Article 3.[151] Of course, when considering the fundamental principles of the CRC, one must also consider Article 12, which requires that children be permitted to express their opinions on matters concerning them, and that such opinions must be taken into account according to the age and maturity of the child. In implementing this principle of participation, it seems odd to discount the views of children as old as 16 or 17 entirely, as the "straight-18" rule would do. Advocates of the "straight-18" rule, therefore, must acknowledge that they are operating on the basis of a theory of children's rights based solely on children's welfare, not their agency.[152] Nonetheless, all of the main actors in the field, including the Special Representative for Children and Armed Conflict, advocate the straight-18 rule. The Special Representative, however, does argue for the importance of child participation in such issues as rehabilitation of former child soldiers, as has the Secretary-General.[153]

The justification for taking this strict child welfare approach derives from two lines of argument. First, the harm suffered by child soldiers is so overwhelming that no act of consent could possibly be in the child's best interest, and therefore the views of the child, regardless of age, are to be given little if any weight.[154] The second line of argument is that there is rarely, if ever, true

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149 Ang, *supra* note 32, at 47–51.

150 Sheppard, *supra* note 21, at 56.

151 *Id*., 50.

152 *But see* Jenny Kuper, *Children and Armed Conflict: Some Issues of Law and Policy. in* Revisiting Children's Rights: 10 Years of the United Nations Convention on the Rights of the Child 105 (D. Fottrell ed., 2000), who argues that although the prohibition on child soldiers emphasizes "child saving" that it is consistent with guaranteeing rights of participation in related areas.

153 Secretary-General's Report 2000, *supra* note 6, para. 43.

154 *See* Otunnu Reports, *supra* notes 6, 13, 14, 19 and 20. This statement is an extrapolation of statements made by the Special Representative in his reports.

informed consent by a child to become a soldier. The CSC appears to argue that child agency is rarely, if ever, an appropriate or relevant way of looking at the issue.[155] It argues that there is no clear distinction between voluntary and compulsory recruitment. In addition, the CSC argues that the voluntary recruitment of children is problematic where the children recruited have few other educational or employment options.[156] There is some support for this argument in the fact that there was no evidence of the use of child soldiers in Kosovo, where although the distribution of educational opportunities discriminated against the Kosovo Albanians, there were good opportunities compared with many other conflict-ridden areas.[157] The practice, therefore, of many developed countries, to recruit partly on the basis of the provision of education and training opportunities, is regarded as inappropriate when directed towards the under-18s. This position is, however, problematic when coupled with the fact that the school-leaving age in most developed countries is 16.

This is reinforced by Article 26 of the ICC Statute, which provides that "The Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime," thus excluding child soldiers from prosecution for crimes under the ICC Statute, although since the ICC operates under a principle of complementarity of jurisdiction, there is nothing to prevent individual states from prosecuting child soldiers for such crimes if the age of criminal responsibility is lower in that state, and it is in a position to take jurisdiction over the crime.[158] This has been the case in the context of the U.S. detention of "illegal combatants" at its prison camp in Guantanamo Bay, Cuba. In April 2003, the U.S. government admitted that it was holding an unspecified number of persons under 18.[159] Following numerous protests by states and NGOs, it was announced that several under-18s would be among those released, although it is not clear whether this constituted all the child soldiers originally detained.[160] U.S. Defense Secretary Donald Rumsfeld denied

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155 In its GLOBAL REPORT 2004, *supra* note 1, at 20, it is argued that children who join armed forces voluntarily often have little choice in practice.

156 The Special Representative for Children and Armed Conflict has made similar arguments; *see* Otunnu Report 2002, *supra* note 14, paras. 17–19.

157 Otunnu Report 1998, *supra* note 20, paras. 96–97; Otunnu Report 1999, *supra* note 20, para. 112. Support for the contrary position, however, may be found in the fact that child soldiers were also not in evidence in Ethiopa or Eritrea, both very poor countries; Otunnu Report 2002, *supra* note 14, paras. 23 and 25.

158 There are no binding international human rights provisions concerning the minimum age for criminal responsibility. The European Court of Human Rights in *T v. United Kingdom*, 30 E.H.R.R. 121 (2000), simply stated that the age must not be set too low.

159 *US Detains Children at Guantanamo Bay*, GUARDIAN, Apr. 23, 2003, *available at* http://www.guardian.co.uk/international/story/0,,941875,00.html.

160 *Pentagon to Release Child Prisoners*, GUARDIAN, May 6, 2003, *available at* http://www.guardian.co.uk/international/story/0,,950134,00.html.

that the detainees, although under 16, should be considered children.[161] It is not clear whether the child detainees were held with the intention of ultimately prosecuting them, or interrogating them for intelligence or other purposes.

Child soldiers, therefore, are seen by international law as victims to be protected. This is reinforced by the obligations in Article 39 CRC and Article 6 of the Optional Protocol. It is possible that, as part of rehabilitation, former child soldiers may be encouraged to take some form of responsibility for their actions, but the trend in international law is to exclude their legal responsibility. National regimes of war crimes tribunals, such as that in Rwanda, may diverge from this. The Special Court for Sierra Leone has jurisdiction over anyone who was at least 15 at the time of the alleged offense.[162] This approach is controversial,[163] but, arguably, for older children, taking responsibility for their actions may be a valid part of their rehabilitation and reintegration.[164] It is worth noting that, in practice, no indictments have been issued concerning crimes committed while a child.[165] In Rwanda, 5,000 minors were detained for prosecution for war crimes including genocide. However, over a five-year period, only 28 were sent for trial.[166] Although UNICEF had provided legal advice to over 1,000 children over the age of criminal responsibility, few children had been processed, and few children under the age of criminal responsibility had been given the necessary documentation for their release nor given any support for reunion with their families.[167]

While the issue of voluntary recruitment has been the more controversial in terms of drafting international legal instruments, the issue of forced recruitment of children is still a serious one. One of the worst examples is the abduction of children in Uganda and Sudan for use in armed conflict.[168] Abduction of children has taken place in the context of several conflicts, and children in refugee camps are particularly vulnerable.[169] The creation of large numbers of refugees is a characteristic of most internal armed conflicts, leading to children's greater vulnerability to recruitment, including forced recruitment into armed groups.

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161 *Id*.

162 Secretary-General's Report 2001, *supra* note 47, para. 66. However, in such cases, if conviction results, imprisonment is not available as a sentence.

163 Generally, see HAPPOLD, *supra* note 22, ch. 9.

164 Otunnu Report 2001, *supra* note 19, paras. 24–27.

165 HAPPOLD, *supra* note 22, at 151.

166 Otunnu Report 1999, *supra* note 20, para. 91.

167 Secretary-General's Report 2000, *supra* note 6, para. 65.

168 Otunnu Report 1998, *supra* note 20, paras. 73–74; Otunnu Report 1999, *supra* note 20, para. 104; Otunnu Report 2001, *supra* note 19, para. 82.

169 Secretary-General's Report 2001, *supra* note 47, paras. 44–48.

4. Non-State Forces

The majority of armed conflicts in recent years have been internal armed conflicts. This means that parties to an armed conflict of this nature will include non-state armed groups. In practice, these groups have to be treated similarly to government forces in many contexts. As the Secretary-General has noted, "Because non-state armed groups may exercise de facto control over areas of territory where population groups are in urgent need of humanitarian assistance, negotiating humanitarian access with these armed groups has become integral to the work of humanitarian agencies."[170] Similarly, it is necessary to recognize that such groups may be recruiting and using child soldiers. Without focusing on non-state as well as government forces, it is impossible to ensure full implementation of prohibitions on the recruitment and use of child soldiers. International criminal law proceedings relating to the illegal recruitment of child soldiers have, to date, only been instituted against leaders of non-state forces.[171]

There is a particular problem with banning recruitment by non-state forces while allowing states to recruit children voluntarily. The problem is conceptual in that human rights law is conventionally thought of as addressed only to human rights violations by states. However, increasingly, states may be held responsible for failing to prevent or to remedy violations committed by non-state armed forces. Until recently, it was necessary to link a human rights violator to the state in order to engage the state's responsibility under international human rights law. This requirement has gradually been eroded, particularly in respect of the right to be free from torture and inhuman or degrading treatment. More recent case law of international human rights implementation bodies has moved the barriers and makes states responsible, at least to some extent, for preventing or remedying the violations of non-state actors.

This broader approach of international human rights bodies arises from the breaking down of the clear distinction between positive and negative duties of states to implement human rights. Negative duties are usually understood as requiring the state from abstaining from interference in the exercise of rights, whereas positive duties involve action by the state to secure rights, whether through the provision of goods or facilities necessary for the realization of the right or by preventing infringements by others. In more recent literature,[172] instead of a two-fold division into positive and negative duties, we now see a threefold division into:

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170 Secretary-General's Report 2002, *supra* note 20, para. 17.

171 *See Norman, supra* note 107 and ICC arrest warrant for Joseph Kony, *supra* note 49.

172 For further discussion of this schema of implementation, see *Introduction*, IMPLEMENTING THE CONVENTION ON THE RIGHTS OF THE CHILD: RESOURCE MOBILISATION IN LOW-INCOME COUNTRIES (James Himes ed., 1995).

- The duty to *respect* the right—the duty of a state not to interfere with the exercise of the right;
- The duty to *protect* individuals against violation of their rights—the duty of a state to prevent or to investigate and punish interference with the right by others;
- The duty to *fulfill* the right—the duty to ensure the full enjoyment of all aspects of the right.

What used to be grouped together under positive duties is now divided into protecting and fulfilling, which are very different duties. The duty to respect the right arises in the duty of states not to recruit child soldiers into their own forces. It is the duty to protect against violations that would require states to have systems in place to prevent or to punish the use of child soldiers by non-state forces. However, the duty to fulfill is implicated in the right of children not to be used in armed conflict situations, particularly when considering the need to provide rehabilitation for children used as soldiers.

Another way of thinking about the obligation of states to stop non-state forces from using child soldiers can be seen in Henry Shue's idea of default duties.[173] These are subsidiary duties falling on the international community in general if the state or other body that is supposed to guarantee human rights for particular individuals fails in its primary duty. In such circumstances, duties may fall not only on the state in which the armed conflict takes place, but on other states, particularly those that are in a position to offer asylum to former child soldiers and states undertaking peacekeeping duties in a state where there has been an armed conflict.

In some respects, the inclusion of responsibility for non-state forces in Article 4 of the CRC Optional Protocol reflects an emerging trend in the determinations of international human rights bodies. These bodies have held states responsible for remedying violations committed by non-state actors, even outside the territory of the state. At present, this reasoning has only applied in cases involving torture or inhuman and degrading treatment, but it is by now a significant development that cannot be restricted to the facts of specific cases.[174] The question, therefore, is how far this reasoning can be extended within the context of particular human rights norms and systems. Of course, the CRC does not yet have an individual petition system, so it is not possible to talk about "cases" in that sense. However, in other contexts, such as the ILO, it is worth considering whether complaints may be made against states for failure to prevent or to remedy the forced or compulsory recruitment of child soldiers by non-state forces.[175]

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173 Henry Shue, Human Rights (1996).

174 R. McCorquodale & R. LaForgia, *Taking Off the Blindfolds: Torture by Non-State Actors*, 1 Hum. Rts. L. Rev. 189 (2001).

175 For a discussion of the complaints mechanisms in the ILO system, see Chapter 6.

These cases have extended the obligations of states from purely negative obligations, or the "respect" aspect of the trilogy of obligations noted above, to positive, protective obligations.[176] Although as early as *Soering v. United Kingdom*,[177] the European Court of Human Rights had recognized a limited obligation on states parties to the European Convention on Human Rights (ECHR) to prevent inhuman and degrading treatment by other states, there was still uncertainty as to whether or not this would apply where the source of the potential violation was a non-state actor. What *Soering* did establish was that states could be responsible in international human rights law, not just for acts committed by themselves and their officials, but for failing to protect individuals from violations outside the direct control of the state. The reasoning in *Soering* applied to cases of extradition but was extended to general deportation situations in *Ahmed v. Austria*,[178] and *Chahal v. United Kingdom*.[179] Finally, the protection was extended to situations where the individual was at risk, if returned to the country of origin, from non-state actors in *HLR v. France*.[180] This approach has been followed by the Committee against Torture in *Elmi v. Australia*,[181] where the Committee decided that torture includes acts by groups in *de facto* control of territory, as was the case with armed groups in Somalia.[182] Australia would therefore be in violation of its obligations under the Torture Convention if it were to deport the applicant back to Somalia, where he would be at risk from an armed group in control of part of the territory of Somalia. The approach of the Committee against Torture was, of necessity, narrower than that of the European Court of Human Rights. Article 1 of the Torture Convention requires that the acts amounting to torture must be committed by "public officials or other persons acting in an official capacity." No similar phrase occurs in Article 3 ECHR, which allows the European Court of Human Rights to prohibit depor-

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176 The European Court of Human Rights has, however, in *D. v. United Kingdom*, 24 E.H.R.R. 423 (1997), taken the obligation to protect an individual from violations by others to the point where the obligation takes on the quality of fulfilling the right. In *D* the applicant was in the final stages of AIDS and, if deported, would have been deprived of medical care to the extent that such a deprivation would, in the view of the Court, amount to inhuman treatment prohibited by ECHR Article 3.

177 Soering v. United Kingdom, 11 E.H.R.R. 439 (1989).

178 Ahmed v. Austria, 24 E.H.R.R. 278 (1997).

179 Chahal v. United Kingdom, 23 E.H.R.R. 413 (1996).

180 HLR v. France, 26 E.H.R.R. 29 (1998).

181 Elmi v. Australia, Complaint No. 120/1998, 7 I.H.R.R. 603 (2000), distinguishing the case of *GRB v. Sweden*, Complaint No. 83/1997, 6 I.H.R.R. 395 (1999), where the Committee decided that the definition of "torture" in the Torture Convention did not cover acts committed by terrorist groups not in control of territory.

182 The Committee, in paragraph 6.5, emphasized the particular situation of Somalia, where there was no effective government and that some of the warring factions had established quasi-governments, with which the international community had negotiated.

tation or extradition to places where the threat facing the applicant is from a criminal group that does not have quasi-governmental power, as in *HLR*.

All of the above cases dealt with removal of individuals from a country rather than responsibility of a state for acts of non-state actors within its own jurisdiction. There are, however, also cases that require states as a matter of human rights law, to protect individuals from torture or inhuman and degrading treatment by non-state groups within the state. These cases tend to revolve around issues of criminal responsibility and the need to ensure that violations are investigated and punished. In the same year as the *Soering* decision, the Inter-American Court of Human Rights decided in *Velasquez Rodriguez v. Honduras* that part of a state's responsibility in respect of human rights was to investigate alleged violations and to ensure that an actual or apparent situation of impunity did not exist.[183] The Human Rights Committee has applied this obligation even to situations where the alleged violation was committed by non-state actors in *Herra Rubio v. Colombia*.[184] In *Ergi v. Turkey*,[185] the European Court of Human Rights found that failure of state forces to protect civilians during internal armed conflict was considered a violation of the European Convention on Human Rights (ECHR). In the context of child protection, an important case is *A v. UK*.[186] Here, the failure of state to ensure the successful criminal prosecution for the caning of the child by his stepfather was considered a violation of Article 3 ECHR, where the punishment amounted to treatment prohibited by that Article. In the field of child labor, the European Court of Human Rights has imposed positive obligations on states to enforce the right to be free from forced labor by means of criminal prosecutions.[187]

This is not to deny the practical difficulties of dealing with the situation of children in non-state armed forces. First of all, they may not see themselves as victims of a human rights violation, but rather as acting patriotically or heroically.[188] Children participating in the Intifada in the Occupied Territories often express a desire to act heroically, including experiencing a martyr's death.[189]

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183 Velasquez Rodriguez v. Honduras, 28 I.L.M. 294 (1989).

184 Herra Rubio v. Colombia, Complaint No. 161/1983 (1988). See also *de Penha Fernandez v. Brazil*, Case No. 12.051, Rep. No. 54/01 (Apr. 16, 2001), 9 I.H.R.R. 173 (2002), where the Inter-American Commission on Human Rights found that Brazil was in breach of its obligations as a consequence of delay in bringing the applicant's husband to trial for domestic violence.

185 Ergi v. Turkey, 32 E.H.R.R. 18 (2001). *See also* Timurtas v. Turkey, 33 E.H.R.R. 6 (2001).

186 A. v. UK, 27 E.H.R.R. 611 (1999).

187 Siliadin v. France, 43 E.H.R.R. 16 (2006).

188 Machel Report, *supra* note 8, paras. 41–43.

189 Veerman & Levine, *supra* note 12, at. 73.

Children even play at participating in hostilities before they do so in fact.[190] In long-term conflicts, children may have known no other reality than war.

There are still important technical limitations in the application of international law to non-state actors. First and foremost, non-state forces are not themselves responsible for the implementation of these norms—states parties to treaties (or all states, in respect of customary international law) are responsible for ensuring that non-state forces apply them.[191] Second, and this follows from the first point, states are only responsible for the actions of non-state forces within their jurisdiction.[192] This does not, however, preclude the possibility of states asserting universal jurisdiction in relation to violations of international crimes. The Belgian law of the late 1990s, which asserted universal jurisdiction over war crimes and crimes against humanity, met with controversy over attempts to apply it to an incumbent foreign minister, therefore conflicting with rules on state immunity.[193] However, there would seem to be no reason why a state could not assert jurisdiction based on universality against members of non-state forces who were responsible for recruitment of children under 15 or of slavery-like practices in relation to child soldiers.

There is some ambivalence among states concerning the inclusion of non-state forces within the prohibition on using child soldiers. Article 4 of the CRC Optional Protocol, therefore, uses language that reflects existing international humanitarian law.[194] While states would not want non-state forces to be exempt from rules to which states are bound, they are concerned that equating state and non-state forces in terms of international legal obligations would legitimize such forces.[195] In the Optional Protocol to the CRC, this concern is directly addressed by Article 4(3), which states that nothing in that Article shall affect the status of any party to an armed conflict. However, as we have seen above, bodies implementing international human rights norms have tended to be pragmatic on such matters and to recognize the potential for human rights violations by non-state actors. The International Committee of the Red Cross (ICRC) in particular operates on the basis of treating all parties to a conflict as equal.[196] The additional fear of states that they would have the international legal respon-

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190 *Id*., 79

191 HAPPOLD, *supra* note 22, at 95–97, however, argues that the Security Council's practice in this area treats non-state forces as having independent obligations to implement humanitarian law. VANDEWIELE, *supra* note 66, at 41, describes the obligation in Article 4(1) of the CRC Optional Protocol, on the other hand, as being a "moral" obligation on non-state forces to refrain from using child soldiers.

192 HAPPOLD, *supra* note 22, at 95.

193 *See* Arrest Warrant Case (Democratic Republic of Congo v. Belgium), 2002 I.C.J. 3.

194 VANDEWIELE, *supra* note 66, at 40.

195 Sheppard, *supra* note 21, at 53.

196 VANDEWIELE, *supra* note 66, at 45.

sibility for acts of groups that they could not control was addressed by obliging states only to take all feasible measures to prevent non-state forces from recruiting children.

Finally, it is necessary to consider the fit of Article 4 of the CRC Optional Protocol with international humanitarian law in general.[197] Humanitarian law relates to *jus in bello*, the law pertaining to the conduct of armed conflict rather than *jus ad bellum*, the law pertaining to the legality of the use of force. The development of humanitarian law during the 20th century was based on the idea of separating the issues of the legality of the recourse to force, in the first place, and the acts done by either party during hostilities. In other words, even a state that is justified in engaging in armed conflict, is not waging aggressive war but is acting in self-defense, for example, must still respect humanitarian law in every particular, as much as a state whose recourse to arms is illegal. Since the adoption of common Article 3 of the four 1949 Geneva Conventions, international humanitarian law has applied, at least to some extent, to non-international armed conflicts. Common Article 3 treats both state and non-state forces as equivalent for the purposes of applying the limited rules in that Article: "In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, *each Party to the conflict* shall be bound to apply, as a minimum" (emphasis added). Article 1(1) of Geneva Protocol II states that the Protocol applies "to all armed conflicts [not covered by Protocol I] and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups that, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations *and to implement this Protocol*" (emphasis added). The tendency of international humanitarian law, therefore, is to treat state and non-state forces equally in respect of their duties under the law.

International human rights law and international labor law are drafted in terms of state obligations only. This is particularly evident in the CRC Optional Protocol, where states are to be responsible under international law for the recruitment of child soldiers by non-state forces in some circumstances as well as being responsible for their own recruitment practices. The CRC Optional Protocol, unlike the Geneva Protocol II, puts obligations on states but not non-state forces. International criminal law, however, because it addresses issues of individual rather than state responsibility, does not create this divergence in the position of state and non-state forces, and it retains the distinction between international and non-international armed conflicts. The CRC Optional Protocol also fails to treat state and non-state forces similarly in its substantive provisions. While states are permitted to engage in voluntary recruitment of 16- or 17-year-olds if they wish, non-state forces may not. In those states that accepted 18 as the minimum age for voluntary recruitment in their declarations when

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[197] Machel Report, *supra* note 8, para. 220.

ratifying the CRC Optional Protocol, there will be, in practice, equality of treatment. However, in many states, there will be a difference between who state forces may recruit and who non-state forces may recruit. Although this difference exists in a human rights instrument rather than a humanitarian law instrument, where the assumptions about the responsibility of non-state actors are very different, the failure to agree a straight-18 rule, or at least to equalize the ages for voluntary recruitment across state and non-state forces, could undermine the level of protection of children, in practice, if non-state forces reject the legitimacy of the distinction.[198]

However, where the political will is present, there is the possibility of integrating non-state forces into the obligations on child soldiers. Machel notes the example of Sudan, where humanitarian NGOs negotiated agreements with rebel groups to prevent their recruitment of children.[199] The Special Representative for Children and Armed Conflict has been successful in a number of cases in securing undertakings from non-state forces to raise the minimum age for their recruitment of soldiers:[200]

- The LTTE in Sri Lanka, in 1998;[201]
- The RCD in the Democratic Republic of Congo in 1999 (agreement in principle only);[202]
- The FARC in Colombia in 1999;[203]
- Insurgent groups in Burundi in 2000;[204]
- Insurgent groups in Sudan in 2000.[205]

The U.N. Secretary-General has emphasized the need to extend the scope of responsibility for children affected by armed conflict, including child soldiers, beyond merely states. This includes, in particular, non-state armed groups.[206]

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198 The CSC raised the problem of double standards during the drafting of the CRC Optional Protocol; *see* Breen, *supra* note 36, at 477.

199 Machel Report, *supra* note 8, para. 61. On the issue of non-state forces generally, see paragraphs 61–62, 220, 230.

200 Full text of these commitments can be found in the 2000 Report of the Special Representative to the Commission on Human Rights, E/CN.4/2000/71 (Feb. 9, 2000).

201 Otunnu Report 1998, *supra* note 20, para. 65.

202 Otunnu Report 1999, *supra* note 20, para. 93. The Special Representative visited again in 2001, and proposed a five-point program, including cessation of recruitment of child soldiers and their demobilization and rehabilitation, which was accepted by the leaders of all sides; *see* Secretary-General's Report 2001, *supra* note 47, para. 12.

203 Otunnu Report 1999, *supra* note 20, para. 126. On difficulties with ensuring the commitment is respected, see Otunnu Report 2000, *supra* note 13, para. 76.

204 Otunnu Report 2000, *supra* note 13, para. 110.

205 *Id*.

206 Secretary-General's Report 2001, *supra* note 47, para. 9.

5. Nature of State Obligations in Relation to Child Soldiers

As noted above, obligations of states in international human rights law have different facets. In addition, it is important to note the way international legal obligations are drafted. Some impose only an obligation of means, or to take appropriate steps towards a goal, whereas some are obligations of result, or absolute obligations. International legal obligations in relation to child soldiers follow both patterns. This goes back to the two Additional Protocols of 1977, where states are called upon to "take all feasible measures" to ensure that children under 15 do not take direct part in hostilities but must absolutely not recruit them into their armed forces. These formulations are repeated in Article 38 CRC and in the CRC Optional Protocol. In addition, Article 4 of the Optional Protocol places an absolute obligation on non-state forces not to recruit children, but it places an obligation on states to take all feasible measures to ensure that this does not occur. Obligations under Article 6 in relation to rehabilitation of child soldiers and more generally to ensure the implementation and enforcement of the Optional Protocol are also phrased as obligations to take measures rather than to achieve a result.

Given its frequent use in this context, it is important to examine the scope of the term "all feasible measures," which as Ang notes, is not language normally used in international human rights treaties.[207] Article 22(2) of the African Charter uses the term "necessary measures" rather than "feasible measures," possibly imposing a stronger obligation than do many of the other provisions relating to child soldiers. Regrettably, the Committee on the Rights of the Child has not attempted to give some objective content to this phrase but simply asks states to report on what feasible measures they are taking to prevent participation in hostilities by children under 15.[208] The reporting guidelines for Article 1 of the CRC Optional Protocol are similar.[209] Generally, there seems to be disagreement as to what "feasible" requires and whether it should be read as equivalent to "possible" or "practical," the latter being a less stringent interpretation.[210]

The obligations of states in relation to non-recruitment and non-use of child soldiers vary in important ways between different instruments and between different provisions in the same instrument. The nature of the obligation is clear when dealing with absolute obligations, but where the language of "all feasible measures" is used, it will be difficult to determine whether a state has done enough to meet its international obligations.

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207 Ang, *supra* note 32, at 44.

208 *Id*., 45–46.

209 Vandewiele, *supra* note 66, at 27–28.

210 *Id*., 26–27.

E. *Child Soldiers as a Child Labor Issue*

The non-recruitment and non-use of child soldiers seems, at first glance, an odd issue to be included among the worst forms of child labor. It seems more appropriate as a focus for international humanitarian law or as a form of child abuse to be protected as a matter of children's rights more generally. However, child labor itself is no longer an issue primarily of labor standards, where it is a technical matter of ensuring that states have laws setting a minimum age for employment. There has been a move in the child labor campaign from a labor regulation approach to a human rights approach.

This move raises, as noted above, the problem of conflicting bases of children's rights—whether based on child welfare or child agency. The new approach to defining prohibited child labor, requiring an element of exploitation or abuse, implies that there is a permissible area of child labor in the CRC and in C 182, although these measures do not define this permitted area. In other words, there is an area of child employment where, in accordance with Article 12 CRC, a sufficiently mature child may choose to work. In the case of child soldiers, the applicable standards do not admit to an area where the child is permitted to exercise choice. It is common for advocates of the straight-18 rule to deny that voluntary recruitment is truly voluntary.[211] This is the problem with linking child labor and child soldiers. There is clearly an area of permissible child work, yet in measures concerning child soldiers, the prohibitions are often absolute.

Despite the different approach to child labor as a whole and the child soldiers issue in particular, there is a relationship between child labor and children becoming involved in armed conflict. Many child workers work in the informal economy, on the streets. These children then become vulnerable to forced recruitment into armed forces.[212] We can therefore see that being involved in one potentially abusive form of child labor leads to another. Another example of the link between these issues is the practice of forced labor in Burma, where the military is involved in forcing entire communities, including children, to perform work, which may be either economic infrastructure or direct services to the armed forces.[213] This is particularly abusive in the case of chil-

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[211] *See, e.g.*, Machel Report, *supra* note 8, para. 38: "In addition to being forcibly recruited, youth also present themselves for service. It is misleading, however, to consider this voluntary."

[212] *Id.*, para. 37. The Special Representative gives the example of Afghanistan, where street children were vulnerable to recruitment into the armed forces; Otunnu Report 1998, *supra* note 20, para. 46.

[213] ILO, *Forced Labor in Myanmar (Burma)*, Report of the Commission of Inquiry appointed under Article 26 of the ILO Constitution to examine the observance by Myanmar of the Forced Labor Convention, 1930 (No. 29), 81 OFF. BULL. (1998), Series B (Commission of Inquiry Report), *at* http://www.ilo.org/public/english/standards/relm/gb/docs/gb273/myanmar.htm; CSC 1379 Report, *supra* note 81.

dren. Children as young as ten are used as porters or mine-sweepers, and even in front-line conflict, when they can handle the necessary weapons.[214] Finally, there is a close link between economic deprivation and children joining the armed forces. In the case of forced recruitment, the more affluent the family, the more likely they will be able to prevent their children being recruited into the military. In the case of voluntary recruitment, and this is also true for countries not directly involved in armed conflicts, for economically marginal families with low education levels, the military may be an attractive career path, with relatively good wages and training opportunities.[215] In the United Kingdom, between 6,000 and 7,000 members of the armed forces were under 18.[216]

In addition to the fact that children involved in abusive forms of child labor are more likely to become soldiers, there is also the link between the recruitment of girls into the military and commercial sexual abuse following cessation of hostilities.[217] This is not surprising, given that one reason that children are abducted by armed groups is to be used as sexual slaves; the vulnerability of children, which leads to such abuse, is still present after the conflict ends, unless authorities intervene.[218] The links between children as soldiers and other forms of abusive child labor therefore works in both directions, highlighting the need for long-term intervention in these issues.

It is worth noting that one of the arguments made in favor of the "straight-18" rule for the CRC Optional Protocol is that under international labor law, including the European Social Charter and ILO C 138, the minimum age for admission to hazardous employment is 18, and few jobs could be more hazardous than soldiering.[219] Arguably, therefore, there should be no surprise that forced recruitment of child soldiers became part of the prohibition on forced child labor in C 182.

However, some arguments in favor of the higher age have nothing to do with child labor issues, or even abuse per se—one argument is that military service, even voluntary, should be linked with minimum ages for voting and other forms of citizenship rights and participation.[220] However, this is extremely problematic. There are continuing debates about whether the voting age should be reduced, and yet few argue for a parallel reduction in age for military service. In the United Kingdom, a person can hold a driver's license, which is often treated as a form of proof of identification similar to a passport, at 17. One can

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214 GLOBAL REPORT 2001, *supra* note 2.

215 See Machel Report, *supra* note 8, paras. 38–40.

216 GLOBAL REPORT 2004, *supra* note 1, at. 285. *See also id.,* 7.

217 Secretary-General's Report 2000, *supra* note 6, Box 3.

218 *Id*., paras. 7 and 9.

219 Sheppard, *supra* note 21, at 47–48.

220 *Id*., 49.

pay taxes at whatever age one receives income, earned or unearned. The citizenship argument takes us away, ironically, from the human rights considerations connected with child soldiers, which relate not to citizenship but to abuse.

The worst forms of child labor in C 182 are linked to forms of abuse and exploitation of children. In the case of child soldiers, it is primarily moral abuse rather than economic abuse that is present.[221] Like all abusive forms of child labor, being a child soldier deprives children of their opportunities for education, although in times of armed conflict, such opportunities may be limited or, in practice, absent for all children.

The role of rehabilitation and prevention is similar in all abusive forms of child labor including child soldiers. IPEC might have a useful role to play in helping to develop programs for rehabilitation of child soldiers.[222] The Special Representative on Children and Armed Conflict has noted the need for a long-term commitment to the rehabilitation of former child soldiers,[223] which may be easier for specialized agencies like the ILO or UNICEF to administer and monitor than the Office of the Special Representative. The normal implementation measures in the ILO, however, are not terribly well adapted for implementing norms in armed conflict situations. The same could be said of the CRC, except that the Committee on the Rights of the Child is more likely to have expertise in this area than the ILO Committee of Experts, especially in light of the new Optional Protocol.

Situations where child soldiers are found may also reveal other instances of abusive child labor. In several countries where non-state forces are in armed conflict with government forces, the non-state armed groups are involved in illegal exploitation of natural resources, including both the drug trade and trade in so-called "blood" or "conflict" diamonds.[224] These trades often involve forced labor of children.[225] This problem has been noted by the Security Council in Resolution 1314 (2000) and Resolution 1460 (2003). The Security Council has established expert groups to examine the manifestations of this phenomenon in Angola and Democratic Republic of Congo, and it has worked with Sierra Leone to establish tracking mechanisms for diamonds.[226] Resolution 1379 (2001) called

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221 GLOBAL REPORT 2001, *supra* note 2.

222 *See* IPEC Fact Sheet on Child Soldiers, *supra* note 64.The role of the ILO in rehabilitating child soldiers is recognized in the Machel Report, *supra* note 8, para. 301.

223 Otunnu Report 2002, *supra* note 14, para. 43, on the situation in El Salvador.

224 *Id*., para. 41; Otunnu Report 2003, *supra* note 20, paras. 9–10; Otunnu Report 2000, *supra* note 13, para. 63; Secretary-General's Report 2000, *supra* note 6, para. 16; Secretary-General's Report 2001, *supra* note 47, paras. 39–43. S.C. Res. 1459, U.N. Doc. S/RES/1459 (Jan. 28, 2003).

225 Secretary-General's Report 2001, *supra* note 47, para. 39.

226 *Id*., para. 41. *See, e.g*., S.C. Res. 1295, U.N. Doc. S/RES/1295 (2000) concerning Angola and S.C. Res. 1306, U.N. Doc. S/RES/1306 (2000) concerning Sierra Leone.

upon states to mitigate the impact of such trade on children in armed conflict, but this Resolution appears to have had little impact in practice.[227] The Secretary-General has noted that mechanisms of corporate and social responsibility, such as labeling schemes, are appropriate where the trade is not inherently illicit.[228]

In the drafting of ILO C 182, there seemed to be a reasonable level of acceptance of the inclusion of child soldiers in the Convention by developing country delegates by the second discussion in 1999.[229] Many of the conflicts in which children have been deployed as soldiers have taken place in developing countries, and therefore this is a highly salient issue for many of them. Nonetheless, on a more cynical note, this is an issue where two of the countries most criticized by NGOs for opposing the emerging international consensus (the "straight-18" rule) are two of the richest countries in the world—the United States and the United Kingdom.[230]

So we can see that in the drafting of C 182, the ILO has linked itself with the wider children's rights movement. In particular, it is arguable that C 182 was a dress rehearsal for the two Optional Protocols to the CRC adopted in 2000 concerning child soldiers and sexual exploitation of children. This can be seen from the statement made upon the adoption by the International Labor Conference Committee on Child Labor of the draft Convention and Recommendation by the Government member of the Netherlands, that, "A basis had been laid for the Working Group on the optional protocol to the United Nations Convention on the Rights of the Child on involvement of children in armed conflicts to make further progress."[231] Smolin argues that the use of child soldiers, like most other issues in C 182, is outside the competence of the ILO, in this case because it relates to international humanitarian law and interna-

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227 Secretary-General's Report 2002, *supra* note 20, para. 19.

228 *Id*., para. 42 and paras. 19–20. On corporate social responsibility mechanisms in general as a means of implementing child labor norms, see Chapter 8.

229 *See* International Labor Conference, 87th Sess., *Report of the Committee on Child Labor*, paras. 37–38, 43, 51, 53 (June 14, 1999). However, at paragraph 145, the government member from Cuba objected to the fact that the prohibition on forced recruitment in C 182 would be narrower in scope than that in Article 38 CRC.

230 Their opposition to the "straight-18" rule may go some way to explaining the limited scope of the prohibition in Article 3 of C 182, given that the ILO does not permit reservations to treaties. If the Convention had included a ban on voluntary recruitment below 18, there would have been a serious risk that either or both countries would have refused to ratify this Convention, on which the ILO had staked so much of its credibility. The limited ban may also be explained by its having been linked to practices analogous to slavery in Article 3(a)—such practices imply some significant element of coercion as the common factor.

231 ILC 87—*Report of the Committee on Child Labor*, para. 396. On the process by which child soldiers became, at a later stage, part of C 182, see Report VI(2), *Child Labor*, 86th Sess., International Labor Conference (1998) and Report IV(I), *Child Labor*, 87th Sess., International Labor Conference (1999).

tional criminal law.[232] This is supported, to some extent, by the fact that the use of child soldiers is made a war crime under the ICC Statute. However, the use of child soldiers implies the type of exploitation and abuse that is common to the "worst forms" of child labor mentioned throughout Article 3 of C 182. As long as the ILO addresses the *labor* aspects of child soldiers, then it should be seen as operating within its constitutional competence. The International Court of Justice decided, in its decision on Preliminary Objections in *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, a request for an Advisory Opinion by the World Health Organization (WHO), that the request was outside the WHO's competence, because it related to the legality of the use of nuclear weapons rather than to the effect of nuclear weapons on health.[233]

F. Child Soldiers and Joined-Up International Law

In light of the implementation problems raised in Sections D and D.4, the utility of having norms concerning child soldiers in so many places might be questioned. The response to such concerns lies in the idea of forums, of measures and of actors. The multiplicity of norms in different contexts, whether human rights, labor law or humanitarian law, demonstrates a high priority given to child soldiers as an issue within the international community, ideally leading to a form of "joined-up international law." In the worst case, the norms potentially conflict, either textually or between the assumptions that underlie the different systems. As noted above, the different treatment of state and non-state forces in terms of voluntary recruitment of children within the CRC Optional Protocol, may undermine the operation of international humanitarian law and international criminal law, whereby, in order to ensure the full implementation of the relevant norms, state and non-state forces are treated similarly.

A multiplicity of norms leads to a multiplicity of *forums* for raising issues. Issues relating to child soldiers can, in this way, be followed up constantly, as opposed to every few years, which would be the case if waiting for the periodic state reports under the CRC or ILO C 182 alone.[234] The Special Representative on Children and Armed Conflict, having been made aware of the use of child soldiers in Guinea-Bissau, requested the Committee on the Rights of the Child to follow up the issue, and to examine with the government of that country what it was doing to demobilize and rehabilitate child soldiers.[235] He has, in more general terms, called upon states parties to the CRC to coop-

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232 David M. Smolin, *Strategic Choices in the International Campaign Against Child Labor*, 22 HUM. RTS. Q. 942, 964–65 (2000).

233 WHO Request for an Advisory Opinion on the Legality of the Use of Nuclear Weapons, 1997 I.C.J. 84, para. 21.

234 For a discussion of the role of reporting systems in the implementation of child labor norms, see Chapter 6.

235 Otunnu Report 2002, *supra* note 14, para. 50.

erate with the Committee on the Rights of the Child and the United Nations to improve its resources.[236] Perhaps the best approach would be to consolidate the monitoring of international obligations. One suggestion that has been made to systematize monitoring of the relevant international standards is to establish an independent observatory that can maintain a continuous form of monitoring, especially in conflict situations, where commitments may be made but quickly forgotten.[237]

The multiplicity of norms also highlights the need for additional *measures* of implementation.[238] Such additional measures can include accurate birth registration and the improvement of educational opportunities and employment opportunities. These issues can be raised under the CRC and, at least to some extent, under C 182 and R 190 but not under international humanitarian law.

Among the additional measures that states may wish to contemplate are criminal sanctions against those who illegally recruit children as soldiers. As can be seen from the inclusion of recruitment of child soldiers as a war crime in the ICC Statute, there is interest in pursuing international criminal law as a possible enforcement mechanism for norms concerning child soldiers. Both the Secretary-General and the Special Representative have emphasized the need for prosecution of those responsible for violations of children's rights in armed conflict situations, including the recruitment and use of child soldiers. The Security Council urged U.N. member states to prosecute such violations in Resolution 1379 (2001).

The presence of norms relevant to child soldiers in a number of different instruments can be problematic unless there are *actors* who can ensure that these norms are continually raised in relevant forums and can tailor the approach to the forum. Obviously, states are the primary actors who are present in international forums. However, states have a broad range of interests, of which child soldiers or other children's rights issues may only be part. Actors from within international organizations, such as the Special Representative on children and armed conflict and specialized agencies, such as UNICEF and NGOs, can all bring a focus on children's rights issues to international forums, often working with sympathetic states.

The development of joined-up international law depends on the efforts of actors who are able to move issues between institutions and regimes. In the case of child soldiers, the main actor has been the Special Representative for Children and Armed Conflict, who describes his mission as follows:

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236 Otunnu Report 1998, *supra* note 20, para. 26.

237 Suggested in Otunnu Report 2000, *supra* note 13, para. 41; Otunnu Report 2001, *supra* note 19, para. 75.

238 Sheppard, *supra* note 21, at 45.

> The role of the Special Representative is that of a catalyst and advocate, highlighting this agenda and fostering concerted action on it within the U.N. system. The main responsibility for developing operational programs for promoting the rights, protection and welfare of children rests with the agencies and bodies that have the expertise, resources and presence on the ground. The Special Representative complements the activities of these bodies through public advocacy and appropriate political and humanitarian initiatives.[239]

One of his most important efforts has been to encourage states to ensure that real international legal commitments are made, and do not remain limited to paper promises. In his 1999 report, he argued that after the development of significant legal instruments for children's rights, it was time to launch an "era of application."[240] In terms of child soldiers, this included a three-pronged approach to the elimination of the use of child soldiers: (1) to complete standard-setting through the adoption of the straight-18 rule; (2) to pressure armed groups to stop abusing child combatants; and (3) to address the political, social and economic factors that facilitate the recruitment and use of child soldiers.[241] The Special Representative has integrated international legal provisions into his recommendations, but he goes beyond advocating the drafting and ratification of international norms to developing practical integration of the values underlying those norms into programs such as post-conflict programs and U.N. peacekeeping missions.[242] He also organized activities on children and armed conflict, particularly the situation of child soldiers and former child soldiers, during the U.N. General Assembly Special Session on Children in 2002.[243]

Because child soldiers have been largely ignored by international law, it is not surprising that the issue of the demobilization and rehabilitation of child soldiers has not, with few recent exceptions, been recognized in peace treaties and demobilization programs.[244] The recent turn to recognition of children's rights issues in the course of peace processes is one result of the efforts of the Special Representative for Children and Armed Conflict.[245] The rehabilitation of child soldiers requires coordinated effort by national and international agen-

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239 Otunnu Report 1998, *supra* note 20, para. 114.

240 Otunnu Report 1999, *supra* note 20, paras. 29–30. This point has been reiterated in all of his subsequent reports and in the reports of the Secretary-General.

241 *Id*., para. 45.

242 *See, e.g*, the recommendations in *id*., paras. 164–182.

243 Otunnu Report 2002, *supra* note 14, para. 47.

244 Machel Report, *supra* note 8, para. 49. *See generally* Ilene Cohn, *Protection of Children in Peacemaking and Peacekeeping Processes* 12 HARV. HUM. RTS. J. 29 (1999).

245 Otunnu Report 1999, *supra* note 20, para. 36; Otunnu Report 2000, *supra* note 13, para. 52; Otunnu Report, 2005, *supra* note 3, paras. 16–17.

cies, and by NGOs. Machel argued in her report for the need to ensure that relevant standards on child soldiers are disseminated widely, including to international peacekeeping forces,[246] and for the impact of armed conflict on children, including child soldiers, to be taken into account by the Security Council in peacekeeping and peace enforcement missions.[247] This question has been taken up by the Special Representative for Children and Armed Conflict, who has established two working groups, one on the incorporation of child protection into U.N. peacekeeping and related operations and one on child protection training for peacekeeping personnel.[248] Child protection advisors have begun to be included in U.N. peacekeeping missions, such as UNAMSIL in Sierra Leone, focusing on child soldiers among other issues.[249] In 2002, the Special Representative welcomed the inclusion of a child protection advisor as a member of the U.N. Integrated Mission in Afghanistan and as a member of the U.N. Assistance Mission in Angola, both conflict zones where child soldiers have been used.[250] Machel gave a detailed account of how the various U.N. organs and agencies and NGOs can integrate concerns about child soldiers into their work, with a particular role for the Committee on the Rights of the Child in co-coordinating and fostering cooperation between the various international actors.[251] The goal is to strengthen the capacity of governments to meet the needs of children caught up in armed conflict.[252]

In keeping with the move from standard setting to implementation, the Security Council has directed the development of a generalized monitoring process concerning children in armed conflict. In Resolution 1539 (2004), the Security Council requested the Secretary-General to devise "an action plan for a systematic and comprehensive monitoring and reporting mechanism, . . . , in order to provide timely, objective, accurate and reliable information on the recruitment and use of child soldiers in violation of applicable international law and on other violations and abuses committed against children affected by armed conflict, for consideration in taking appropriate action."[253] The process pro-

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246 Machel Report, *supra* note 8, para. 240.

247 *Id*., para. 282.

248 *See* Otunnu Report 2002, *supra* note 14, paras. 11–13; Otunnu Report 2003, *supra* note 20, para. 5.

249 Secretary-General's Report 2000, *supra* note 6, para. 58; Secretary-General's Report 2001, *supra* note 47, para. 28; Otunnu Report 2003, *supra* note 20, paras. 7–8.

250 *Id*., at para. 14. For the terms of reference of child protection advisors in peacekeeping missions, see Secretary-General's Report 2000, *supra* note 6, Box 5. They have been used in missions in Republic of Congo, Angola, Liberia, Burundi, Côte d'Ivoire, the Sudan and Haiti; *see* Otunnu Report 2005, *supra* note 3, para. 20.

251 Machel Report, *supra* note 8, para. 287.

252 *Id*., para. 290.

253 Resolution 1539 (2004), U.N. Doc. S/RES/1539, para. 2 (Apr. 22, 2004).

posed by the Secretary-General was approved in 2005.[254] The mechanism does not create any new permanent body, analogous to monitoring committees under the CRC and other international human rights treaties or the ILO's monitoring bodies,[255] but relies on the leadership and coordination of UNICEF and the Special Representative.[256] Its focus is on the most grave violations, including the recruitment or use of child soldiers and the denial of humanitarian access for children.[257] The basis for the monitoring is a range of standards, including the conventions discussed in Section B, the recent Security Council resolutions on children and armed conflict and regional and national standards.[258] The Secretary-General is to form a task force to compile information on the country level, in each state where he has identified that children are being used in armed conflict, whether by state or non-state parties.[259] The information will be drawn from United Nations and other international organizations working in these states and from NGOs. The task forces will prepare annual country reports, monthly reports on relevant developments and alert reports as necessary, thus ensuring a continuous stream of information.[260] The Special Representative will be responsible for the review of the reports of country-level task forces, including an overall annual report to be submitted to the Security Council, the General Assembly, regional organizations, national governments, the ICC and the Commission on Human Rights.[261] These recipients will be expected to act on the monitoring reports, each within its sphere of competence.[262] The process is now in place, and the Security Council's working group reviewing monitoring reports has begun to look at particular cases arising from the reports, starting with the Democratic Republic of Congo.[263]

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254 S.C. Res. 1612, U.N. Doc. S/RES/1612, paras. 2 and 3 (July 26, 2005). In para. 8, the Security Council decided to establish a working group to review the monitoring reports.

255 For a discussion of the work of these bodies in relation to child labor, see Chapter 6.

256 General Assembly, *Children and Armed Conflict: Report of the Secretary-General*, U.N. Docs. A/59/695, S/2005/72, para. 67 (Feb. 9, 2005).

257 *Id*., para. 68.

258 *Id*., paras. 70–72.

259 *Id*., paras. 80, 83.

260 *Id*., para. 87.

261 *Id*., paras. 92–106. Presumably, the Human Rights Council will now receive the report originally intended for the Commission.

262 *Id*., para. 107.

263 United Nations, Statement to the Press by Jean-Marc de La Sablière, Permanent Representative of France to the United Nations in his capacity of chairman of the Working Group of the Security Council on Children and Armed Conflict (June 26, 2006), *at* http://www.franceonu.org/article.php3?id_article=986.

A good example of how a joined-up approach to child soldiers can have a positive impact can be found in the activities of the Special Representative for Children and Armed Conflict in Sierra Leone. On his first visit to that country, in 1998, he noted that "one of the most pressing challenges facing Sierra Leone . . . was the 'crisis of the young'—the plight of children affected directly and indirectly by the conflict."[264] One of five areas for urgent action identified by the Special Representative was the demobilization and rehabilitation of child soldiers.[265] The first stage of this process was to obtain agreement by the government to cease to recruit under-18s, to demobilize child soldiers currently in their ranks, to provide protection to child soldiers of non-state forces coming into the custody of government forces and to set up a task force for demobilization of child soldiers.[266] By 1999, the commitment to cease recruitment and use of child soldiers had been included in the Lomé Peace Agreement and was accepted by government and opposition forces.[267] The child protection advisor attached to UNAMSIL supervised the release and demobilization of nearly 2000 child soldiers in 2001, the children then entering UNICEF-supported programs for rehabilitation and family reunification.[268] By 2002, the Sierra Leone government had established a National Commission on War-Affected Children that was operational.[269] Nearly 7,000 child soldiers had been demobilized, and most had been reunited with their families.[270] The Office of the Special Representative continues to assist the government of Sierra Leone through education programs for demobilized child soldiers.[271]

The inclusion of the issue of demobilization and rehabilitation of child soldiers into the Lomé Peace Agreement concerning Sierra Leone has been contrasted favorably with the situation in Liberia, where over 4,000 child soldiers were demobilized without any provision for reintegration of these children into

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264 Otunnu Report 1998, *supra* note 20, para. 55.

265 *Id*., para. 56.

266 *Id*., para. 58.

267 The Lomé Peace Agreement was the first to address the issue of child soldiers. The Belfast (or Good Friday) Agreement concerning the peace process in Northern Ireland also mentions the situation of children; *see* Secretary-General's Report 2000, *supra* note 6, para. 49, as does the August 2000 peace agreement in Burundi; *see* Otunnu Report 2000, *supra* note 13, para. 103.

268 Secretary-General's Report 2001, *supra* note 47, paras. 28 and 50; a more critical view is expressed by the Special Representative on Children and Armed Conflict; Otunnu Report 2001, *supra* note 19, para. 69.

269 Otunnu Report 2002, *supra* note 14, para. 44.

270 Secretary-General's Report 2002, *supra* note 20, para. 51.

271 Office of the Special Representative of the Secretary General on Children in Armed Conflict, "DDR for Children," *at* http://www.un.org/children/conflict/english/ddrforchildren86.html.

their communities. The result was that may children did not in fact demobilize and have remained under the control of military leaders.[272]

The United Nations has also encouraged the demobilization of child soldiers in the midst of armed conflicts, even where there is no imminent peace. The challenge in such situations, in addition to the usual problems of rehabilitation, is to prevent re-recruitment.[273] One method that the Special Representative on Children and Armed Conflict has advocated is the development of "neighborhood initiatives," where countries in the same sub-region collaborate to address issues of child protection. Such initiatives have been established in West Africa and Eastern Africa.[274] In the African Great Lakes region, the World Bank and donor countries have agreed to provide financial support of $500 million to support demobilization projects.[275]

UNICEF has often been involved in areas on which the Special Representative has focused. In addition to its practical involvement in programs for the rehabilitation of child soldiers, UNICEF developed a document for the Security Council, *Peace and Security Agenda for Children*, which as one of its main objectives, included an end to the use of child soldiers.[276]

Among the actors who can carry an issue from forum to forum, NGOs are often better placed than states themselves. Increasingly, NGOs are forming issue-oriented networks to maximize their effectiveness. The success of this strategy has been demonstrated particularly in the area of the drafting of international instruments, starting with the 1998 Ottawa Convention on Land Mines and then the Rome Statute establishing an International Criminal Court.[277] These networks now also work on implementation and monitoring issues, retaining the links forged during drafting processes.

The rights of the child is an area where NGOs have been particularly active, going back to the drafting of the CRC.[278] The CRC is virtually unique among human rights treaties (one other example is the European Social Charter)[279] in

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272 Secretary-General's Report 2000, *supra* note 6, para. 42.

273 Secretary-General's Report 2001, *supra* note 47, paras. 52–55; Otunnu Report 2001, *supra* note 19, para. 82.

274 Otunnu Report 2000, *supra* note 13, paras. 53–58; Otunnu Report 2001, *supra* note 19, para. 75.

275 Secretary-General's Report 2002, *supra* note 20, para. 55.

276 Report of the Secretary-General, *Status of the Convention on the Rights of the Child*, U.N. Doc. A/54/265, para. 29 (Aug. 19, 1999).

277 *See* Z.N. Pearson, Global Civil Society and International Law-Making: Mapping the Boundaries (2002).

278 Breen, *supra* note 36, at 457.

279 Articles 23 and 27 (concerning the reporting system). *See also* the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, especially Article 1.

giving an explicit role to NGOs in the monitoring process under Article 45. Article 45 allows the Committee on the Rights of the Child to invite NGOs to "provide expert advice on the implementation of the Convention in areas falling within the scope of their respective mandates."[280] It was NGOs that highlighted the insufficiency of Articles 38 and 39 CRC in respect of child soldiers.[281]

In addition to the work of NGOs with the Committee on the Rights of the Child, they have been active throughout the U.N. system on issues of children in armed conflict. The Secretary-General of the United Nations has recognized NGOs, along with the Special Representative on Children and Armed Conflict, as key in the development of the CRC Optional Protocol.[282] There are many roles that national and international NGOs can play in addressing the problem of child soldiers.[283] They can assist in disseminating information about national and international laws prohibiting the use of child soldiers. They can assist with the reunification, where feasible, of former child soldiers with their families and communities. They will often be instrumental in rehabilitation programs for former child soldiers.

Increasingly, NGOs operate through formal and semi-formal networks to maximize their influence. The CSC appears to have been modeled to some extent on the successful precedent of the Coalition for an International Criminal Court (CICC). The CICC included most of the NGOs participating in the negotiations leading to the adoption of the ICC Statute.[284] In particular, the CICC appears to have been crucial in optimizing the effectiveness of NGOs in the negotiation process, providing organization and services rather than advocacy itself.[285] At its establishment in 1995, the CICC had around 30 NGO members, but it ultimately had over 1,000 members.[286]

The CSC may be seen as drawing from the CICC model but going beyond it. The CSC, formed in May 1998 (one month before the International Labor Conference, which included the first discussion of the draft C 182), by six NGOs: Amnesty International, Human Rights Watch, the International Save the Children Alliance, Jesuit Refugee Service, the Quaker United Nations Office—Geneva, and International Federation Terre des Hommes.[287] It now has members or activities in 40 countries.[288] Certainly the CSC was active in the

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280 *See* Breen, *supra* note 36, at 458–59 on the Committees Rules of Procedure and its practice on the participation of NGOs.

281 *Id*., 460.

282 Secretary-General's Report 2001, *supra* note 47, para. 9.

283 *See generally* Machel Report, *supra* note 8.

284 PEARSON, *supra* note 277, at 234.

285 *Id*., at 238.

286 *Id*., at 237.

287 *See* http://www.child-soldiers.org/.

288 *Id*.

negotiations leading to the adoption of the CRC Optional Protocol and may have had some influence on the inclusion of the forced recruitment of child soldiers in C 182, but unlike the CICC, it also has a direct advocacy role. This can be explained primarily by the nature of the issue. The many members of the CICC may have agreed on the need for an international criminal court, but they came to the issue from a variety of perspectives. For example, there were groups representing the rights of the defense and groups advocating the compensation of victims.[289] As a result, many of the details of the statute would be the subject of disagreement between various members. For the CSC, however, the issue is much more focused, which allows the CSC to take a clear and unified position in favor of the straight-18 rule.

Another relevant NGO network has been established on the broader issue of children in armed conflict, which works with the CSC on child soldiers questions. The Watchlist on Children in Armed Conflict is a network focusing on research and information and, only to a lesser extent, activism.[290] Created by children's rights NGOs, it has national, regional and international partner organizations and obtains its information from a broad range of sources. The CSC is a member of the Watchlist steering committee, along with CARE International, the International Save the Children Alliance, the Norwegian Refugee Council, the Women's Commission on Refugee Women and Children and World Vision.[291] It concerns itself with a wide range of humanitarian issues affecting children, including child soldiers and the impact of trade in small arms on the recruitment and of child soldiers.

More established individual NGOs are also important in keeping the child soldiers issue active in international forums and in the context of armed conflicts and peace processes. The ICRC has a special status in the implementation of international humanitarian law, as recognized in the Geneva Conventions.[292] It therefore has a significant role to play in implementing any ban on the use of child soldiers, including by non-state forces.[293]

Finally, child soldiers should have an important voice in the development and implementation of relevant international norms. Until recently, despite the requirement in Article 12 CRC that children should be allowed to participate in decisionmaking that affects them, in accordance with their age and maturity, they have not been involved in the international forums that have addressed issues relating to child soldiers. Children themselves have to be involved in the

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289 PEARSON, *supra* note 277.

290 Watchlist Web site, *at* http://www.watchlist.org. *See also* Freedson, *supra* note 16, at 39.

291 *See* http://www.watchlist.org/about/steeringcommittee.php.

292 Holly Cullen & Karen Morrow, *International Civil Society in International Law: The Growth of NGO Participation*, 1 NON-STATE ACTORS & INT'L L. 7 (2001).

293 Machel Report, *supra* note 8, para. 302.

process of eliminating the recruitment and use of child soldiers. The Special Representative on Children and Armed Conflict has been active in promoting the involvement of children, particularly in his Voice of Children project, which helps to establish radio programs and stations devoted to the needs and interests of children and especially to give them a voice.[294] He also advocates the development of children to children networks between conflict-torn and peaceful countries.[295] Children have begun to be heard on the issues of the impact of conflict, including being soldiers at international conferences, before the Security Council debates on children and armed conflict and especially at the General Assembly Special Session on Children in 2002.[296]

G. Conclusion

International legal norms relating to child soldiers may be found in several contexts. Originally found in international humanitarian law instruments, prohibitions on the recruitment and use of child soldiers may be found in human rights treaties, international labor law and international criminal law as well as humanitarian law. Despite the proliferation of international standards, there are still problems in defining the scope of the prohibition on child soldiers, some of which derive from threshold issues of international humanitarian law and some of which relate to the refusal by some states to accept 18 as the minimum age for voluntary recruitment of soldiers into government armed forces.

Even if the scope of the prohibition on child soldiers can be agreed upon despite the ambiguities and controversies within the international legal instruments, there are considerable difficulties in ensuring the full implementation of these norms. The Special Representative on Children and Armed Conflict has identified three elements to any strategy for eliminating the use of child soldiers: (1) putting political pressure on the offending parties; (2) addressing the political, social and economic factors that make soldiering attractive to children;[297] and (3) mobilizing resources for the rehabilitation and reintegration of former child soldiers.[298] This all goes far beyond the scope of international legal processes but must be informed by the international law norms that have been developed. Actors beyond states, particularly NGOs, are well placed to influence states and international institutions to integrate the relevant international

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294 Otunnu Report 2000, *supra* note 13, para. 136; O Otunnu Report 2001, *supra* note 19, paras. 64–66.

295 *Id*., para. 137.

296 United Nations Special Session on Children, meeting with Security Council on armed conflict, *at* http://www.unicef.org/specialsession/activities/security-council.htm.

297 On these factors, see Otunnu Report 2001, *supra* note 19, para. 79.

298 Otunnu Report 2000, *supra* note 13, para. 126. Cohn, *supra* note 244.

standards into their responses to conflict situations. An example of such integration is the response to the conflict in Sierra Leone.

The idea of an "era of application" for the international norms on child soldiers is now accepted by even the Security Council.[299] Its level of priority in the international system makes it somewhat less surprising than it might seem at first glance that this is a priority within international labor law. However, the idea of exploitation and abuse that underpins the ideology of C 182 and the worst forms of child labor is consistent with the idea of ending the recruitment and use of child soldiers. Ironically, this leads to an emphasis on child welfare over child agency as the basis of the right. Children's rights to participate are not entirely absent, and the Special Representative has repeatedly advocated the need for child participation to address the particular situations in which child soldiers find themselves.

[299] S.C. Res. 1460, U.N. Doc. S/RES/1460 (Jan. 30, 2003).

Chapter 5
Critiques of Prioritization and Alternative Approaches to Regulating Child Labor

A. *Introduction*

ILO C 182 of 1999 takes the approach of setting priorities in the area of child labor. Rather than setting a minimum age for entry into employment, which had been the approach of previous conventions, the International Labor Organization (ILO) seeks, in C 182, to ban all persons under 18 from certain forms of labor that are deemed to be particularly harmful.[1] There are two fundamental questions to consider in light of this Convention. First, is prioritization the correct way to make progress on eliminating harmful child labor? Second, does the Convention set the correct priorities?

It is important to remember that in addition to the three specific types of the worst forms of child labor listed in Article 3 of C 182, which have been discussed in the three previous chapters, there is a residual category in paragraph (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." However, there is little guidance in C 182 itself as to what is covered by this paragraph, although some is provided in R 190, which accompanies C 182. R 190 was adopted in parallel with C 182 to provide additional non-binding guidance on how C 182 is to be implemented. Unfortunately, there is a danger that the undefined nature of C 182's Article 3, paragraph (d), in comparison with the three previous paragraphs, will lead it to be ignored, and the first three paragraphs will become effectively the only priorities in the campaign to eliminate harmful child labor.

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[1] Article 3 of C 182 defines the worst forms of child labor as including: "(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 labor, 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."

Smolin has criticized the ILO's approach to prioritization as irrational, being based largely on political factors.[2] However, I would argue that, when the wider picture is examined, the prioritization approach can be defended, although it may not be enough to catch all forms of harmful child work. C 182 engages with the wider contemporary children's rights agenda, reflecting concerns in the Convention on the Rights of the Child (CRC) and other human rights organs rather than the more technocratic labor law approach that had been followed in previous ILO conventions. The prioritization approach, unlike that of C 138, does not take an abolitionist approach to child labor and therefore implies that some child labor is permissible or even beneficial. This is a controversial position to take, and it is not surprising that C 182 does not explicitly endorse it. However, by not doing so, the Convention fails to address fully two important issues: the link between child labor and education and the need to guarantee working children safe and fair working conditions.

Nonetheless, the prioritization approach can be criticized from grounds other than those raised by Smolin. As noted above, there is a danger that issues outside the areas named in Article 3(a)-(c) will be ignored. These priorities do not directly deal with the sectors in which a large proportion of children work, namely agriculture and domestic service. Priorities, moreover, can also be described as biases. First, C 182 is biased towards a combination of economic and moral exploitation. Second, it is biased against the informal sectors of the economy. Third, it may contain bias against the so-called private sphere.

B. Critiques and Defenses of Prioritization

The main opposition to the prioritization approach of C 182 comes from those who seek to abolish all child labor, arguing that it is in itself a harm to children. Some activists and others are still in favor of an abolitionist goal if not an immediately abolitionist approach. The ILO has stated that the abolition of all child labor is its ultimate goal.[3] Implicitly, therefore, the prioritization approach taken by C 182 is seen as a matter of strategy rather than principle. It is about reinvigorating the campaign against child labor by establishing a broad consensus on certain child labor issues. The ILO, therefore, sees prioritization as part of a larger strategy, which embraces the International Program on the Elimination of Child Labor (IPEC) and the core conventions of the 1998

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2 David M. Smolin, *Strategic Choices in the International Campaign Against Child Labor*, 22 HUM. RTS. Q. 942 (2000).

3 JUAN SOMAVIA, DECENT WORK, REPORT OF THE DIRECTOR GENERAL TO THE 87TH INTERNATIONAL LABOR CONFERENCE (1999); the report repeatedly refers to the elimination of child labor and describes C 182, then under discussion by the Conference, as a step in the progressive elimination of child labor and as building on existing ILO standards.

Declaration of Fundamental Principles and Rights at Work (which includes both C 182 and C 138).[4]

One critique of prioritization, however, is that it is not about building a consensus around certain issues simply as a stage of the campaign against child labor but runs the risk of becoming the whole campaign. This would have the effect of excluding the vast majority of child workers. If they choose freely to work, and are not involved in criminal activities or the sex trade, it will be difficult to bring them within the scope of C 182, even if they face other hazards. The general clause in Article 3(d) is vague, and even the elaboration set out in R 190 may be insufficient to allow for clear identification of a hazardous form of child labor as a "worst" form.[5] It certainly makes it difficult for states to know whether or not they have adopted the correct legislation and administrative practices to combat these relatively undefined worst forms of child labor. By extension, it will be difficult for ILO monitoring procedures to challenge states on the question of whether or not they have acted sufficiently against the non-enumerated worst forms of child labor. To date, the Committee of Experts has focused on industries where the hazards are well documented: agriculture, mining and domestic service.[6]

Some advocates of prioritization would agree that prioritization should be about eliminating the truly harmful forms of child labor rather than all child labor.[7] They argue that the abolitionist approach is an incorrect one. There are

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4 *Id*.

5 Judith Ennew, William Myers & Dominique Plateau, *Defining Child Labor as if Human Rights Matter, in* CHILD LABOR AND HUMAN RIGHTS: MAKING CHILDREN MATTER 27, 37 (Burns H. Weston ed., 2005). Article 3 of R 190 provides that:

> 3. In determining the types of work referred to under Article 3(d) of the Convention, and in identifying where they exist, consideration should be given, inter alia, to:
>
> (a) work which exposes children to physical, psychological or sexual abuse;
>
> (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 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.

6 *See* Chapter 6.

7 Antonella Invernizzi & Brian Milne, *Are Children Entitled to Contribute to Inter-*

strong arguments for this position. First, there is the children's rights argument that children must be allowed to choose to work. To say that children cannot work, in any circumstances, denies their agency and therefore their rights under the CRC. This argument is an important one, and it is an important challenge to the abolitionist stance. Second, there is the argument that work is often developmental and can be a better education than the formal system of education in many countries. This argument is developed further in Section C.2 in the context of evaluating the link between denial of education and child labor in setting priorities.

Prioritization, whether as a strategic approach preparing for abolition, or as an alternative to abolition, implies that some forms of child labor are permissible.[8] However, C 182, like all child labor conventions, fails to define what is permissible child labor. C 138 can arguably be seen as defining permissible child labor in its category of light work, but this is complicated by the numerous exceptions and potential exemptions and exclusions that states parties may make.[9] As a result, there is no clear or consistent definition of permissible child labor in C 138. C 182 leaves permissible work as a residual category, after the worst forms of child labor are excluded. Throughout the debate over prioritization, there has been a focus on defining when child labor is abusive and should be illegal rather than when child labor is permissible and benign or even beneficial. It is difficult, even by reversing the logic of the prohibited forms of child labor, to state the characteristics of positive child labor.

Ironically, however, in practice, the abolitionist and prioritization approaches may blur together. Since the issue of child labor became high profile in the ILO in the early 1990s, the ratification of C 138 has risen markedly. In the mid-1990s, it had an embarrassingly low ratification of 49. As of early 2007, it had been ratified by 147 states.[10] Part of this will be due to its being elevated to a core convention under the 1998 Declaration of Fundamental Principles and Rights at Work. However, it does seem also to have benefited from the publicity given to child labor as an issue in general in the context of the adoption of C 182.[11] In addition, although C 182 has been ratified by more states (163) than

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national Policy Making? A Critical View of Children's Participation in the International Campaign for the Elimination of Child Labor, 10 INT'L J. CHILDREN'S RTS. 403 (2002).

8 I am grateful to Jeff Kenner for pointing out this silence in the child labor debate.

9 Holly Cullen, *Child Labor Standards: From Treaties to Labels, in* CHILD LABOR AND HUMAN RIGHTS: MAKING CHILDREN MATTER 87, 91–92 (Burns H. Weston ed., 2005) [hereinafter, Cullen, Child Labor Treaties]; Breen Creighton, *Combating Child Labor: The Role of International Labor Standards*, 18 COMP. LAB. L.J. 362 (1997).

10 *See* http://webfusion.ilo.org/public/db/standards/normes/appl/index.cfm?lang=EN.

11 William E. Myers, *The Right Rights? Child Labor in a Globalizing World*, 575 ANNALS AM. ACAD. POL. & SOC SCI. 38 (2001).

C 138, there have been more observations made by the Committee of Experts on C 138 in the period since reporting began on C 182 than on C 182 itself.[12]

C. *Alternative Approaches to Child Labor Priorities*

The main distinction between C 138 and C 182 is that the former is an abolitionist convention that seeks to eliminate all work by children below school-leaving age (broadly speaking), whereas the latter implicitly distinguishes between permissible and impermissible forms of child work. In fact, in the years leading up to the adoption of the Convention, IPEC began making a distinction between child work, which merely means the employment of children, and child labor, which implies some form of harm. Contrary to the scheme established under C 138, IPEC had moved to an acceptance that much child work was beneficial or at least benign.[13] Child labor, in this analysis, included some element of harm, or particular exploitation, which went beyond mere employment of children. However, on the basis of C 138, it was impossible to distinguish between benign and abusive forms of child labor.[14] Under IPEC, the ILO defined child labor as work that is detrimental to children's physical and mental development.[15] However, as noted in Section B, the ILO has been unclear as to whether prioritization in the campaign against child labor is a principle or a temporary strategy.

Although IPEC has sometimes employed this distinction between child work and child labor, the definition of the distinction does remain elusive. After C 182, there appears to be a further distinction between child labor and the worst forms of child labor. It is unclear therefore whether this means that there are three categories: (1) child work, which is not harmful; (2) child labor, which is harmful; and (3) the worst forms of child labor, which are so harmful that they must be outlawed with immediate effect and eliminated as soon as possi-

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[12] Eighty-seven observations on C 138 and 65 on C 182. Although Article 22 of the ILO Constitution requires states to report on conventions annually, the ILO's practice is to require an initial report within a year of ratification and further reports every four years. For more detail on state reporting under these conventions, see Chapter 6.

[13] International Labor Organization, Child Labor, Targeting the Intolerable (1996).

[14] Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights: *Contemporary Forms of Slavery: Updated Review of the Implementation of and Follow-up to the Conventions on Slavery, Addendum, Forms of Slavery*, E/CN.4/Sub.2/2000/3/Add.1, para. 70 (May 26, 2000).

[15] International Labor Organization, International Program on the Elimination of Child Labor (IPEC), *Child Labor in Commercial Agriculture in Africa: Report*, Technical Workshop on Child Labor in Commercial Agriculture in Africa, Dar es Salaam, United Republic of Tanzania, Aug. 27–30, 1996, para. 10 (Geneva, 1997).

ble. Smolin therefore correctly questions whether C 182 is informed by a clear definition of child labor.[16] While the forms of child labor listed in paragraphs (a) to (c) of Article 3 clearly interfere with at the very least mental development, many forms of labor with considerable physical risks are not listed. Mining, some forms of manufacturing and commercial agriculture, all present significant health hazards to children.[17] Such hazards arise from exposure to harmful chemicals, unsafe working environments and inappropriate or absent safety equipment.[18] It is instructive to compare Article 3 of C 182 with the list of prohibitions suggested by the U.N. Commission on Human Rights in Resolution 1993/79 on the Program of Action for the Elimination of the Exploitation of Child Labor, paragraph 20:

(a) Employment before the normal age of completion of primary schooling in the country concerned;

(b) Under-age maid service;

(c) Night work;

(d) Work in dangerous or unhealthy conditions;

(e) Activities linked with prostitution, pornography and other forms of sexual trade and exploitation;

(f) Work concerned with trafficking in and production of illicit drugs;

(g) Work involving degrading or cruel treatment.

This list contains some of the categories of Article 3 of C 182, particularly sexual and criminal exploitation. It also includes interference with basic education, physical hazards and domestic service, which were discussed but ultimately excluded from C 182.

One way, therefore, to set priorities in the area of child labor is to identify those areas that cause the most harm to children's development, regardless of other factors.[19] This has not been followed, since areas where well-identified harms exist, such as agriculture and domestic service, are not included in Article

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16 The essence of Smolin's critique of the Convention is that it does not define child labor in a sufficiently clear way in order to render evident the nature of the harm from which children are to be protected.

17 Holly Cullen, *The Right of Child Workers to Protection from Environmental Hazards*, in THE RIGHT OF THE CHILD TO A CLEAN ENVIRONMENT 35 (Malgosia Fitzmaurice & Agata Fijalkowski eds., 2000).

18 *Id*.

19 Smolin, *supra* note 2, suggests numerous ways of setting priorities, most of which derive from medical practice. I do not propose to follow this method, but rather to examine the alternatives based on previous ILO practice in the area of child labor or on the basis of arguments put forward during the drafting process.

3. It is worth noting that a harm approach was taken in Article 3 of C 138, which sets a higher minimum age for hazardous work.

Smolin criticizes the prioritization approach in C 182 for being driven by political factors rather than by a definition of harm. There is a great deal of truth in his assertion. As has been demonstrated in previous chapters in this part, the priorities in C 182 are very similar to priorities in other areas of human rights, particularly children's rights: child soldiers, commercial sexual exploitation, trafficking and forced labor. It is worth, however, looking at other potential approaches to prioritization in child labor and evaluating their merits.

1. Targeting Particular Sectors

Prior to C 138 in 1973, ILO conventions on child labor tended to be based around different sectors of the economy: manufacturing and industry, mining, seafaring, agriculture and services.[20] Not surprisingly, this approach was abandoned with C 138, since its goal was the virtually complete abolition of child labor. The patterns of employment in different sectors were therefore irrelevant. C 182 likewise ignores sectors. The only specific forms of employment mentioned in Article 3 are military service or use in the sex industry or criminal activities. C 182 focuses on abuses rather than sectors in attempting to address the worst forms of child labor and follows the priorities of other human rights instruments.

However, by focusing on the worst forms, it must be remembered that only a minority of child workers are directly covered by C 182, at least in terms of the enumerated categories in Article 3(a)–(c). The two largest sectors where child workers are found are domestic service and agriculture. Some children in these sectors may be covered by C 182 indirectly, but the majority will have to look to C 138.

a. Child Domestic Workers

Child domestic work covers a wide range of situations and a wide range of legal relationships, from family relationships, forms of adoption, formal employment relationships and slavery-like practices. Often it is difficult to tell where the "upbringing" of a child ends and employment begins.[21] Sending children to live with relatives or strangers who are better off, in the hope that their life chances will be improved, is a frequent coping strategy in families in many parts of the world, but it can become exploitation of children's labor.[22]

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20 Cullen, Child Labor Treaties, *supra* note 9, at 89–91.

21 Maggie Black, Child Domestic Workers: Finding a Voice 1–2 (2002).

22 *Id*., 8–9.

Most studies only address domestic work outside the context of the immediate family. For example, a recent UNICEF study defined child domestic workers as:

> Children under the age of 18 who work in other people's households, doing domestic chores, caring for children and running errands, among other tasks. [This includes mainly] live-in child domestics, that is children who work full-time in exchange for room, board, care, and sometimes remuneration.[23]

However, as has been noted in other contexts, particularly the European Committee on Social Rights monitoring the European Social Charter, domestic work within the family can be equally harmful in terms of preventing a child from benefiting from education.[24] Child domestic work, even on conservative definitions, such as that used by UNICEF, is the largest sectoral category of child work.[25] As in other sectors where child labor is common, children may be preferred as domestic workers, because they may be paid less (or nothing except room and board) and are less likely to disobey or question orders.[26]

The factors that make child domestic work a cause of concern for campaigners against abusive child labor include the relative lack of freedom, vulnerability to abuse, the relatively high numbers of very young children, lack of remuneration or lack of control of remuneration and lack of contact with family and friends.[27] These factors are also those that make it difficult to regulate child labor even at the domestic level, let alone the international level. The central issue surrounding the regulation of child domestic work is invisibility.[28] The child domestic worker's status may be obscured by a supposed adoption or by promises of education and improved socio-economic position. In the case of girls, their employment may be obscured by traditional ideas of women's roles, whereby long hours of domestic work are considered simply as a normal contribution to family life. Child domestic workers are diffused throughout different households in an area rather than being located in a single identifiable economic undertaking, such as a factory, farm, or even a brothel. These factors all raise the question of whether regulation of child domestic work is practically possible. Several European countries have legislation that regulates the

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23 UNICEF International Child Development Center, Innocenti Digest, Child Domestic Work 2 (1999).

24 International Commission of Jurists v. Portugal, Complaint No. 1/1998, 7 I.H.R.R. 525 (2000) (merits).

25 UNICEF, Innocenti Digest, *supra* note 23, at 2.

26 Black, Finding a Voice, *supra* note 21, at 9.

27 *Id*., 4–8

28 *Id*., 3.

use of children in domestic work outside the home, but there are serious doubts as to its effectiveness in practice.[29]

Child domestic work is not explicitly mentioned even in R 190, although paragraph 3 sets out that States should, in defining the worst forms of child labor, give consideration to the following factors:

> (a) work which exposes children to physical, psychological or sexual abuse;
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> . . .
>
> (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.

The potential for abuse of child domestic workers is a well-documented phenomenon, including by IPEC,[30] although the research on child domestic workers has almost exclusively been done within the last decade.[31] Child domestic work is, furthermore, a growing trend.[32] It is a problem that particularly faces immigrants, where their employer may confiscate their passports in order to prevent their potential flight.[33] Even in countries where law and practice take a strong position against the abuse of domestic workers, especially children, there can be problems in enforcement. In France, many of the abused workers were employed by diplomats[34] who, due to diplomatic immunity, could not be prosecuted. The European Court of Human Rights has found France in violation of Article 4 ECHR concerning slavery, servitude and forced labor, because its criminal law did not enable persons who had kept a girl in conditions of servitude to be convicted of a crime.[35]

Some authors distinguish between children undertaking domestic work within the family and those working outside the family.[36] The original approach

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29 UNICEF, Innocenti Digest, *supra* note 23, at 12.

30 International Labor Office, Helping Hands or Shackled Lives? Understanding Child Domestic Labor and Responses to It (2004).

31 Maggie Black, *Child Domestic Workers: Slaves, Foster Children or Under-Age Employees?, in* Revisiting Children's Rights: Ten Years of the United Nations Convention on the Rights of the Child 157, 160–61 (Deirdre Fottrell ed., 2000).

32 *Id*., 164.

33 A. Yasmine Rassam, *Contemporary Forms of Slavery and the Evolution of the Prohibition of Slavery and the Slave Trade Under Customary International Law*, 39 Va. J. Int'l L. 303, 327–28 (1999).

34 *Report of the Working Group on Contemporary Forms of Slavery*, E/CN.4/Sub.2/1999/17, para. 64 (July 20, 1999).

35 Sialidin v. France, 43 E.H.R.R. 16 (2006).

36 International Labor Office, *supra* note 30, at 5. The distinction here is made primarily because of the lack of data on children working in their own homes.

of the ILO was to exclude work done within the family from the scope of child labor conventions: see, for example, C 33 on Minimum Age in Non-Industrial Employment, Article 2(b). C 138 does not make such an exemption, but some have argued that it is implicit, particularly in light of permitted exclusion of sectors, where particular problems of application arise, on the ground that it is practically impossible to monitor child work in the family home.[37]

Certainly some child domestic workers would be protected by C 182. However, this would, in general, require the proof that the relation amounted to slavery. The U.N. Working Group on Contemporary Forms of Slavery has recognized that child domestic service is a category of slavery-type bond in many cases, reflecting Article 1(d) of the 1956 U.N. Supplementary Convention on Slavery:

> any institution or practice whereby a child or young person under the age of 18 is delivered by either or both of his natural parents or by his guardian to another person, where for reward or not, with a view to the exploitation of the child or young person or of his labor.

Nonetheless, the Working Group has called on the ILO to give child domestic work a higher priority than it has in C 182.[38] Child domestic workers will also be covered by C 182 if they are trafficked into domestic service. This appears to be a growing phenomenon. Increasingly, children are being trafficked into countries, such as the United Kingdom, to be used for domestic labor as well as the sex trade.[39]

Many of the circumstances surrounding child domestic work are nonetheless caught by Article 3 of C 182.[40] The trafficking of children for the purposes of placing them in domestic service is covered by paragraph (a),[41] as would be

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37 *See* Smolin, *supra* note 2, at 966.

38 *Report of the Working Group on Contemporary Forms of Slavery, supra* note 34, para. 107, Recommendation 10.

39 Audrey Gillan, *The Teenagers Traded for Slave Labor and Sex*, THE GUARDIAN (London), July 30, 2003, at 1. UNICEF U.K.'s Report on child trafficking, *at* http://www.endchildexploitation.org.uk/pdf/ct/UKtraffickingreportfinal.pdf [hereinafter UNICEF U.K. Report]. More generally on trafficking of children for domestic work, see UNICEF UK, CHILD LABOR TODAY (2005), pp. 32, 49–50.

40 IPEC sets out the following factors as bringing child domestic service within the category of worst forms of child labor: where a child is sold or trafficked, is bonded to repay family debt, works without pay or for excessive hours, works in isolation or during the night, is exposed to safety or health hazards, is unreasonably confined to the employer's premises, suffers physical violence or sexual harassment or is very young; *see* IPEC, FACTS ON DOMESTIC CHILD LABOR, (2003), *at* http://www.ilo.org/public/english/standards/ipec/publ/download/factsheets/fs_domesticlabour_0303.pdf.

41 On the trafficking of children for domestic service, see ILO, *Stopping Forced Labor, Global Report of 2001 on the Declaration of Fundamental Principles and Rights at Work* 76–77 (2001) [hereinafter ILO Global Report 2001]. UNICEF U.K. Report, *supra* note 39.

any practices amounting to forced labor. In some cases, the line between abuse of a child domestic servant and commercial sexual exploitation may be crossed, which would bring into play paragraph (b).[42] Finally, the conditions under which domestic servants work may cause situations to fall into the catch-all category in paragraph (d). However, this means that child domestic work is only considered one of the worst forms of child labor where there is some additional factor such as compulsion or particularly hazardous working conditions. Evidence of those conditions would have to be obtained in circumstances where the only evidence might be the testimony of the children themselves.

However, out and out slavery or clear abuse will not always be the situation of child domestic workers. The idea that C 182 should only cover the worst forms of child labor, and that child labor implies more than child employment but also some form of abuse, admittedly makes it difficult to argue for the inclusion of child domestic service in category terms.[43] Child domestic work can range from children doing relatively undemanding chores within the family household outside school hours to the slavery-type relations of the Haitian "restavec" children, for example.[44] "Restavec" children are live-in domestic servants (from the French, "*rester avec*," meaning to stay or remain with) whose relationship with the families with whom they live goes beyond an employment relationship but is less than one of adoption and involves the child working for the family. Smolin argues that it is the essentially private or family nature of most child domestic service that makes it inappropriate for an international standard, partly on principle and partly because of enforcement difficulties.[45]

The borderline between family-type relations and slavery-type relations is often difficult to draw. In some circumstances, children exploited for their labor in the household may well have been legally adopted by their employers.[46] Child domestic workers are sometimes part of movements of children between parts of an extended family, which are common, particularly in Africa.[47] In some

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42 However, as noted in the UNICEF U.K. Report, *supra* note 39, at 10, statistics concerning trafficking for commercial sexual exploitation often do not disaggregate by age, and include 16- and 17-year-old girls, who are protected by C 182, with adult women.

43 *See* statement by the U.K. government member of the Committee on Child Labor, International Labor Conference, 87th Sess., *Report of the Committee on Child Labor*, 14 June 1999. para. 402 (June 14, 1999).

44 Timothy C. Janak, *Haiti's "Restavec" Slave Children: Difficult Choices, Difficult Lives . . . Yet . . . Lespwa fe Viv*, 8 Int'l J. Children's Rts. 321 (2000). The "restavec" (sometimes "restavek") relation is in fact illegal in Haiti, but it is not properly enforced; *see* Black, *Child Domestic Workers: Slaves, Foster Children or Under-Age Employees?, supra* note 31, at 163.

45 Smolin, *supra* note 2.

46 Black, *Child Domestic Workers: Slaves, Foster Children or Under-Age Employees?, supra* note 31, at162.

47 UNICEF U.K. Report, *supra* note 39, at 6.

cases, employers of domestic child labor have lived up to the promises given to the parents of child servants and have provided them with education and support through to adulthood, like an extended family.[48] Furthermore, in some respects, the conditions of child domestic workers are frequently better than those of many other working children, for example in respect of nutrition.[49]

There are, therefore difficult lines to draw in defining child domestic service as a form of child labor. Intensive legal intervention in this area would involve interference with family relations. In particular, the practice of sending children to distant relatives must be handled sensitively. Informal forms of adoption are often not well understood in the West, and African countries have been criticized, possibly unfairly, because of the lack of judicial supervision of such adoptions.[50] It is probably difficult, except on a case-by-case basis, to determine whether a child domestic servant is involved in an abusive form of child labor.[51] As a form of child labor, child domestic service remains largely invisible. The same invisibility that would make a norm against child domestic service difficult to enforce also makes it difficult to estimate. In many countries, domestic employment is not included in national employment statistics.[52] Even where paid domestic employment is included, it may be only a fraction of the real figure, as many child domestic workers are not paid and are considered family members rather than employees.

Domestic service is estimated to be the largest employer of female child labor.[53] As noted above, in general, domestic service is not included in national employment statistics. This reflects a wider gender bias in economic statistics, whereby economic value is not attributed to household tasks, usually performed by women.[54] In the case of child domestic work, the bias against counting such work is heightened by the perception that many of these relationships involve the upbringing of children rather than their employment.[55]

The reasons for exclusion of child domestic workers as a category from C 182 may be many. First, there are few existing standards except for the 1956

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48 *Id*.

49 UNICEF, Innocenti Digest, *supra* note 23, 7.

50 Sonia Harris-Short, *Listening to "the Other"? The Convention on the Rights of the Child*, 2 Melbourne J. Int'l L. 304 (2001).

51 The UNICEF U.K. Report, *supra* note 39, at 13, argues that the parents of children sent to distant relatives are often unaware of the potential for this practice to mask trafficking.

52 Black, *Child Domestic Workers: Slaves, Foster Children or Under-Age Employees?, supra* note 31, at 161.

53 *Id*.

54 *See* Marilyn Waring, If Women Counted: A New Feminist Economics (1988).

55 Black, Finding a Voice, *supra* note 21, at 54.

Supplementary Convention on Slavery from which to draw inspiration, when compared with child soldiers for example. Second, there would be formidable difficulties in defining a standard that was not over- or under-inclusive, particularly in respect of work within the family. Third, the private and diffused nature of child domestic service would render any standard exceptionally difficult to enforce. Fourth, despite the efforts of IPEC to provide data and analysis of the circumstances of girls' work in domestic service,[56] there may be an unconscious gender bias that affected the priority-setting of the International Labor Conference when drafting C 182, which only requires states to "take account of the special situation of girls" in their implementation programs rather than in defining the worst forms of child labor.[57]

b. *Agriculture*

Agriculture is the sector where most child workers are found. This is certainly the case in countries such as Bangladesh.[58] As a result, treating this sector as a priority may be, in practice, impossible both because of the scale of the situation and because of resistance to removing such a large number of children from employment. Like domestic service, agricultural work is often performed in family settings in which states are reluctant to intervene and in which intervention is less likely to be effective.

One of the earliest child labor conventions from the ILO, C 10 of 1921, directly addressed child participation in agricultural work. Like all ILO child labor conventions before C 182, it focuses on the minimum age for employment, which in C 10 was 14, rather than working conditions. C 10 is unique, however, in allowing states to modify the school year to allow children to participate in agricultural work. The flexible attitude towards child work in agriculture extends to C 138, which allows family-scale farms to be excluded from its scope. A distinction therefore is made between family and non-family employment.[59] This

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[56] International Labor Office, Girl Child Labor in Agriculture, Domestic Work and Sexual Exploitation: Rapid Assessment on the Cases of the Philippines, Ghana and Ecuador (2004), especially the conclusions at 355–56; International Labor Office, A Comparative Analysis: Girl Child Labor in Agriculture, Domestic Work and Sexual Exploitation: The Cases of the Ghana, Ecuador and the Philippines (2004), especially at 70–75 and 89–92.

[57] C 182, Article 7(2)(e). Similarly, in paragraph 2(c)(i) of R 190, states should give special attention to the girl child and to the problem of hidden work "in which girls are at special risk," when developing programs of action to eliminate the worst forms of child labor.

[58] Muhammad Masum, *Eradication of Hazardous Child Labor in Bangladesh: The Need for an Integrated Strategy*, 10 Int'l J. Children's Rts. 233, 234 (2002) 234; it accounts for around two-thirds of child employment for both boys and girls.

[59] *Id.*, 967.

marks a different approach from C 10, which did not distinguish between context, but only required that child work in agriculture be performed outside of school hours.

Agricultural work by children, even more than domestic work, is done in a variety of contexts. It exists in small-scale subsistence agriculture on family farms and in large-scale commercial agriculture. These are not two distinct forms of agriculture—small farms may be part of a larger export-oriented industry. The distinction between formal employment and work within the family unit may also be difficult to distinguish.[60] For example, children may accompany a parent, usually one working on piece-rates, to improve the parent's productivity.[61] These factors make it difficult to develop regulatory regimes that can address those aspects of child work in agriculture that may be considered a worst form of child labor within the meaning of Article 3(d) of C 182.

And yet, there are reasons why agricultural work should, in some circumstances, be considered among the worst forms of child labor. The work can be extremely hazardous, including exposure to chemicals that may be more hazardous to children than to adults, and the lack of appropriate safety equipment even if employers choose to make such equipment available.[62] In addition, very young children may not even understand the hazards. There is some guidance in R 190 on how Article 3(d) of C 182 should be interpreted, and in paragraphs 3(c) and (d), the Recommendation highlights work with dangerous equipment or machinery and exposure to hazardous substances, agents or processes. Several examples of such hazards have been set out by IPEC.[63] As a result, while there are very good practical reasons why it is difficult to put the idea of child agricultural work as a worst form of child labor into practice, there are good reasons not to ignore agricultural work altogether.

In addition to these aspects of agriculture, which could fall into Article 3(d) of C 182, there are other circumstances where agricultural work could be considered among the worst forms of child labor. In particular, instances of bonded labor and other slavery-like practices have been noted in some areas of agriculture, such as cocoa plantations in West Africa.[64] While child labor in agriculture has not been a priority in the drafting of C 182, child labor, includ-

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60 Masum, *supra* note 58, at 236, cites statistics showing that nearly two-thirds of child workers in Bangladesh are unpaid family workers rather than employees or self-employed.

61 *Child Labor in Commercial Agriculture in Africa: Report, supra* note 15.

62 Cullen, *The Right of Child Workers to Protection from Environmental Hazards, supra* note 17, at 35.

63 IPEC, Facts on Child Labor in Agriculture (2003), *at* http://www.ilo.org/public/english/standards/ipec/publ/download/factsheets/fs_agriculture_0303.pdf.

64 *See* Chapter 2.

ing forced labor (which would be covered by Article 3(a) of the Convention) in agriculture has been a long-running focus of ILO technical assistance.[65] However, the ILO acknowledges that agriculture has been less of a priority area in the 1990s, which may be a partial explanation for the failure to push for the specific inclusion of at least some forms of agricultural work as the worst forms of child labor.[66]

So we see that in both the cases of domestic and agricultural workers, the original approach of the ILO to child labor may have been more relevant. In the early conventions, the ILO sought to regulate child labor by sector. The move to a more human rights oriented approach, ironically, has resulted in something being lost in the case of these sectors. While the ILO's early child labor standards in relation to agriculture or service work could easily be faulted as providing too many exemptions, especially in relation to work within the family, it is now necessary to examine instances of child domestic or agricultural work on a case-by-case basis to determine whether some aspect of it falls within the categories set out in Article 3 of C 182.

2. Link to Education

Smolin is strongly in favor of making the priority for child labor those instances of child labor that prevent children from taking full benefit of education. Similarly, one proposal made frequently during the drafting process for C 182, particularly by labor representatives to the International Labor Conference, and supported by many OECD states, was that any work that prevented school attendance or interfered with a child's ability to benefit from education should be considered one of the worst forms of child labor. This issue was not resolved until the second discussion in 1999, where an amendment was proposed to the Office draft to include a sub-paragraph in Article 3(d) that would have read "work, which systematically deprives children of access to education in accordance with applicable compulsory education requirements as established by national laws or regulations or by the competent authority," was withdrawn "with some regret" by its sponsors.[67]

The clause linking child labor and lack of education was opposed primarily by developing countries. The provision of education, particularly primary

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65 Global Report 2001, *supra* note 41, at 71.

66 *Id*., 73. The ILO appears to attribute this to the emphasis on market-driven approaches to agricultural reform during this time. However, see the reports on the position of the girl child worker in agriculture, domestic work and sexual exploitation, *id*.

67 ILC 87, *Report of the Committee on Child Labor, supra* note 43, para. 178—amendment proposed by government members of Austria, Belgium, Canada, Denmark, Finland, Germany, Ireland, Italy, Luxembourg, Netherlands, New Zealand, Norway, San Marino, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States.

education, is very poor in some parts of the developing world. A cycle emerges of poor quality and poorly funded education, which children and their parents rightly see as useless for improving the child's opportunities, leading to low rates of school attendance and high rates of child labor. As a result, primary education needs to be improved in order to persuade families that the sacrifice of the child's present potential earnings will, in the long term, pay off in higher earnings later. This problem is acute in most parts of India, where, although the percentage of GDP spent on education compares favorably with other developing countries, less than half is spent on primary education, and literacy rates are comparatively low.[68]

The debate over the link between education and child labor, as it played out in the International Labor Conference, leaves out several aspects of the interaction between education and child work.[69] These aspects would tend towards the rejection of the proposal to consider any work that prevents a child from benefiting from education as a worst form of child labor, although not necessarily for the reasons advanced by developing countries. First, the debate polarized education and employment, presenting them as alternatives. Even C 138 recognizes, through the category of light work, that for many children, work and school are both part of their lives. Presenting employment and education as alternatives, furthermore, can have the effect of delegitimizing work, and indicates to working children that their contribution to their families' well-being is valueless. Advocates of the complete abolition of child labor may consider all forms of children's work as inherently wrong, but even they do not wish to harm the child workers themselves, but rather to eliminate work that they consider harmful. Nonetheless, the argument that child employment should be eliminated in order to ensure full benefit of education could lead to education systems that are not designed for working children and therefore have the effect of excluding them, for example, by means of timetables that require attendance during working hours. Related to the polarization of education and employment, the second aspect that is lost in the current debate is the need for children to have choice and to guarantee their real participation in systems that affect their lives. A third aspect that needs to be integrated into the debate, which is related to the first two points, is that the debate centers around formal school-based education—education through work is often forgotten. To some extent this is understandable, as the argument that children are being trained in

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68 Lee Tucker, *Child Slaves in Modern India: The Bonded Labor Problem*, 19 HUM. RTS. Q. 572, 576–78 (1997).

69 However, it is worth noting that recently the ILO has made greater efforts to research the link between education and child labor; INTERNATIONAL LABOR OFFICE, WORKING PAPER: CHILD LABOR, SCHOOL ATTENDANCE AND ACADEMIC PERFORMANCE: A REVIEW (2003); INTERNATIONAL LABOR OFFICE, IMPACT OF CHILDREN'S WORK ON SCHOOLING: MULTI-COUNTRY EVIDENCE BASED ON SIMPOC DATA (2004).

a trade often masks abusive forms of child labor, where in fact the children are performing low-skill tasks in harmful conditions.[70] Nonetheless, vocational education is an issue in every country, and the abuse of the concept of vocational education or apprenticeship should not rule out the consideration of these situations as being part of education. It is worth noting that IPEC has recognized the role of non-formal education in its policies on eliminating child labor, drawing from the experience of its partner non-governmental organizations (NGOs).[71] Finally, removing children from employment will not in itself improve the quality of the education available. The education system itself must be reformed so that it is worthwhile for children to forsake employment for school.

Some researchers argue that integrating work and education is a valid approach for many children.[72] Determining work to be harmful because it deprives a child of a worthwhile education begs many questions and may have the perverse effect of exempting states that do not provide universal high quality education from the obligation to remove children from otherwise harmful forms of work. The existence of free primary education for all cannot be taken for granted in many countries. Even where education is free, in the sense that no fees are required from families, books, uniforms, transportation and sometimes room and board (if the school is very far away from home) are costs that families have to bear. In many countries, state primary education may not be easily available outside urban areas. Parents are also often skeptical about the utility of education for their children's future earning potential. While it may be economically rational for parents to forgo their children's present earnings, or unpaid labor within the household, if they see a long-term benefit from education, such benefit is not always obvious.[73] The quality of education locally may be poor, or the job opportunities locally may be largely limited to unskilled occupations where literacy and numeracy are no advantage. However, this argument carries the risk of allowing states to do nothing about either education or child labor. If states are only obliged to eliminate child labor where the educational provision is sufficient to make education a better option than work for children, then continuing to provide patchy or poor-quality education has the added benefit of lifting the obligation to enforce child labor laws.

Ultimately, C 182 defines access to education as part of the solution to child labor rather than its deprivation being part of defining the problem. Article

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70 *See* Tucker, *supra* note 68.

71 IPEC has often integrated education into its programs to remove children from harmful child labor; IPEC, COMBATING CHILD LABOR THROUGH EDUCATION (2004).

72 William E. Myers, *Can Children's Education and Work Be Reconciled?*, 2 INT'L J. EDUC. POL'Y, RES. & PRAC. 309 (2001).

73 *See* Masum, *supra* note 58, at 240–41 and 244–45, on determinants of the supply of child labor in Bangladesh. He notes, at 245, that these factors may be exacerbated by discriminatory attitudes towards women or ethnic minorities.

7(2)(c) requires states, as part of their action to implement the Convention, to improve access to education:

> 2. Each Member shall, *taking into account the importance of education in eliminating child labor*, take effective and time-bound measures to:
>
> . . .
>
> (c) ensure access to free basic education, and, wherever possible and appropriate, vocational training, for all children removed from the worst forms of child labor (emphasis added)[.]

This approach has also been supported by UNICEF, notably in relation to the situation of child domestic workers, where it has been suggested that the provision of education is more important than the adoption and enforcement of employment law.[74]

Smolin goes further and argues that this should be the sole basis on which child labor should be prohibited. He argues the essence of the harm of child labor, in the sense of harmful child work, is that it prevents a child from benefiting from education. As a result, child labor should only be seen as a violation of rights where it prevents a child from taking full advantage of educational opportunities that actually exist. Where there is no worthwhile provision of education, he argues, there is no reason why a child should not work. His conclusion appears to be, albeit not explicitly stated, that the very focus on child labor is a distraction from the real issue, which is the denial of the right to education. The focus, in his view, should be on ensuring the provision of adequate primary education.[75] However, as noted above, the shift in focus to education could leave children in forms of work that are otherwise harmful to their physical or mental health where that work had no direct effect on access to education.

D. Rights of Working Children

If prioritization of the worst forms of child labor is a defensible approach to the international regulation of child labor, then many instances of child labor will not be illegal. As a result, there are children who are legal workers. Like all workers, their rights within the employment relationship must be defended. However, some of their rights are specific to children. At present, only European regional instruments directly address the rights of young workers. While these rights are set within a context of a minimum age regime, they can provide guidance for how the rights of working children might be conceptualized more generally.

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74 UNICEF, Innocenti Digest, *supra* note 23, at 12–13.

75 Smolin, *supra* note 2, at 955.

The European Social Charter (ESC) of 1961 and Revised Social Charter (Revised ESC) of 1996 contain highly detailed standards on the employment of those under 18. While minimum age provisions are set out first in the relevant provision, Article 7, the remainder of the Article relates primarily to working conditions:

Article 7—The right of children and young persons to protection

With a view to ensuring the effective exercise of the right of children and young persons to protection, the Contracting Parties undertake:

(1) to provide that the minimum age of admission to employment shall be 15 years, subject to exceptions for children employed in prescribed light work without harm to their health, morals or education;

(2) to provide that a higher minimum age of admission to employment shall be fixed with respect to prescribed occupations regarded as dangerous or unhealthy;

(3) to provide that persons who are still subject to compulsory education shall not be employed in such work as would deprive them of the full benefit of their education;

(4) to provide that the working hours of persons under 16 years of age shall be limited in accordance with the needs of their development, and particularly with their need for vocational training;

(5) to recognize the right of young workers and apprentices to a fair wage or other appropriate allowances;

(6) to provide that the time spent by young persons in vocational training during the normal working hours with the consent of the employer shall be treated as forming part of the working day;

(7) to provide that employed persons of under 18 years of age shall be entitled to not less than three weeks' annual holiday with pay;

(8) to provide that persons under 18 years of age shall not be employed in night work with the exception of certain occupations provided for by national laws or regulations;

(9) to provide that persons under 18 years of age employed in occupations prescribed by national laws or regulations shall be subject to regular medical control;

(10) to ensure special protection against physical and moral dangers to which children and young persons are exposed, and particularly against those resulting directly or indirectly from their work.

In the Revised ESC, paragraph (2) of Article 7 requires that 18 should be the minimum age for occupations that are dangerous or unhealthy. This brings the text of Article 7 ESC into line with the practice of the European Committee

on Social Rights and European Community Directive 94/33/EC.[76] In paragraph (4) of revised Article 7, the age limit is also raised to 18. In paragraph (7) of revised Article 7, the minimum holiday entitlement for young workers is raised to four weeks, consistent with the minimum for adults in revised Article 2(3) and the European Community's Directive 93/104/EC on Working Time, Article 7.[77] It is worth noting, moreover, that more states have accepted the obligations under Article 7 in relation to working conditions than have accepted the minimum age obligation in Article 7(1)—the ESC allows states to select, subject to set minimums, the articles or paragraphs that they will implement.[78]

The ESC therefore, gives child workers the following rights within the employment relationship:

(1) limited hours of work in accordance with their development, including exclusion from most night work;

(2) fair wages;

(3) holidays of the same duration as adult workers;

(4) some accommodation of employment with vocational training;

(5) protection from dangers and medical supervision when engaged in potentially harmful work.

The European Committee on Social Rights, which monitors state implementation of the ESC, has often highlighted failures to live up to these obligations. Two examples may be offered to demonstrate the Committee's practice. France, Ireland and the United Kingdom have all been criticized for failing to extend minimum wage legislation to younger workers.[79] Ireland has also been criticized, because its laws did not guarantee young workers adequate rest during the school holidays.[80]

The EU's Young Workers Directive, Directive 94/33/EC, distinguishes between children and adolescents, but it sets out, as one of its purposes, "Member States shall ensure that employers guarantee young people have working conditions which suit their age."[81] For the purposes of the Directive, a child is

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76 O.J. 1994 L216/12. *See* DAVID HARRIS & JOHN DARCY, THE EUROPEAN SOCIAL CHARTER 261 (2d ed. 2001). Directive 94/33/EC itself follows ILO C 138 on the Minimum Age for Employment fairly closely, although it is more flexible in respect of light work permitted to children still in education.

77 O.J. 1993 L307/18.

78 The procedures under the ESC are discussed in greater detail in Chapter 6.

79 Conclusions of the Committee on Cycle XV-2 in relation to the United Kingdom and Ireland, and Revised Social Charter, Conclusions 2002, in relation to France, available from the Social Charter database, *at* http://hudoc.esc.coe.int/esc/search/default.asp?mode=esc&language=en&source=co.

80 Conclusions, Cycle XV-2, *id*.

81 Directive 94/33/EC, *supra* note 73, art. 1(3).

someone under 15 or still in compulsory education, an adolescent is someone at least 15 but under 18 and a young person is anyone under 18.[82] While the provisions specifically relating to children follow the basic framework of C 138, in terms of setting minimum ages for employment, the provisions on young people generally impose obligations that presume the existence of an employment relationship. Article 6 sets out general obligations in relation to health and safety of young people, and Article 7 requires that they be prohibited from performing tasks that are particularly harmful or risky, taking into account "that young people have not yet fully matured." Both these provisions involve adaptation of the tasks and the workplace rather than the exclusion of children from work. Articles 8 through 12 set out rules relating to working time, including breaks and holidays. These largely follow the pattern of the Working Time Directive, Directive 93/104/EC,[83] although the rules are stricter for young people than the Working Time Directive's rules for adult workers. Like the ESC, the Young Workers Directive prohibits night work for young people.[84]

Ironically, in a part of the world where child labor is not considered a significant problem, the regional regulation of the issue better reflects the need to protect children in work than the universal international standards. These measures demonstrate that it is possible to combine restrictions on child labor, even those based on a minimum age principle, with a recognition that children do work and must be protected within the employment relationship. Such a regime fits better with the move to prioritization, with its implicit recognition that some child work is legitimate.

E. Conclusion: Can Prioritization Be Defended?

C 182 marked a move away from an abolitionist approach to child labor and towards one that focuses on priority areas, based on harm to children. This is a controversial move, as some argue that any employment of school-age children is a harm and a violation of their rights. Furthermore, the basis on which the priorities in C 182 were chosen is not clear, and, therefore, it has attracted criticism, notably from Smolin. It is therefore worth assessing the advantages and disadvantages of the approach of C 182—its use of prioritization of the worst forms of child labor and its choice of priorities.

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82 *Id*., art. 3. There is some doubt as to whether the EU could fully exclude children who wish to work from working. It is a question of the balancing of different provisions relating to discrimination, free movement of workers, and the Young Workers Directive; *see* Holly Cullen, *Children's Rights, in* THE EUROPEAN UNION CHARTER OF FUNDAMENTAL RIGHTS 323 (Steve Peers & Angela Ward eds., 2004).

83 O.J. 1993 L307/18. For example, the maximum work week for adult workers in the Working Time Directive is 48 hours, whereas Article 8 of the Young Workers Directive, *id*., limits the work week of adolescents, or of children on training schemes to 40 hours. Working time for children still in education is restricted further.

84 *Id*., art. 9.

The great virtue of C 182, and its great limitation, is that it integrates the ILO's campaign against child labor as a core labor issue into the wider international children's rights agenda. The priorities of C 182 are also reflected in other recent international treaties, notably the two Optional Protocols to the CRC and the trafficking protocol to the U.N. organized crime convention. The priorities within Article 3 of C 182 require the support of other areas of international law, such as international criminal law and migration law in order to be fully implemented. The link to other parts of the international children's rights agenda brings in the expertise and constructive criticism of NGOs beyond the traditional worker/employer groups that are entrenched in the ILO. It also enables issues to be carried through, usually by NGOs, from one international forum to another. However, it has meant that the worst forms of child labor have been defined very much to reflect the international children's rights agenda and not to focus on particular sectors and industries where exploitative child labor may be found. A comparison of the situation concerning child soldiers and child domestic servants demonstrates this point. The international legal standards concerning child soldiers may be found in several international documents. There are, not surprisingly, no specific standards on child domestic workers, although their situation may be caught by Article 3(a) of C 182 on practices similar to slavery, or possibly by new standards on trafficking in human beings, and most recently, by Article 4 ECHR on forced labor, slavery and servitude. The ILO is really the only place where one might expect a specific standard on child domestic workers to exist, since it is about regulating a particular sector of the economy, yet this sector is only mentioned in R 190.

One fear, therefore, is that by focusing on certain areas, others may be forgotten. Article 3(d) of C 182 and the elaboration of C 182's rules in R 190 allow for the inclusion of new priority areas as they emerge, but the Recommendation has received relatively little attention. C 182 itself tends to ignore pure economic exploitation, instead seeming to require some additional form of exploitation or abuse to be caught as one of the worst forms of child labor. The focus on the worst forms of child labor may also lead to a focus on large-scale problems, when much child labor is found in the informal sector of the economy and in small-scale family operations, particularly in agriculture. This may also lead to comparatively little focus on the experience of girls, who often work in families as domestic servants.

Nonetheless, the prioritization approach of C 182 has many advantages. It is a more focused convention, which is arguably more workable for states than the minimum age approach of C 138. The earlier convention tended towards an abolitionist approach to child labor, which does not reflect the reality of children's lives, even in wealthy countries. This is reflected by the existence within European regional systems of provisions protecting the rights of child workers within the employment relationship. Because prioritization implicitly acknowledges the legitimacy of some child work, provisions protecting child workers become relevant and necessary.

Part II
Implementation of Child Labor Norms Through International Law

Chapter 6
International Treaty Supervision: State Reporting and Petition Systems

A. Introduction

Treaties relating to human rights law or labor standards, because they involve the rights of individuals rather than the interests of states, require specialized implementation mechanisms. These usually take the form of bodies of independent experts reviewing periodic reports by states on their implementation of the treaty in question. In addition, many human rights treaties have some form of individual or collective petition systems, where complaints by individuals or non-state actors concerning state compliance with treaties can be independently reviewed.[1] Many systems allow inter-state petitions, but these have been used only rarely and therefore have made little contribution to the interpretation and implementation of international treaties.

These are the conventional ways of monitoring treaty implementation in the area of human rights. I will focus on three systems where child labor has been a significant area of work, so that the general approach to the interpretation of child labor standards by each body can be identified. The International Labor Organization (ILO) has, as discussed in previous chapters, been active in setting and implementing child labor standards for decades. Particularly with the development of the International Program on the Elimination of Child Labor (IPEC) and the 1998 Declaration of Fundamental Principles and Rights at Work, the level of adherence to the main child labor conventions has increased.[2] This has created greater opportunities for ILO bodies to develop the interpretation of the ILO's child labor standards. Similarly, the convention on the Rights of the Child (CRC) has nearly universal ratification, and the Committee on the Rights of the Child has demanded, over the decade-plus of its operation, greater detail from states on how they implement child labor and related provisions of the CRC. The European Social Charter's European Committee on Social Rights

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1 The European Convention on Human Rights is unusual in relying exclusively on a petition system and having no system of state reports. At present, the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child have only reporting systems.

2 Holly Cullen, *From Treaties to Labels: The Emergence of Human Rights Standards on Child Labor, in* CHILD LABOR AND HUMAN RIGHTS: MAKING CHILDREN MATTER 87 (Burns H. Weston ed., 2005).

(ECSR) has taken advantage of the relative homogeneity of its member states to develop the obligations in relation to child labor in great detail, particularly in relation to working conditions for young workers. It is beyond the scope of this chapter to provide a comprehensive survey of the practice of international treaty monitoring bodies in relation to child labor, therefore, this chapter will focus on recent practice.

Reporting has been a much more important method of monitoring compliance with child labor norms. The CRC has no petition system, whether individual or collective. The ILO and the European Social Charter (ESC) have collective petition systems, which are driven by states and social partner organizations (in the case of the ILO) or social partner organizations and non-governmental organizations (NGOs) (in the case of the ESC). Only one case, within the ESC system, has been brought in relation to child labor. However, the procedural aspects of the ILO's Commission of Inquiry in relation to Burma's violations of ILO C 29 on forced labor will also be examined, as child labor was part of the pattern of violation.[3] It is therefore primarily through reporting systems that state compliance can be measured.

However, there has been a great deal of commentary in recent years concerning the effectiveness of these conventional methods of implementing human rights treaties. Such criticisms can apply to child labor standards as much as to any other human rights norms. While the idea of state reporting to international human rights monitoring bodies is often described as the mobilization of shame,[4] it is difficult to shame states that do not submit reports, and non-submission and late submission of reports is a problem for most human rights monitoring bodies. At the extreme end of non-cooperation lies Burma, which has refused to implement the recommendations of the ILO's Commission of Inquiry. Such challenges to the authority of international human rights organizations demonstrate the limits of international law in the field of child labor. Nonetheless, the work of these committees does make a valuable contribution in terms of interpretation of human rights standards and the development of consensus on the importance of those standards.

B. ILO Implementation Procedures—State Reports and Complaints System

The ILO has a range of procedures for monitoring implementation of its treaties, culminating in the possibility of referral to the International Court of Justice. However, the interpretation of ILO conventions, in practice, has been the responsibility of bodies within the ILO itself. According to Article 37 of

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3 For discussion of the substantive aspects of this case, see Chapter 2.

4 *See, e.g.*, Rosalyn Higgins, Problems and Process: International Law and How We Use It (1994).

the ILO Constitution, questions concerning the interpretation of the Constitution or of ILO conventions must be referred to the International Court of Justice.[5] Referral to the International Court of Justice has never occurred, and referral to its predecessor, the Permanent Court of International Justice, only in relation to one convention.[6] The Director General of the ILO may be consulted by member states for interpretations or be required in the course of his functions to give a legal opinion, which he communicates to the Governing Body and which is published in the ILO's *Official Bulletin*. These advisory opinions delivered by the Director General, and in effect produced by the International Labor Office, were, for most of the ILO's history, a significant form of interpretation of conventions.[7] In recent practice, however, it has primarily been the supervisory machinery of the ILO that has developed interpretations of ILO conventions.

For most conventions, ILO member states are required to report on implementation every four years.[8] Each report submitted by a member state must first be communicated to the national employer and worker organizations for comment, and those comments are also submitted to the ILO.[9] Reports are first examined by the Committee of Experts, and then by the Conference Committee on the Application of Conventions and Recommendations at the International Labor Conference. The ILO Constitution initially provided for examination of reports by the Director General, but it soon became apparent, given the number of measures adopted by the ILO, that the task was too onerous for the Director General's office.[10] Furthermore, the range of subject matter covered by ILO conventions requires the participation of outside experts.

The Committee of Experts is an independent body appointed by the Governing Body on the recommendation of the Director General.[11] In its examination of member state reports on the implementation of a convention, there

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5 Prior to World War II, this provision referred to the Permanent Court of International Justice.

6 *Interpretation of the convention of 1919 Concerning the Employment of Women during the Night*, PCIJ (ser. A/B), No. 50. Other PCIJ Advisory Opinions concerning the ILO related to constitutional matters, such as its competence to regulate agricultural labor (*Competence of the International Labor Organization*, Series B, No. 02-03) or incidentally to regulate the personal work of the employer (*Competence of the International Labor Organization*, Series B, No. 13).

7 J. F. McMahon, *The Legislative Techniques of the International Labor Organization*, British Y.B. Int'l L. 1, 7–101 (1965–66).

8 Lammy Betten, International Labor Law: Selected Issues 397 (1993). First reports have to be submitted within a year of ratification and the next two reports on a biennial basis. The four-year rule has been in effect since 1977.

9 *Id*., 398.

10 *Id*., 396.

11 *See, e.g*., Governing Body Document GB.290/8, June 2004.

is no dialogue process analogous to that of the Human Rights Committee or the Committee on the Rights of the Child. Instead, the Committee of Experts may issue a direct request or an observation. There is no clear dividing line for when an observation, which is a more serious form of criticism, should be issued rather than a direct request, which may be issued simply due to a lack of information on a particular point.[12] The Committee uses observations for more serious deficiencies in a member state report. It may also move from a direct request to an observation when the matter has not been resolved after direct requests have been issued. Although it is not a judicial body, the Committee's activities have necessarily entailed interpretation of the conventions, in determining whether or not member state implementation is adequate.[13] As a result, it is the primary body developing the interpretation of ILO conventions.

While NGOs do not have a role in the ILO supervision procedures similar to that enjoyed by NGOs recognized by the U.N. Economic and Social Council, the International Labor Office provides expertise and support to the Committee of Experts beyond that provided within the various U.N. human rights reporting systems.[14] The constructive dialogue approach used by many U.N. human rights monitoring bodies, pioneered by the Human Rights Committee under the International Covenant on Civil and Political Rights (ICCPR),[15] is not part of the ILO system. The two-stage process means that only a small number of reports are discussed in public by the Conference Committee on the Application of Conventions and Recommendations. The Committee of Experts examines reports in a closed session. This approach has advantages and disadvantages. On one hand, it discourages political grandstanding by states, but it means that only the most serious failures of implementation are ever discussed publicly.[16] The working methods of the Committee of Experts have led to criticisms that it operates in too diplomatic a fashion.[17] There are questions concerning the effectiveness of the state reporting systems in the ILO. The Committee of Experts received over 1,800 reports in 2006.[18] However, there is substantial non-com-

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12 Betten, *supra* note 8, at 398. Virginia Leary, *Lessons from the Experience of the International Labor Organisation, in* The United Nations and Human Rights: A Critical Appraisal 580, 597–98 (Philip Alston, ed., 1992), notes that observations are published in the Committee's report but not direct requests. Only reference is made to direct requests.

13 Betten, *supra* note 8, at 399. Occasionally, such interpretations have led to accusations that the Committee was acting in a biased manner; *see id*., 399–400.

14 Leary, *supra* note 12, at 596.

15 Dominic McGoldrick, The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights (1994).

16 Leary, *supra* note 12, at 597.

17 *Id*., 598.

18 Committee of Experts, *General Report 2006*, para. 17 (2006).

pliance with reporting obligations, demonstrated by the fact that the Committee had *requested* nearly 2,700 reports.[19] There is also a problem with member states failing to respond to direct requests or observations made by the Committee of Experts.[20]

While the ILO's supervisory procedures include petitions as well as state reporting, all procedures exist within the framework of tripartitism. As noted above, NGOs have less of a role in the reporting process than in U.N. human rights treaty reporting procedures,[21] and the complaint and representation procedures are not individual petition procedures. They may only be activated by a member state or by a worker or employer organization,[22] not by any person who is a victim of a violation of the convention. This could have advantages in the case of child labor, as it is often difficult for children to access international human rights petition procedures. However, the procedure leaves victims reliant on having their case taken up by a state or by an employer or worker organization. In practice, these procedures have not been a factor in the implementation of child labor conventions.

The Committee of Experts has recently issued general observations concerning C 138 and C 182.[23] Both are designed to give guidance to states on the type of information required in their reports on these conventions. The perceived need for such guidance arose because of the rapid rate of ratification of C 182 and the sharp increase of ratifications on C 138. In relation to C 138,

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19 *Id*. This was an improvement of 5 percent over the submission rate in 2005. However, a small number of countries have submitted no reports; *id*., para. 21. The rate of non-reporting seems fairly similar to that of the United Nations: for example, there are 64 states overdue with their reports under the CRC, out of 193 states parties. Oral Report on the Work of the Committee on the Rights of the Child by Jakob E. Doek, Chairman of the Committee on the Rights of the Child, 61st Sess. of the United Nations General Assembly, Item 63 (Oct. 13, 2006), *at* http://www.ohchr.org/english/bodies/crc/docs/oral_report_61stga.doc.

20 *Id*., para. 30.

21 Leary, *supra* note 12.

22 Under Article 24 of the ILO Constitution, worker or employer organizations may make representations that a member state is not complying with its obligations. Under Article 26 of the Constitution, member states or delegates to the International Labor Conference may make complaints against other member states of non-observance of obligations, which can lead to the establishment of a Commission of Inquiry. Delegates to the International Labor Conference will include states and worker and employer organizations.

23 CEACR, *General Observation concerning C 182, Worst Forms of Child Labor, 1999* (2005); *General Observation concerning C 138* (2004). Both *available at* http://www.ilo.org/ilolex/. Since states are not directly required to report on the implementation of recommendations, the General Observations make no comment on the contents of R 146 or R 190.

the Committee requested more complete statistical information about the nature, extent and trends in child labor; extracts of reports of inspection services and information about violations of national law and penalties imposed; information classified by sex. The general comment on C 182 focused on trafficking of children. The Committee praised the efforts of West African countries, separately and regionally, in collaboration with ILO/IPEC. However, it noted that child trafficking is a worldwide problem and that all states should report fully on measures taken to combat trafficking, including the following:

1. legislative measures;
2. preventative measures;
3. training of officials;
4. statistics on violations of national law, investigations, prosecutions and convictions;
5. application of the principles of free and compulsory education, especially for girls;
6. time-bound measures taken on prevention, removal, protection and rehabilitation in relation to child trafficking.

The Committee went on to highlight the need for monitoring of national measures, international police and judicial cooperation, integration of child trafficking concerns into development and poverty-reduction strategies (particularly in relation to provision of education and economic opportunities). The Committee has, through this general comment, given a fuller meaning to the obligations of states in relation to child trafficking as one of the worst forms of child labor under C 182.

A further consequence of the rapid ratification of C 182, and the increased ratification of C 138, is that recent years have seen a greater number of individual observations on state reports on these conventions. The Committee made one individual observation on C 182 in 2002 (the first year when reports were submitted on this convention), five in 2003, one in 2004, 19 in 2005 and 17 in 2006. On C 138, the Committee made only one or two individual observations per year (sometimes none) up to 1996; then 12 in 1997, 16 in 1998, five in 1999, two in 2000, 11 in 2001, five in 2002, 13 in 2003, 24 in 2004, 17 in 2005 and 15 in 2006. More individual observations mean a more detailed interpretation of the conventions in question. This is of particular use in the case of C 182, which includes the catch-all category of "other hazardous work," which requires elucidation. Individual comments concerning C 138 tend to identify gaps in legislation or areas where the law is inadequately applied, based on statistical evidence supplied by the state.[24]

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[24] *See, e.g., Individual Observations Addressed to Algeria, El Salvador and Malawi* (2005), *available at* http://www.ilo.org/ilolex/. Participation in programs directed at the elimination of child labor, such as ILO/IPEC, are also noted by the Committee.

Individual comments on C 182 tend to be more detailed. Given the wide range of difficult child labor issues that are covered by this convention, it is probably not surprising that the Committee tends to focus on one or two issues per state report, although it often discusses these issues in the context of several articles of the Convention. In most cases, the Committee appears satisfied with the state of the law, but requests further information on how it is applied in practice, or identifies possible gaps in coverage of the law. Examples of the latter tend to be age limits in national laws that are lower than the C 182 requirement that the worst forms of child labor be eliminated for all children under 18, or laws that apply only to formal employment relationships and therefore exclude children who are in the informal sectors of the economy or work on their own account. In 2005, in the 19 individual observations made by the Committee,[25] the most common issue raised was trafficking of children for sexual or labor exploitation (United States, Turkey, El Salvador, Qatar, Niger, Mexico, Morocco, Indonesia, Guatemala, Gabon, Dominican Republic, Bangladesh, Burkina Faso, United Arab Emirates). For Brazil, sexual exploitation is highlighted but not trafficking per se. Many of the other issues highlighted by the Committee in individual observations relate to Article 3(d) of C 182, concerning "other hazardous work," and call upon states to ensure that their law and practice provides protection from hazards in particular sectors: agriculture (Mexico, United States), domestic service (Bangladesh, Gabon, Morocco, Mexico, El Salvador), mining (Niger), fishing (Indonesia) and camel jockeys (Qatar and United Arab Emirates). The only issue from paragraphs (a)–(c) of Article 3, other than trafficking of children, which appears in the 2005 individual observations, is recruitment of child soldiers by paramilitary organizations in the Philippines. In 2006, there was an even stronger emphasis on trafficking—this issue was raised in respect of every country that received an individual observation.[26] The issue of child soldiers occurs twice (Congo and Philippines), and internal questions of sexual exploitation of children four times (Mauritius, Morocco, Thailand, Ukraine). For the first time, illicit activities are a focus: the Committee mentions smuggling in Mexico and begging in Turkey. Hazards in particular sectors seem to be less evident, with only five mentions: mining (Congo), domestic labor (Mexico and Philippines), carpet-weaving and surgical instruments (Pakistan) and camel jockeys (United Arab Emirates).

The Committee integrates into its individual observations all the issues addressed by C 182. Notably, the 2005 individual observations included discussions of the need to ensure access to education (Niger, El Salvador) and the problems of protecting street children from being drawn into the worst forms of child labor (Morocco, Turkey). Many of the 2006 observations in relation to

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25 *Available at* http://www.ilo.org/ilolex/.

26 The United States received an observation that was a repetition of the 2005 one, as it had not submitted a new report as requested.

trafficking in children emphasized the need for effective criminal law responses. In evaluating state compliance with C 182, the Committee has regard to the activities of other international human rights bodies. In its individual observations, it refers to reports by the Committee on the Rights of the Child, the Special Representative on Children and Armed Conflict, the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography and the Working Group on Contemporary Forms of Slavery. It also refers to the work of IPEC, and similar work by UNICEF, and its own comments on ILO C29 on forced labor. The individual observations on C 182, therefore, are the result of consideration of a wide range of issues and materials, resulting in quite detailed comments in comparison with most of the individual observations on C 138.

As stated above, the Committee of Experts operates through an exclusively documentary process, unlike those of human rights monitoring bodies for U.N. human rights treaties. In order to alleviate the problems resulting from the lack of a dialogue element of its procedures, in 1968 the Committee developed a system of direct contacts with member states.[27] The direct contact mission is conducted by a representative of the Director General of the ILO, who will meet with government officials, representatives of employer and worker organizations and any other body or person he or she deems necessary.[28] However, this system, while available in the context of all ILO supervisory procedures, is used only exceptionally. This is partly because, like the country reports undertaken by the American Commission on Human Rights,[29] the system can only be used with the consent of the country concerned.

The second stage of the reporting procedure is undertaken by the Conference Committee on the Application of Conventions and Recommendations (the Conference Committee).[30] It is therefore a political body rather than an expert body, although unlike the International Labor Conference itself, government representatives are outnumbered by non-governmental representatives. This non-governmental majority has helped to make the Conference Committee quite effective in pursuing serious cases of infringement of conventions.[31] While the Committee of Experts examines every member state report submitted, the Conference Committee only discusses the most important issues arising from

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27 Betten, *supra* note 8, at 400.

28 *Id*., 405. Other ILO supervisory bodies suspend their activities while the direct contact mission is carried out.

29 It is worth noting that many of the countries that have consented to a direct contacts mission are members of the Organization of American States and are therefore familiar with the work of the American Commission on Human Rights; see list of countries in Betten, *supra* note 8, at 405.

30 Standing Orders of the International Labor Conference art. 7.

31 Leary, *supra* note 12, at 601.

the report of the Committee of Experts.[32] In recent years, five individual cases have been examined in relation to C 138. Two have been in relation to the situation of child camel jockeys in the United Arab Emirates.[33] Two have concerned Kenya's lack of a fully developed child labor policy, including guarantees of free primary education.[34] Most recently, in 2004, the Conference Committee examined the situation in the Ukraine, where child labor, including labor in hazardous forms of work, continues to exist in the informal sector.[35] The Conference Committee operates in public, and representatives of the member states, whose failures of implementation are being discussed by the Conference Committee, appear before it.[36] The Conference Committee's report may include "special paragraphs" that take note of situations where member states are particularly intransigent in their failures in implementation.[37]

In addition to the system of reporting on ratified conventions, the ILO maintains a system of requiring reports on unratified conventions and on recommendations. The obligation to report on unratified conventions and on recommendations was introduced when the ILO Constitution was amended in 1946 and is contained in Article 19, paragraphs (5)(e) and (6)(d).[38] Similarly, the follow-up procedures set out in the 1998 Declaration on Fundamental Principles and Rights at Work include an obligation to report on progress towards meeting the standards in the conventions referred to in the Declaration but that have not yet been ratified.[39] These reports follow the format of the Article 19(5)(e) reports.

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32 Betten, *supra* note 8, at 402.

33 ILCCR, *Examination of Individual Cases Concerning C 138, Minimum Age convention, 1973 United Arab Emirates (ratification 1998)* (2001); ILCCR, *Examination of Individual Case Concerning C 138, Minimum Age convention, 1973 United Arab Emirates (ratification 1998)* (2002). Both *available at* http://www.ilo.org/ilolex/.

34 ILCCR, *Examination of Individual Case Concerning C 138, Minimum Age convention, 1973 Kenya (ratification 1979)* (2001); ILCCR, *Individual Observation Concerning C 138, Minimum Age, 1973 Kenya (ratification 1979)* (2003). Both *available at* http://www.ilo.org/ilolex/.

35 ILCCR, *Individual Observation Concerning C 138, Minimum Age, 1973 Ukraine (ratification 1979)* (2004), *available at* http://www.ilo.org/ilolex/.

36 Leary, *supra* note 12, at 598–99.

37 This system replaced the special list system of noting continued failures in implementation. The special list system was seen as too confrontational (it became known as the black list), and was therefore changed in 1980; *see* Betten, *supra* note 8, at 402–03. The initial intention of the move to special paragraphs was to highlight "cases of progress, certain special cases and cases of continued failure to apply conventions"; *see The 66th Session of the International Labor Conference, June 1980*, 119 Int'l Lab. Rev. 665, 678 (1980). In practice, however, it is the latter category of cases that has tended to dominate the special paragraphs.

38 McMahon, *supra* note 7, at 13–15.

39 Annex, Follow-up to the Declaration, Part II.

There are two forms of contentious procedure within the ILO for addressing failures by ILO member states to fulfill their obligations under conventions that they have ratified. These are the complaint procedure, which is purely intergovernmental, and the representation procedure, which may be invoked by employer or worker organizations. In the complaint procedure, under Article 26 of the ILO Constitution, both the complaining state and the state that is the subject of the complaint must have ratified the convention in question. A delegate to the International Labor Conference may also make a complaint, or the Governing Body may initiate the procedure of its own motion. Article 24 of the ILO Constitution allows associations of employers or workers to make representations about alleged failures to implement a ratified convention. Representations may be converted into complaints by the Conference.

Complaints are dealt with by the Governing Body, which may appoint a Commission of Inquiry to investigate if the initial response from the member state complained against is unsatisfactory.[40] A Commission of Inquiry is made up of three independent persons and acts quasi-judicially in its investigations,[41] but can only operate within the state complained against with its consent.[42] Full cooperation is necessary in order that the Commission of Inquiry can operate by conciliation, which is necessary for the ultimate success of the complaints procedure, since the ILO lacks coercive powers.[43] The report of the Commission of Inquiry is published, as well as being communicated to the governments involved in the complaint and the Governing Body.[44] The governments involved then have three options. They each may accept the report, refuse to accept it but take the matter no further or refuse to accept the report and refer the matter to the International Court of Justice.[45] As stated above, no matters have ever

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40 ILO Constitution art. 26(3).

41 Nicolas Valticos, *Les Commissions d'Enquete de l'Organisation Internationale du Travail,* 91 Revue Generale de Droit International Public 847, 856–60 (1987).

42 Article 27 of the ILO Constitution requires that member states cooperate with the Commission of Inquiry. Leary, *supra* note 12, at 610 notes the case of Poland, which was the subject of a complaint in 1982, and did not consent to in-country operations. Nonetheless, the Commission of Inquiry was able to obtain sufficient evidence to complete its work without the on-the-spot investigations. *See also*, on this issue, Valticos, *supra* note 41, at 866–68.

43 Valticos, *supra* note 41, at 868 and 872–73. Article 33 of the ILO Constitution gives the Governing Body the rather vague and general power to "recommend to the Conference such action as it may deem wise and expedient to secure compliance therewith." The 1919 text included reference to economic sanctions, but this was removed in the 1946 amendments: Valticos, *supra* note 41, at 851.

44 ILO Constitution arts. 28 and 29(1).

45 ILO Constitution art. 29(2). Valticos, *supra* note 41, at 870–71, notes that most governments accept the report of the Commission of Inquiry. In one case of rejection, in respect of a complaint against Germany concerning the exclusion of members of

been referred to the International Court of Justice, although there have been instances where the member state that was the subject of the complaint has refused to accept the report.[46]

Whatever the views of the governments involved, the Committee of Experts and the Conference Committee follow up the report of the Commission of Inquiry in the course of examining reports from the member state that was the subject of the complaint.[47] The Governing Body will also monitor the member state's compliance with the recommendations of the Commission of Inquiry. An example can be seen in the case of the most recent Commission of Inquiry Report, relating to violations of C 29 on Forced Labor by Burma.[48] The Report was published on July 2, 1998, and the Governing Body examined the extent of Burma's compliance with the recommendations contained in the report at its 273rd Session in November 1998[49] and its 274th Session in March 1999.[50] The replies received from the government of Burma related only to changes in legislation, so the Governing Body decided to continue its monitoring of the implementation of the recommendations of the Commission of Inquiry at its 275th Session in June 1999.[51]

By 2000, attitudes to Burma's non-compliance with the Commission of Inquiry recommendations had hardened, leading to the first-ever invocation of Article 33 of the ILO Constitution, which provides that "In the event of any Member failing to carry out within the time specified the recommendations, if any, contained in the report of the Commission of Inquiry, or in the decision of the International Court of Justice, as the case may be, the Governing Body may recommend to the Conference such action as it may deem wise and expedient to secure compliance therewith." This Article became the basis for a resolution of the International Labor Conference requesting that member states and international organizations review their relations with Burma to avoid abetting the practice of forced labor and to pressure the government to implement the recommendations of the Commission of Inquiry.[52]

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extremist political parties from public employment, the Commission had been divided, and one member issued a dissenting opinion. The same issue later went before the European Court of Human Rights, which decided that the practice violated the European Convention on Human Rights; Vogt v. Germany, 21 E.H.R.R. 205 (1995).

46 Betten, *supra* note 8, at 409–10.

47 *Id*., 410.

48 The content of this report is discussed in the chapter on contemporary forms of slavery.

49 Doc. GB.273/5 (Oct. 6, 1998).

50 Doc. GB.274/5 (Feb. 22, 1999).

51 Doc. GB.274/6 (Jan. 28, 1999).

52 Resolution Concerning the Measures Recommended by the Governing Body under

The Conference, however, delegated to the Governing Body the power to suspend implementation of the resolution if the government had taken sufficient measures of implementation. As a consequence of this resolution, the Burmese government began to cooperate with the ILO to a greater extent, allowing a new Technical Cooperation Mission to enter, and adopting a more comprehensive order abolishing forced labor.[53] The Governing Body deemed the measures to be insufficient to meet the requirements of the Commission of Inquiry and allowed the resolution to take effect.[54] While the Burmese government rejected the view of the Governing Body, it did ultimately allow the ILO to send a high-level team to evaluate the impact of the measures taken by the government to stop forced labor.[55] The results of the team's visit indicated that the central problems in eliminating forced labor were the size and role of the military and the lack of economic modernization. In order finally to eliminate forced labor, the team recommended a long-term ILO presence in Burma, plus the creation of an ombudsperson to assist victims of forced labor.[56] These measures were ultimately agreed by the government, and Article 33 measures have not been fully implemented under the resolution. However, the level of cooperation by the Burmese government with these measures is questionable. The International Confederation of Free Trade Unions (ICFTU) brought forward evidence in 2004 that individuals who contacted the ILO representatives in Burma were subject to criminal charges, including charges potentially leading to the death penalty,[57] and that forced labor was still occurring.[58] The International Labor Conference, nonetheless, has been satisfied with small, often temporary, items of progress, and in 2006 set yet another timetable for action for the Burmese government and once again delegated the matter to the November 2006 Governing Body meeting.[59] However, despite

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Art. 33 of the ILO Constitution on the Subject of Myanmar, International Labor Conference, Provisional Record, 88th Sess. (Geneva, 2000).

53 Francis Maupain, *Is the ILO Effective in Upholding Workers' Rights?: Reflections on the Myanmar Experience, in* Labor Rights as Human Rights 85, 100–01 (Philip Alston ed., 2005).

54 *Id*.

55 *Id*., 102.

56 *Id*., 103–04. The ombudsperson was, at the behest of the Burmese government, called a facilitator.

57 ICFTU, ICFTU Online Bulletin: "Burma: death sentences for contacting the ILO" (Mar. 18, 2004), *at* http://www.icftu.org/displaydocument.asp?Index=991219095&Language=EN.

58 ICFTU, ICFTU Online Bulletin: "Burma: Fresh ICFTU evidence of forced labor ahead of crucial ILO meeting (Nov. 12, 2004), *at* http://www.icftu.org/displaydocument.asp?Index=991220743&Language=EN.

59 ILO, *Press Release: ILO's 95th Annual Conference Concludes* (June 16, 2006), *available at* http://www.ilo.org/public/english/bureau/inf/pr/2006/35.htm.

extensive work by the ILO mission in Burma,[60] there was still no agreement by November 2006 on a mechanism for the independent evaluation of complaints of forced labor in Burma by the ILO Liaison Officer.[61] In parallel to evaluating the progress (or lack thereof) of discussions with the Burmese government, the Governing Body has discussed possible referral of the matter to the International Court of Justice. This could be done either by the ILO itself requesting an advisory opinion, or by an ILO member state that is also a party to C 29 requesting a binding ruling in accordance with Article 37(1) of the ILO Constitution.[62]

Representations, as befits the fact that they originate from non-governmental elements within the ILO, are examined by a tripartite committee of three Governing Body members.[63] The Governing Body may, if the member state that is the subject of the representation does not respond or does not make a satisfactory response, publish the representation and any statement in response.[64] This procedure is much simpler and more limited than the complaints procedure. However, the Governing Body may convert a representation into a complaint, using Article 26(4) of the ILO Constitution.[65]

Two representations were made by worker organizations in the 1980s concerning lack of conformity with C 138. However, neither complaint resulted in an examination of what that convention requires. Both representations alleged failures in respect of a wide range of conventions. The representation submitted by an American union against the Federal Republic of Germany in 1987 was declared non-receivable.[66] The representation by Costa Rican unions against

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60 Governing Body, 297th Sess., *Developments Concerning the Question of the Observance by the Government of Myanmar of the Forced Labour convention, 1930 (No. 29)*, Doc. GB.297/8.1 (Geneva, Nov. 2006).

61 Governing Body, 297th Sess., *Conclusions on Item GB.297/8: Developments Concerning the Question of the Observance by the Government of Myanmar of the Forced Labour Convention, 1930 (No. 29)*.

62 Governing Body, 297th Sess., *Developments Concerning the Question of the Observance by the Government of Myanmar of the Forced Labour Convention, 1930 (No. 29): Legal Aspects Arising Out of the 95th Session of the International Labor Conference*, Doc. GB.297/8.2 (Geneva, Nov. 2006). The matter was deferred for decision by the 298th Session of the Governing Body in March 2007; *see* Governing Body, 298th Sess., *Developments Concerning the Question of the Observance by the Government of Myanmar of the Forced Labour Convention, 1930 (No. 29): Preparations for the Governing Body to Request an Advisory Opinion of the International Court of Justice*, Doc. GB.298/5/2 (Geneva, Mar. 2007).

63 Betten, *supra* note 8, at 406–07.

64 ILO Constitution art. 25. Betten notes that the state is usually given a three-month delay in which to make its response.

65 Betten, *supra* note 8, at 407.

66 *Representation Submitted by the Oil, Chemical and Atomic Workers International*

Costa Rica in 1984 resulted in several recommendations of areas where improvement was needed, but the Committee examining the representation found that there was insufficient factual basis for a finding on C 138.[67]

The ILO's system of implementation of its conventions seems to be designed primarily to identify serious issues of non-compliance rather than every instance of less than full implementation. The individual observations tend to highlight only the most significant problems of implementation. They may therefore be seen as rather more condemnatory than conclusions deriving from the constructive dialogue approach of U.N. human rights treaty bodies. Whether this is beneficial, in that states might take such observations more seriously, or harmful, in that states will be discouraged from cooperating with the system, is unclear. The complaints and representations system, although allowing employer organizations and trade unions to participate in identifying particular problems of non-compliance, appears to be in practice rarely used. Its effectiveness appears to rely more on the attitude of the government complained against than the practice of the ILO itself. Maupain, a Special Advisor to the ILO Director General, makes the point that problems leading to complaints under Article 26 of the ILO Constitution have tended to be solved either through progressive, if reluctant, change by governments, or by regime change.[68] In the case of Burma, the threat of sanctions being deployed against it has prevented the government from refusing all cooperation with the ILO, but has not yet succeeded in eliminating forced labor.

C. Convention on the Rights of the Child—Reporting System

The CRC, as noted in previous chapters, contains several provisions relevant to child labor. In particular, its specific provision on child labor, Article 32, reflects both the exploitation approach of the International Covenant on Economic, Social and Cultural Rights in paragraph 1 and the minimum age approach of ILO conventions prior to C 182 in paragraph 2:

Union, AFL-CIO, Alleging Non-Observance by the Federal Republic of Germany of Conventions Nos. 29, 62, 81, 87, 98, 99, 100, 102, 111, 132, 135, 138, 139, 144, 148, 154, 155 and 156, Doc. GB.235/17/11 (1987).

67 *Report of the Committee Set Up to Examine the Representation Made by the Confederation of Costa Rican Workers (CTC), the Authentic Confederation of Democratic Workers (CATD), the United Confederation of Workers (CUT), the Costa Rican Confederation of Democratic Workers (CCTD) and the National Confederation of Workers (CNT), Under Article 24 of the Constitution, Alleging the Failure by Costa Rica to Observe International Labor Conventions Nos. 81, 95, 102, 122, 127, 130, 131, 138 and 144*, Doc., Vol. LXVIII, 1985, Series B, Special Supplement 3/1985.

68 Maupain, *supra* note 53, at 95.

> 1. States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.
>
> 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.

The Committee on the Rights of the Child has yet to adopt a General Comment on child labor, setting out some general ideas of how this issue should be approached, although it did hold a day of discussion on the topic of economic exploitation of children in 1993.[69] The recommendations arising from that general discussion related primarily to the structural and procedural obligations of states to implement child labor norms rather than setting out a substantive interpretation of what Article 32 CRC requires, although emphasis was placed on the need for states absolutely to prohibit harmful forms of child labor, indicating that this way of thinking about child labor was, in practice, at least in some areas, prior to the adoption of ILO C 182.

The only method of implementation provided for in the CRC is periodic state reports, reviewed by an expert committee, the Committee on the Rights of the Child. Under Article 44 CRC, states must submit their initial report within two years of ratification and subsequent reports every five years afterwards. The Committee may request further information from states after their reports but before the Committee formally considers the reports, by virtue of Article 44(4). The Committee often requests information concerning programs for the elimination of child labor in these lists of issues and requests for additional information.[70] Unlike earlier U.N. human rights treaties, CRC Article 46, provides for the Committee's use of NGOs, as well as U.N. agencies, particularly

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[69] Committee on the Rights of the Child, *Reports of General Discussion Days*, CRC/C/DOD/1, at 10–26 (Sept. 19, 2001).

[70] *See, e.g.*, Committee on the Rights of the Child, 40th Sess., Pre-Sessional Working Group, *List of Issues to Be Taken Up with the Consideration of the Second Periodic Report of the Kingdom of Saudi Arabia*, CRC/C/Q/SAU/2. Gerrison Lansdown, *The Reporting Process under the Convention on the Rights of the Child, in* THE FUTURE OF

UNICEF.[71] The Committee provides guidelines for state reporting, with separate guidelines for initial and periodic reports.[72] The Committee groups the CRC rights under thematic headings, with child labor and related issues (sexual exploitation of children, children in armed conflict and trafficking) coming under the heading of "Special Protection Measures." In their initial reports, states are asked, in this thematic section, to provide "relevant information, including the principal legislative, judicial, administrative or other measures in force; factors and difficulties encountered and progress achieved in implementing the relevant provisions of the convention; and implementation priorities and specific goals for the future."[73] In subsequent periodic reports, the guidelines are more detailed in relation to each article of the CRC, but they ask again for both legislative and administrative measures and practical protective measures.[74] The guidelines on Article 32, relating to economic exploitation of children including child labor, emphasize the need to prevent children from engaging in hazardous work and work that interferes with education. They also require states to indicate what special provisions are made for the working conditions of children, particularly their hours of work.

Child labor has received significant attention from the Committee. In states parties where child labor has been identified as a problem, the Committee tends to devote considerable time to examining the laws and practices in this area. This can be seen in reports considered in 2005 and the Committee's concluding observations on those reports. In the second periodic report from the Philippines, the Committee noted with approval the adoption of legislation on child exploitation (including child labor) and trafficking of children, but it expressed concern about whether these laws were being adequately enforced.[75] It also exhorted the state to urge armed rebel groups to cease using child sol-

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UN HUMAN RIGHTS TREATY MONITORING 113, 123 (Philip Alston & James Crawford eds., 2000), notes that some states have criticized the Committee for not giving enough time to clarify issues and argues that there may be a need for the pre-sessional stage to identify issues more clearly.

71 On the practice of the Committee in this area, see Lansdown, *supra* note 70, at 118–22.

72 Committee on the Rights of the Child, *General Guidelines Regarding the Form and Content of Initial Reports Submitted by States Parties Under Article 44, paragraph 1(a), of the Convention*, CRC/C/5 (Oct. 30, 1991); *General Guidelines Regarding the Form and Content of Periodic Reports Submitted by States Parties Under Article 44, paragraph 1(b) of the Convention*, CRC/C/58 (Nov. 20, 1996).

73 *Guidelines for Initial Reports, id*., para. 23.

74 *Guidelines for Periodic Reports, supra* note 72, paras. 123–131 (children in armed conflict), 151–154 (child labor), 158 (sexual exploitation), 159–162 (trafficking of children).

75 *Concluding Observations, Philippines*, CRC/C/15/Add.258, paras. 79 and 84–86 (June 3, 2005).

diers and urged the state to provide rehabilitation for former child soldiers.[76] In the case of Nepal, also submitting its second periodic report, the Committee went into more detail in its concerns and recommendations, requesting that the state do the following, in summary:

- on sexual exploitation of children, adopt laws prohibiting sexual abuse and exploitation of all children under 18, compile accurate data on the extent of the problem and develop a comprehensive policy;
- adopt policies for the protection and rehabilitation of children at risk of sexual abuse or victims of sexual abuse or exploitation, covering all the regions of the country;
- seek assistance from UNICEF in this area;
- strengthen enforcement of laws abolishing bonded labor and provide reintegration services for former bonded workers;
- ensure that child labor laws apply to all, including in the informal sectors of the economy;
- ensure that working children have access to education and do not work in hazardous conditions;
- improve data collection on trafficked children and develop a comprehensive legal framework on trafficking;
- ensure that the law is properly enforced and that trafficked children have access to necessary support and services;
- make the necessary bilateral and international commitments to make the anti-trafficking policy effective.[77]

This summary of the Committee's recommendations reflects the current practice of the Committee in terms of the recommendations made to states with significant problems of child labor and child sexual exploitation. In its 2005 conclusions, the Committee raises the issues of trafficking of children and sexual exploitation for every state.[78] Children working in hazardous conditions or in conditions that prevented them from obtaining an education were raised for all states except those in Western Europe, although Austria was criticized for its low minimum age for light work.[79] The sectors most often mentioned are

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[76] *Id*., para. 76.

[77] *Concluding Observations, Nepal*, CRC/C/15/Add.260 (June 3, 2005).

[78] The states reviewed in early 2005 were: Philippines, Bosnia and Herzegovina, Nepal, Ecuador, Norway, Mongolia, Nicaragua, Costa Rica, Yemen, Nigeria, Albania, Luxembourg, Austria, Belize, Bahamas, Togo, Sweden and Bolivia. *See* United Nations Office of the High Commissioner for Human Rights, Treaty Bodies Database, *at* http://www.unhchr.ch/tbs/doc.nsf.

[79] Committee on the Rights of the Child, *Concluding Observations, Austria*, CRC/C/15/Add.251, paras. 49–50 (Mar. 31, 2005).

agriculture, domestic service and mining. States were encouraged in many cases to seek assistance from UNICEF or IPEC and to ratify other relevant treaties including ILO C 138 and C 182 and the U.N. Protocol on Trafficking in Persons. The pattern was similar in 2006 concluding observations, where states were praised for ratifying ILO C 138 and C 182 and working with IPEC. Most of the states reporting had taken some action to reduce child labor, and the role the Committee sets itself in such cases is to encourage further action, particularly in terms of improving information-gathering and enforcement.[80] It is important to note that the Committee does not take an abolitionist approach to child labor, but rather a protective approach, sees that education and work can coexist and may be the best approach in some circumstances, criticizing states particularly where work prevents children from benefiting from education.

While the CRC is the most widely ratified of the U.N. human rights treaties, there have been difficulties with ensuring its implementation. This is partly due to the high number of reservations entered by states.[81] In addition, many states are overdue with their reports. As of mid-2005, 121 reports for the CRC were overdue, with 42 overdue reports on the Optional Protocol on children in armed conflict and 49 overdue reports on the Optional Protocol on the sale of children, child prostitution and child pornography.[82] However, the limitations of the system cannot be solely attributed to lack of cooperation by states. The Committee has also been the subject of criticism itself. It has been criticized for not taking sufficient account of cultural differences in states parties and having too rigid a concept of what the CRC requires.[83]

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80 Committee on the Rights of the Child, *Concluding Observations, Peru*, CRC/C/ /PER/CO/3, paras. 62–64 (Mar. 14, 2006).

81 William Schabas, *Reservations to the Convention on the Rights of the Child*, 18 HUM. RTS. Q. 472 (1996); Sonia Harris-Short, *International Human Rights Law: Imperialist, Inept and Ineffective? Cultural Relativism and the UN Convention on the Rights of the Child*, 25 HUM. RTS. Q. 130, 135–36 (2003). The following states have entered reservations in relation to Article 32 CRC: India (declining to set minimum ages for employment other than in hazardous forms of work), New Zealand (stating that, in its view, its legislation addresses the concerns of paragraph (1), and therefore declining to legislate further or take measures under paragraph (2)), Singapore (stating that it sets a minimum age for employment of 12, and provides employment protection measures for workers between the ages of 12 and 15; therefore its obligations under Article 32 are subject to this legislation), United Kingdom (in respect of overseas territories except Pitcairn and Hong Kong, the latter reservation being continued by China when it resumed sovereignty over Hong Kong; these reservations allow certain workers under 18 to be treated as "young persons" rather than children). These are the reservations currently in force. The United Kingdom withdrew a partial reservation in relation to its domestic law in 1999.

82 *See* http://www.unhchr.ch/tbs/doc.nsf/newhvoverduebytreaty?OpenView.

83 Harris-Short, *supra* note 81.

The high rate of ratification of the CRC, even with the large number of non-submissions and late submissions of state reports, leads to pressure on the Committee. In 1995, it began to conduct three sessions per year rather than two.[84] In December 2004, the General Assembly agreed to allow the Committee to work in two chambers.[85] This is intended to be an "exceptional and temporary measure" to allow the Committee to work through its backlog, but given that the pressure on the Committee is unlikely to abate, it is possible that this measure could be made permanent. The other main way in which the Committee has simplified its procedure is by eliminating the role of country rapporteurs, although this was based more on political factors (the perception that particular members of the Committee were responsible for the reports of particular states) than the need to streamline the process.[86] The backlog of reports is a serious problem, as reports will be out of date in at least some respects by the time the Committee considers them. This could devalue the Committee's observations, as it will always be open to states to claim that the observations bear no relation to the current situation in the state.

D. European Social Charter—Reporting System and Collective Complaints Mechanism

For member states of the Council of Europe, the regional instruments on economic and social rights are the European Social Charter, adopted in 1961, and the Revised European Social Charter, adopted in 1996. Council of Europe member states may be parties to either version and, in some cases, both.[87] Both instruments include provisions concerning child labor in their respective version of Article 7. The Charters, which share the same implementation system, are implemented primarily by means of a reporting system that is inspired more by that of the ILO than of the U.N. human rights treaties. However, it is hampered, to some extent, in its effectiveness by the presence of a strong political element through the Governmental Committee and the Committee of Ministers.[88] In 1995, the reporting system was supplemented by an Optional Protocol establishing a system of collective complaints, which draws to some extent from ILO

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84 Lansdown, *supra* note 70, at 123.

85 General Assembly, *Promotion and Protection of the Rights of the Child*, U.N. Doc. A/59/499 (Dec. 3, 2004), Resolution on Implementation of the convention on the Rights of the Child and the Optional Protocols Thereto on the Involvement of Children in Armed conflict and on the Sale of children, Child Prostitution and Child Pornography, para. 9.

86 Lansdown, *supra* note 70, at 123–24.

87 David Harris & John Darcy, The European Social Charter 21 (2d ed. 2001).

88 This is also true of the European Convention on Human Rights; *see* Clare Ovey & Robin White, Jacobs and White the European Convention on Human Rights (4th ed. 2006).

procedures but not as strongly as does the reporting procedure. The role of the Committee of Ministers has drawn severe criticism here, as its failure to adopt measures calling on states to remedy failings identified in a collective complaint determination calls into question the credibility of the procedure.[89]

The main body involved with reviewing state reports and evaluating collective complaints is the ECSR.[90] States submit their periodic reports to this Expert Committee, which explicitly declares whether, in its view, states are in compliance with their obligations under the relevant provisions. The Charter, particularly in its revised version, is a comprehensive statement of economic and social rights, although with something of a bias towards employment-related rights. States, however, need not undertake to respect all the rights of the Charter. Unlike most human rights treaties, which presume acceptance of all provisions unless a reservation is made, the Charter sets out a more menu-like approach. In Article 20 of the Charter and Article A of the Revised Charter, states are required to accept a certain minimum of provisions: about two-thirds of the so-called "hard core" articles and about half of the remaining provisions of the Charter. Although most states accept at least part of Article 7 on child labor,[91] it is worth noting that the Revised Charter makes this obligation more difficult for states to evade, as it includes Article 7 among the hard core provisions. States must report on hard core provisions at more frequent intervals than on other provisions: every two years for hard core, and every four years for others.[92] These reports, and comments made by social partner organizations and NGOs, are examined by the ECSR. The Committee, in the process of reviewing state reports and adopting its conclusions, engages in extensive and detailed interpretation of the meaning of provisions. However, very few instances of the ECSR's highlighting of non-compliance by states go further through the process, which subsequently becomes highly politicized. The Governmental Committee, which, as its name suggests, is composed of representatives of states rather than

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89 Robin Churchill & Urfan Khaliq, *The Collective Complaints Mechanism of the European Social Charter: An Effective Mechanism for Ensuring Compliance with Economic and Social Rights?*, 15 EUR. J. INT'L L. 417 (2004).

90 HARRIS & DARCY, *supra* note 87, at 293–302. Before 1998, it was known as the Committee of Independent Experts.

91 Of the parties to the Charter, only Denmark, Iceland and Latvia have accepted no provisions of Article 7. All parties to the Revised Social Charter have accepted at least part of Article 7; Acceptance of Provisions of the Revised European Social Charter/Acceptance of Provisions of the European Social Charter (1961), as of Dec. 21, 2006, *available at* http://www.coe.int/t/e/human_rights/esc/1_general_presentation/Provisions2006rev_en.pdf .

92 *See* the calendar for submitting reports, *at* http://www.coe.int/t/e/human_rights/esc/3_reporting_procedure/1_state_reports/Calendar_SC.asp#TopOfPage (Social Charter) and http://www.coe.int/t/e/human_rights/esc/3_reporting_procedure/1_state_reports/Calendar_SC.asp#TopOfPage, (Revised Social Charter).

independent experts, identifies the instances of non-compliance that should be forwarded to the Committee of Ministers for recommendations to be addressed to states.[93] The Committee of Ministers is a Council of Europe body rather than a treaty body and is, again, made up of political representatives of states. It may adopt recommendations addressed to non-complying states, as identified by the Governmental Committee, by virtue of Article 29 (Article 28 after the Amending Protocol comes into force) of the Charter. However, only since 1993, after the Committee of Ministers agreed to operate on the basis of the somewhat relaxed voting rules in the Amending Protocol did it become possible for recommendations addressed to individual states to be adopted.[94]

The 1991 Amending Protocol to the 1961 Social Charter, not yet in force, would reduce the role of the Governmental Committee and give the ECSR exclusive competence to interpret and apply the Charter.[95] It also provides for increased membership of the ECSR and gives it more powers, such as the ability to make direct requests to states for information. Despite the fact that the Amending Protocol is not in force, since it has not been ratified by all parties to the Charter, its provisions have largely been implemented in practice, including the requirement to make national reports public.[96]

It is worth comparing the reporting procedure under the Charter with the ILO's reporting procedures discussed in Section B. Increasingly, the practice under the Charter is moving away from the ILO model and towards the U.N. human rights treaty model as exemplified by the CRC. Unlike the experience of the ILO, the ECSR has not experienced a problem of non-submission of reports and only rarely of significant delay.[97] Like the ILO, the Charter provides for limited reporting on unaccepted provisions,[98] but this possibility has only occasionally been used by the ECSR.[99] Article 23 of the Charter requires states to transmit their reports to the main national trade union federations and

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93 On the criteria used by the Committee in this task, see HARRIS & DARCY, *supra* note 87, at 336–39.

94 HARRIS & DARCY, *supra* note 87, at 350. The Amending Protocol changes the voting rule from an absolute two-thirds majority to a majority of two-thirds of members voting.

95 *Id*., 15.

96 *Id*.; note that the only provision not made operational is the involvement of the Council of Europe's Parliamentary Assembly (a body made up of delegates from the parliaments of Council of Europe member states) in the election of members of the European Committee of Social Rights.

97 *Id*., 309–10. On the reasons for this good reporting record, see David Harris, *Lessons from the Reporting System of the European Social Charter, in* THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING 347, 348 (Philip Alston & James Crawford eds., 2000).

98 European Social Charter art. 22.

99 HARRIS & DARCY, *supra* note 87, at 314.

employer organizations, and under the 1991 Amending Protocol version of Article 23, to NGOs with consultative status with the Council of Europe, making the process more like that under U.N. human rights treaties. Similarly, Article 24, as amended by the Amending Protocol, now allows for a form of constructive dialogue with states, whereas the original formula was purely a paper exercise. However, this part of the procedure is only rarely used.[100] One important difference from ILO practice is the thoroughness of the ECSR's conclusions on state reports. Rather than highlighting only serious difficulties or gaps in information provided, the ECSR critiques state practice in detail on all accepted articles.[101] This can probably be justified on the basis that states are given much more freedom to accept or reject individual provisions of the Charter, so it is justifiable for them to be held strictly to account on the accepted provisions. However, it also highlights the gap between the practice of the ECSR and the more political bodies at the other stages of the reporting process.

The ECSR has, through the reporting process, developed the scope of state obligations under Article 7 of the European Social Charter and Revised European Social Charter. In Article 7, there are provisions relating to the exclusion of children under age 15 from employment except for light work. This ensures that even where children may work, they are not exposed to hazards and guarantees the working conditions of young workers. A central problem is the fact that many states do not apply the rules relating to child work to employment in family enterprises, particularly agriculture.[102] The ECSR has tended to set quite specific and strict standards for the implementation of Article 7. For example, it has accepted the limitation of work by school-age children to two hours per day, but it rejected another state's policy to set the limit at three hours per day on school days and six to eight hours on other days.[103] In the area of permitted light work, the ECSR has been particularly opposed to early morning work.[104]

The Charter is unique in its provision for fair working conditions for young workers. The Charter seems to distinguish between children, who should do only light work, and young workers (following the logic of Article 7, those over school-leaving age, and at least 15) who should be protected from hazardous work but may work. Certainly, the provisions on working conditions refer exclusively to young workers rather than children. However, the interpretation of the paragraphs of Article 7 that refer to working conditions of young workers does

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100 *Id*., 320–21.

101 *Id*., 352.

102 *Id*., 115.

103 *Id*., 119.

104 *See, e.g*., Council of Europe, European Committee on Social Rights, *Conclusions* XVII-2 (United Kingdom), at 813 (2005).

not make such a category distinction. The United Kingdom, for example, has been criticized for not providing for a minimum wage for those under 18, as required by Article 7(5), rather than simply for those between 16 and 18.[105] Similarly, Article 7(4) provides that working hours of those under 16 (under 18 in the Revised Charter) shall be limited, even though paragraph (1) of Article 7 provides that those under 15 should not be working at all. As a result, it can be said that the ECSR's interpretation of Article 7 provides protection for child workers even when they are in employment that itself is prohibited by that article. This is partly the result of the fact that, because states may decide to accept only certain paragraphs of an Article, a state may not have accepted the obligation to set a minimum age for employment, but it may have accepted the obligation to provide fair working conditions for young workers. However, if the ECSR had decided that "children" and "young workers" were distinct categories, the rights might have been limited to those over 15.

The Charter, to some extent, anticipates the approach of ILO C 182 by providing for protection of children from physical and moral dangers in Article 7(10). This has enabled the ECSR, in recent years, to examine state policies in relation to protection of children from trafficking and sexual exploitation.[106] For example, in 2005, the ECSR noted the legislative changes made by the United Kingdom to prevent and punish the trafficking of children for sexual or labor exploitation, but it requested further information on how possession of child pornography is regulated and what measures were in place to assist child victims of trafficking and sexual exploitation.[107]

One area in which the ECSR is particularly strong is probing states on their enforcement and application of the law, rather than deeming them to be in compliance if their positive law implements the principles of the Charter.[108] This has been demonstrated notably in the Collective Complaint 1/1998, *International Commission of Jurists v. Portugal*. The collective complaints mechanism was introduced into the Charter system by means of an optional protocol in 1995. Based on the ILO's Freedom of Association Committee system of complaints,[109] it allows international federations of employers or workers, national organizations of employers or workers and international NGOs recognized by the Council of Europe to bring complaints that a member state is not in conformity with its

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105 Council of Europe, European Committee on Social Rights, *Conclusions* XVII-2 (United Kingdom), at 815–16 (2005).

106 The ECSR regards this provision as going beyond protection within the work context, and it treats it as a more general child protection provision, focusing on matters including addiction and youth crime; *see* HARRIS & DARCY, *supra* note 87, at 127.

107 Council of Europe, European Committee on Social Rights, *Conclusions* XVII-2 (United Kingdom), at 816–17 (2005).

108 HARRIS & DARCY, *supra* note 87, at 116.

109 *Id*., 355.

obligations under the Charter.[110] Article 3 requires that complaining organizations must demonstrate particular competence in the area of the complaints. To date, no complaint has been declared inadmissible for failure to meet this requirement, and it tends not to be contested by states.[111] One discussion of the requirement is in Complaint 1/1998, where the International Commission of Jurists (ICJ) demonstrated that it had a history of involvement with children's rights issues, including involvement in the drafting process leading to the adoption of the CRC.[112]

Unlike the individual petition system of the European Convention on Human Rights (ECHR), the collective complaint mechanism does not have a victim requirement. In fact, the ECSR has declared a complaint inadmissible, because it was essentially an individual complaint in Complaint 29/2005, *Syndicat des hauts fonctionnaires (SAIGI) v. France*.[113] As a consequence, the collective complaints protocol does not give the ECSR powers to make remedial orders. It simply makes findings that a state has or has not ensured the satisfactory application of the Charter. The role of collective complaints is seen as complementary to that of the state reporting system. This is amply demonstrated, in the case of child labor, by the admissibility and merits decisions in *ICJ v. Portugal*.[114] The case focused on the alleged lack of enforcement by Portugal of its child labor laws. At no time was the legislation itself criticized. The Portuguese government argued that the complaint was inadmissible, because it revisited matters that had been addressed by the ECSR in its conclusions on Portugal's recent state reports. The ECSR decided that since the nature of the two procedures (reporting and complaints) differed, there was nothing to prevent it from examining a complaint on an issue that had arisen in the state reporting system.[115]

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110 Protocol art. 1. States may also, optionally, accept the right of national NGOs to bring complaints; art. 2(1). Only Finland has accepted this; *see* HARRIS & DARCY, *supra* note 87, at 359. No complaints have yet been brought against Finland by a national NGO.

111 *See, e.g.*, the admissibility decision in Complaint 7/2000, *International Federation of Human Rights Leagues v. Greece*, para. 8. However, the Greek government did contest the competence of the complaining NGO in Complaint 8/2000, *Quaker Council for European Affairs v. Greece*, para. 4 of the admissibility decision. However, the ECSR rejected this claim, in paragraphs 8 and 9, for the most part merely repeating the information given by the Quaker Council. It is worth noting that both Complaints 7/2000 and 8/2000 relate to the same issue, the forced labor of conscientious objectors to compulsory military service.

112 Admissibility decision, para. 1. In paragraph 9 of the decision, the ECSR makes a specific finding that the ICJ meets the requirement of particular competence.

113 Admissibility decision, paras. 7–8.

114 A fuller discussion of this case may be found in Holly Cullen, *The Collective Complaints Protocol of the European Social Charter*, 25 EUR. L. REV. HUM. RTS. SURVEY HR/18 (2000).

115 Admissibility decision, para. 10.

The ECSR's interpretation of Article 7 of the Charter in the *ICJ v. Potrugal* decision follows its approach under the state reporting system. It emphasized the wide scope of the prohibition on child labor. In particular, the ECSR noted that it applies to all sectors of the economy and to unpaid work within the family.[116] Only light work for school-age children is permitted, and to count as light work, the child must not be exposed to any risks, including of a moral nature. Work may also be unsuitable because of the duration of the work or other working conditions.[117] The ECSR decision on the merits of this case provides, therefore, a good summary of its overall approach to the interpretation of Article 7. Portugal was found to be in violation, because it did not have the inspection and enforcement procedures to prevent children from performing prohibited work despite legislation banning it. Although the parties disagreed on the interpretation of the relevant statistics, the ECSR was of the view that these amply demonstrated a pattern of children working in contravention of the law.[118] The need to demonstrate unsatisfactory application of the Charter, rather than the violation of an individual's Charter rights, leads to a more general approach to state policies than would be the case if a state was trying to justify a policy on the basis of an exception in the ECHR, with its proportionality requirements. There is no issue of balancing the rights of the individual against a public interest, but instead, there is a question of whether the state has done enough to meet its obligations under the Charter. Here, the ECSR found that although the government had taken steps, including the improvement of labor inspection services, it had not fully rectified the situation of illegal child work.[119]

The Collective Complaints Protocol, Article 9, provides that the Committee of Ministers shall receive the decision of the ECSR, and it shall adopt a resolution by a majority of those voting. This resolution closes the procedure. If the ECSR has found an unsatisfactory application of the Charter, the Committee of Ministers "shall adopt, by a majority of two-thirds of those voting, a recommendation addressed to the Contracting Party concerned." However, in the *ICJ* case, and in all but one of the cases where unsatisfactory application was found by the ECSR,[120] only a resolution has been adopted, despite the imperative language of Article 9.[121] The Committee's manner of operation is arguably biased towards the state party in any event: the state may participate in the deliberations of the Committee, but the applicant organization may not.[122] As

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116 Merits decision, paras. 26–28.

117 *Id*., paras. 29–31.

118 *Id*., paras. 34–38.

119 *Id*., paras. 40–44.

120 The exception is Complaint 6/1999, *Syndicat national des professions du tourisme v. France*, with Recommendation ResChS 1 (2001).

121 Churchill & Khaliq, *supra* note 89, at 439, 442–45.

122 *Id*., 447.

Churchill and Khaliq note,[123] the quasi-judicial role of the Committee in the ECHR process was removed by Protocol 11 (before this, once the European Commission on Human Rights had made its report on the merits of an application, it could go either to the Committee of Ministers or to the European Court of Human Rights). It seems anomalous that it should remain for the collective complaints mechanism under the Charter.

However, the justification for this more politicized procedure may be that the collective complaints mechanism is not a remedial process but is instead intended to complement the state reporting process.[124] The same justification could be offered to justify the lack of remedial powers given to the ECSR under the mechanism. However, Churchill and Khaliq suggest that the two functions of the ECSR may be incompatible,[125] or that there may instead be too much overlap between the functions.[126]

However, the less judicial aspects of the mechanism also remove some of the problems experienced by other human rights petition systems. As a collective complaint system, highlighting not harm to individuals but lack of compliance by states, it does not have a victim requirement. Nor do applicants have to demonstrate exhaustion of domestic remedies.

The experience of the follow-up to the *ICJ* case suggests that there may be some merit to any overlap between the state reporting system and the collective complaints mechanism. Just as the complaint may have been prompted by the Committee of Ministers' Recommendation to Portugal, following a finding by the ECSR under the state reporting system that Article 7 was not being properly implemented, the findings in the *ICJ* case have been followed up in the state reporting system. In 2005, the ECSR found that Portugal was still not in conformity with Article 7(1), while making specific reference to improvements in labor inspection since the *ICJ* case.[127]

E. Crisis in International Human Rights Implementation: Implications for Child Labor

As demonstrated in Sections B through D, the monitoring of state implementation of international treaty obligations under international labor law and international human rights law is continuously evolving, and systems are learning from each other. Nonetheless, criticisms have been expressed recently about

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123 *Id*.

124 *See ICJ v. Portugal*, admissibility decision, para. 10.

125 Churchill & Khaliq, *supra* note 89, at 448.

126 *Id*., 450. For a contrary argument, see Harris & Darcy, *supra* note 87, at 369–70.

127 Council of Europe, European Committee of Social Rights, *Conclusions* XVII-2 (Portugal), at 4–5 (2005).

state reporting systems and petition systems. On the one hand, in the ILO and the CRC, there are serious issues of non-submission and late submission of state reports. On the other, the monitoring committees have limited resources and would likely have difficulty dealing with a nearly full submission rate.[128] Even the ECSR's monitoring of the European Social Charter might have difficulty dealing with a higher rate of accession to the Collective Complaints Protocol and a greater recourse to this mechanism by European NGOs. Its application of the admissibility criteria has so far been generous, but this is on the basis of a few applications per year, unlike the thousands received by the European Court of Human Rights.[129]

International human rights law in general is now the subject of a debate on the worth of reporting systems. Petition systems, because of their relatively minor position in the implementation process, have received less consideration but are still the subject of critical evaluation. In reviewing these debates, we can see the limits of these processes in relation to the implementation of child labor norms. Child labor is such a complex phenomenon and relates to a number of human rights issues, as diverse as the right to education and the right to be free from forced labor, that the concerns about international human rights treaty monitoring apply with particular force to child labor.

Even petition procedures ultimately contribute more to prevention than to remediation. Nowak argues that "[t]he actual significance of these procedures . . . is . . . that of being fact-finding tools to expose human rights violations, to unmask those responsible and to prevent future human rights violations."[130] He also argues that decisions in petition procedures contribute more strongly to interpretation than to enforcement of human rights norms.[131]

The concerns of the system, in terms of overload (for both committees and states), lack of resources and limited state cooperation have led to many proposals for reform, some modest, some more radical. Some of the more radical commentators would eliminate the proliferation of reporting systems, at least within the United Nations, and replace them with one permanent committee.

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128 Elizabeth Evatt, *Ensuring Effective Supervisory Procedures: The Need for Resources, in* THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING 461 (Philip Alston & James Crawford eds., 2000).

129 On possible reasons for the low rate of use of the mechanism, see Churchill &Khaliq, *supra* note 89, at 445–46.

130 MANFRED NOWAK, INTRODUCTION TO THE INTERNATIONAL HUMAN RIGHTS REGIME 268 (2003). *See also* CHRISTIAN TOMUSCHAT, HUMAN RIGHTS: BETWEEN IDEALISM AND REALISM 186 (2003). For a contrary view on the preventative value of individual petition systems, see Henry Steiner, *Individual Claims in a World of Massive Violations: What Role for the Human Rights Committee?, in* THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING 15, 36–38 (Philip Alston & James Crawford eds., 2000).

131 Nowak, *supra* note 130. *See also* Steiner, *supra* note 130, at 38–40.

Nowak argues for a system whereby each state would produce a single comprehensive human rights report reviewed by a single body and accompanied by a petition system similar to the European Court of Human Rights' highly judicialized one.[132] However, there is a danger that such a system would marginalize the rights of children. After all, the two Covenants apply to children as much as adults, yet it was considered desirable to develop a convention specifying children's rights. In a single report, would child labor receive the detailed attention that the Committee on the Rights of the Child has demanded from states? Bayefsky's proposals are more radical still, although she also advocates the use of a single report for all obligations.[133] However, she would further reduce the workload of committees by allowing only democratic states to be parties to human rights treaties.[134] The legitimacy of human rights treaties is compromised, in her view, by allowing states to be parties to human rights treaties where their political systems are not adapted to support human rights. She also recommends allowing committees to do on-site fact-finding rather than relying on NGOs.[135] She would also integrate economic sanctions into the system of human rights enforcement.[136]

Alston rejects Bayefsky's proposals and defends the basic parameters of the existing system.[137] In particular, he defends the idea of universal participation in human rights treaties.[138] He argues that there is no clear category difference between Western democracies and developing countries in terms of acceptance of obligations (neither the United States nor the United Kingdom accept the Optional Protocol to the ICCPR allowing individual petitions) or reporting.[139] In particular, he notes that there are some developing countries with poor human rights records who in fact are good at meeting their reporting obligations, and some Western states that report but fail to act on the criticisms made of their human rights records.[140] He rejects the idea of on-site

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132 Nowak, *supra* note 130, at. 275.

133 ANNE F. BAYEFSKY, THE UN HUMAN RIGHTS TREATY SYSTEM: UNIVERSALITY AT THE CROSSROADS 146 (2001).

134 Anne F. Bayefsky, *Remarks in "Panel Discussion: The UN Human Rights Regime: Is It Effective?", in* 91 PROC. ANN. MEETING AM. SOC'Y INT'L L. 471–72 (1998).

135 Bayefsky, CROSSROADS, *supra* note 133, at 153–54 (on clarifying the role of NGOs), 168 (missions to state parties).

136 Bayefsky, *Remarks, supra* note 134, at 472.

137 Philip Alston, *Beyond "Them" and "Us": Putting Treaty Body Reform into Perspective, in* THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING 501 (Philip Alston & James Crawford eds., 2000).

138 *Id*., 516–18.

139 *Id*., 519. He also argues, at 520, that Bayefsky fails to take into account the fact that poorer countries have fewer resources, both human and financial, to devote to meeting their obligations under international human rights treaties.

140 *Id*.

fact-finding as politically non-viable and too expensive.[141] Economic sanctions, in Alston's view, do not have a good record of effectiveness and therefore should not be a primary method of enforcing human rights.[142]

While there is a high level of consensus on the failings and limitations of the current system of human rights treaty monitoring, particularly at the U.N. level, many of the proposed solutions would not be advantageous for the implementation of child labor standards. Comprehensive reports run the risk of marginalizing children's rights. Limiting the membership of human rights treaties would exclude many states where child labor problems are prevalent but where the Committee on the Rights of the Child has identified some progress being made. Excluding such countries from international forums may slow down the rate of progress, as public scrutiny would be reduced. As yet, aside from the single report model, there has been no solution offered to encourage states parties to submit reports. Perhaps, for the present, we will have to accept the current flawed and limited system and look to other methods of implementing child labor standards discussed in the two following chapters: trade sanctions and private enforcement mechanisms.

F. Conclusion

International labor law conventions and recommendations have had a limited effect in eliminating child labor. The existing labor law does not, and possibly cannot, address the causes of child labor in a thorough manner. This criticism concerning effectiveness extends to all international human rights treaties and their implementation mechanisms. The limitations of international legal systems that cannot enforce legal rules in the way that national legal systems can must be accepted.

While the effectiveness of conventional treaty monitoring systems is limited in changing state behavior, its utility in developing interpretation of child labor standards is significant. After recent practice of the ILO Committee of Experts, and the Committee on the Rights of the Child, we can say that we have a clearer idea of several concepts in child labor standards. There has been some elaboration of what types of work might be covered by the idea of hazardous work, including moral hazards—the committees have mentioned the risk of sexual abuse facing child domestic workers, for example. The committees have also highlighted priority areas, such as the trafficking of children. One important development is committees' willingness to make the link between unacceptable child labor and education, a link that political bodies have been reluctant to acknowledge. Finally, both the Committee on the Rights of the Child and the ECSR have pressured states on the working conditions of young workers, rec-

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141 *Id*., 511–12.

142 *Id*., 521. For a discussion of the possible use of trade sanctions, although not economic sanctions generally, see Chapter 7.

ognizing that excluding children from harmful work is only part of the solution in child labor. There has been, therefore, convergence in interpretation of child labor standards by international treaty monitoring bodies, which means that there is emerging a single body of legal interpretation of what it means to eliminate harmful child labor. This is reinforced by the fact that treaty bodies make explicit reference to the instruments and interpretations of other systems.

There is some evidence, in relation to some states, of progress between reporting periods, but persistent problems remain, particularly with enforcement. As with international law, national law often has developed appropriate standards in relation to child labor, but it still has much to do in implementing and enforcing those standards.

Chapter 7
Child Labor and the International Trading System

A. Introduction

Since the 1990s, a highly polarized debate has been conducted over the possibility of using the international trading system as a means of eliminating child labor. For the most part, international labor lawyers and international human rights lawyers took the view that states should be permitted to restrict imports of goods made with child labor,[1] and international trade lawyers took the view that such restrictions would be incompatible with the principles of free trade and, in particular, General Agreement on Tariffs and Trade (GATT) rules.[2] However, over the past few years, greater complexity has emerged. International human rights lawyers and international labor lawyers began to recognize the limited utility of trade sanctions in this field.[3] More intriguingly, perhaps, international trade lawyers, in the aftermath of the failure to agree a program of further trade liberalization at the World Trade Organization (WTO) ministerial conference in Seattle in 1999, have taken a slightly more sympathetic view of the possibility of applying trade sanctions.[4] In light of the increasing questioning of the

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1 Janelle M. Diller & David A. Levy, *Child Labor, Trade and Investment: Toward the Harmonization of International Law*, 91 Am. J. Int'l L. 663 (1997); Michael A. Tonya, *Baby Steps Toward International Fair Labor Standards: Evaluating the Child Labor Deterrence Act,* 24 Case W. Res. J. Int'l L. 631 (1992); Philip Alston, *Labor Rights Provisions in US Trade Law: "Aggressive Unilateralism"?, in* Human Rights, Labor Rights and International Trade 71 (Lance A. Compa & Stephen F. Diamond eds., 1996); Patricia Stirling, *The Use of Trade Sanctions as an Enforcement Mechanism for Basic Human Rights: A Proposal for Addition to the World Trade Organisation* 11 Am. U. J. Int'l L. & Pol'y 1 (1996).

2 Paul Waer, *Social Clauses in International Trade: The Debate in the European Union*, 30 J. World Trade 25 (1996); John O. McGinnis & Mark Movesian, *The World Trade Constitution*, 114 Harv. L. Rev. 511 (2000–2001).

3 Holly Cullen, *The Limits of International Trade Mechanisms in Enforcing Human Rights: The Case of Child Labor*, 7 Int'l J. Children's Rts. 1 (1999); David M. Smolin, *Strategic Choices in the International Campaign Against Child Labor*, 22 Hum. Rts. Q. 942 (2000).

4 Ernst-Ulrich Petersmann, *From "Negative" to "Positive" Integration in the WTO: Time for "Mainstreaming Human Rights" into WTO Law?*, 37 Common Mkt. L. Rev. 1363, 1370 (2000), states that the failure of the negotiations in Seattle and concerning

existing system of international trade, particularly by non-governmental organizations (NGOs) representing a wide range of interests,[5] the question of legitimacy of international trade rules has begun to exercise the minds even of the promoters of free trade.[6] Although there was an attempt to address some aspects of the trading relationship between developing countries and the richest countries through the Doha development round of negotiations relating to the WTO, the relationship between core labor rights, such as child labor and trade, remains non-committal, at best, and uses the same language as the 1996 Singapore Ministerial Declaration, which stated that the International Labor Organization (ILO) rather than the WTO should deal with issues of core labor standards.[7]

Most of the 1990s' writings arguing for the use of trade sanctions in areas such as child labor were based on the view that restricting imports of goods made with child labor could not be done in such a way as to be consistent with GATT, except by recourse to the exceptions in Article XX. In other words, restricting the import of goods made with child labor was thought, even by its proponents, to be *prima facie* contrary to GATT. More recent analysis, however, has put forward a strong argument that such distinctions, if they are origin-neutral (they apply equally to all countries) and do not take the form of blanket bans on all goods from an offending country, might actually be consistent with the basic rules of GATT. This is supported, in particular, by the Appellate Body decision in *Asbestos*, where the carcinogenic nature of asbestos

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the OECD's proposed Multilateral Agreement on Investment were a warning that the one-sided focus on producer interests in international trade risks opposition by civil society. A re-examination of the conventional wisdom on trade restrictions based on human rights or environment can be found in Robert Howse & Donald Regan, *The Product/Process Distinction—An Illusory Basis for Disciplining "Unilateralism" in Trade Policy*, 11 EUR. J. INT'L L. 249 (2000). John H. Jackson, replying to Howse and Regan, in *Comments on Shrimp/Turtle and the Product/Process Distinction*, 11 EUR. J. INT'L L. 303 (2000), while arguing for the utility of the "bright line" rule of product/process distinction, accepts the need for some flexibility on its application, seemingly because of a need for limited protection of values.

5 *See, e.g.*, Oxfam's "Make Trade Fair" campaign, at http://www.maketradefair.com/en/index.htm.

6 Petersmann, *supra* note 4. This issue was raised before Seattle by Robert Howse & Michael J. Trebilcock, *The Fair Trade/Free Trade Debate: Trade, Labor and the Environment*, 16 INT'L REV. L. & ECON. 61, 62 (1996): "If international trade law simply rules out of court any trade response to the policies of other countries, however abhorrent, then there will be an understandable, and dangerous, temptation to declare that international trade law is an ass." See also the various contributions to the workshop on *The Limits of International Trade: Workers' Protection, the Environment and other Human Rights*, 94 PROC. AM. SOC'Y INT'L L. 219 (2000).

7 *See* the Doha Declaration of Nov. 14, 2001, WT/MIN(01)/DEC/01. The declaration simply took note of the ILO's current work on the social dimension of globalisation.

was taken into account in assessing whether it was a "like product" to asbestos substitutes, even though the two are functionally similar.[8] Furthermore, the possibility of exemption under Article XX may have been given new life by some of the comments of the Appellate Body in the *Shrimp/Turtle* case.[9]

Beyond the question of legality, there is the question of appropriateness. Increasingly, trade sanctions have been rejected by advocates of the elimination of child labor, led by NGOs involved in the ILO's International Program on the Elimination of Child Labor (IPEC). They are seen as ineffective and potentially counter-productive. However, the possibility that trade sanctions against goods made with child labor may be appropriate in extreme cases, as a last resort, will be argued in this chapter. In such cases, similar to the situation of Burma in relation to forced labor, the primary purpose of trade sanctions is not to eliminate child labor but to express abhorrence at the practice of it. They serve a political rather than remedial purpose.

One response to the problem of trade/labor conditionality has been to provide not sanctions, but additional trade preferences for countries that observe core labor standards, including the elimination of child labor. The European Union's Generalized System of Preferences (GSP) is the leading example of this. Its main virtue is that it is a voluntary system, so the element of coercion, arguably verging on intervention, which is criticized in the context of trade sanctions, is absent.

B. Reconsideration of the Legality of Trade Sanctions Under GATT

Even before the establishment of the WTO, there was concern that the international trading system was inconsistent with policies to link trade with non-economic values, such as human rights or the environment. Some have argued that the exclusion of non-trade values from international trade law is an abandonment of its early post-war conception.[10] It is suggested that even the GATT

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8 *EC-Asbestos*, WT/DS135/AB/R (Mar. 12, 2001).

9 *See* Jackson, *supra* note 4, at 306.

10 Michele Vellano, *Le plein emploi et la clause sociale dans le cadre de l'OMC*, 102 Revue Générale de Droit International Public 880, 886–89 (1998), discussing the abandoned Havana Charter, which was heavily influenced by Keynes (representing the United Kingdom) and other economists who were among the negotiators emphasizing the goal of full employment and the role of governments and inter-governmental coordination as a method of achieving this goal. See also *id*. at 892, noting the refusal of the 1954–55 working group to take up the employment provisions of the Havana Charter. *See also* Rorden Wilkinson, *Labor and Trade-Related Regulation: Beyond the Trade-Labor Standards Debate*, 1 Brit. J. Pol. & Int'l Relations 165 (1999) arguing that international trade law has crystallized as a system that refuses to address labor as a factor of production, compared with its at least partial regulation of capital and land.

dispute resolution panels, which pre-date the WTO, engaged in too much self-restraint of their discretion to consider non-trade values.[11] The *Tuna/Dolphin* cases of the early 1990s were seen as representing the hostility, or at least incomprehension, of international trade law in the face of non-economic values.[12] International trade law appears even to have an ambiguous relationship to democratic governance. Some argue that international trade law contains elements of democracy, notably the argument from McGinnis and Movesian, that international trade law reinforces majoritarian democracy.[13]

It is important to begin by stating that there has never been a decision of a GATT panel, a panel established under the Dispute Settlement Understanding (DSU) or the Appellate Body under the WTO that has dealt with the question of whether a state can refuse to allow the import of goods made with child labor. There has never been a decision dealing with labor or human rights conditions for excluding goods at all. The arguments regarding the legality of excluding goods made with child labor, or in some cases, of excluding all goods from countries where child labor is prevalent, are made by analogy with cases dealing with rather different issues, such as environmental protection. The question of legality is, therefore, very much open.

Many international trade lawyers have concluded that trade restrictions on goods made with child labor are inconsistent with GATT, largely because they would or could amount to disguised protectionism. They have tended to treat international trade law as a self-contained system that need not have recourse to the values or norms of other areas of international law.[14] Those urging the WTO to take on board the values of core labor standards, human rights or environmental protection have largely, although not exclusively, come from other areas of specialization. Increasingly, however, international trade lawyers are recognizing a legitimacy gap within the international trade law system. In part, this is probably due to external protest against the functioning of international free trade. In addition, there has been a recognition that the nature of international trade law has changed with the introduction of the WTO, necessitating a greater grounding in "constitutional" type principles, including human rights. The WTO "rests on a broader and more coherent concept of international trade than that underlying GATT 1947."[15] Furthermore, as Maupain comments, the limits of voluntarism in labor standards, as practiced by the ILO, led to a consideration of whether binding trade sanctions would produce better results.[16]

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11 Vellano, *supra* note 10, at 882–84.

12 Howse & Regan, *supra* note 4, at 250.

13 McGinnis & Movesian, *supra* note 2.

14 However, Gabrielle Marceau has rejected this approach: Gabrielle Marceau, *WTO Dispute Settlement and Human Rights*, 13 EUR. J. INT'L L. 753 (2002).

15 Petersmann, *supra* note 4, at 1364.

16 Francis Maupain, *La protection internationale des travailleurs et la libéralisation*

Where labor standards relate directly to international competition, the ILO has failed to achieve strong standards.[17]

The WTO covers agreements on services, investment and intellectual property, as well as goods. It is therefore progressing along an agenda for positive integration, particularly notable in the intellectual property sphere, with elements of harmonization and mutual recognition.[18] In this area, a legitimacy problem arises because the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) provides one-sided protection, with a focus on producer interests.[19] In particular, while GATT disputes tend to arise because of discriminatory treatment of foreign producers, TRIPs disputes have arisen, often at the behest of private right-holders, out of non-discriminatory practices.[20] Such issues raise difficult political problems for the state whose laws or practices are challenged and set the values of trade liberalization against other values much more sharply than do discrimination against imports. Like restrictions on imports of goods made with child labor, or in any other way that violates publicly held values, challenges under TRIPS to national rules on intellectual property raise questions of how much free trade is actually a fetter on policymaking.

One answer to this perceived legitimacy gap is to argue that the WTO is a constitutional system, and therefore follows procedures that are recognizably legitimate in a rule of law sense. This argument is advocated by supporters of the WTO system to defend it from accusations that it undermines democratic governments. McGinnis and Movesian argue that a *properly limited* system of international trade law leaves sufficient regulatory capacity for states, while reinforcing majoritarian democracy by preventing the "capture" of national democratic institutions by protectionist interest groups.[21] Their argument demonstrates the beginnings of a convergence between supporters and critics of the WTO, in that both criticize the strong version of proportionality adopted by the Appellate Body in the *Shrimp/Turtle* case.[22] However, describing the constitutionalization of an international trade system is not unproblematic. First, there are many ways of approaching the question of constitutionalization: institutions, rights, a form of social contract, hierarchy of norms or the presence of judicial

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du commerce mondiale: un lien ou un frien?, 100 Revue Générale de Droit International Public, 45, 52–53 (1996).

17 *Id*., cites the example of working time regulation, going back to the 1930s.

18 *Id*., 1365.

19 *Id*., 1366–67. Petersmann, *supra* note 4, argues that the transitional provisions of TRIPs for developing countries are insufficient to correct this imbalance.

20 *Id*., 1367.

21 McGinnis & Movesian, *supra* note 2.

22 This point will be discussed further in Section B.2 when considering the exceptions under Article XX.

lawmaking.[23] Second, the existence of a constitutionalized international trade system does not answer the question of legitimacy; instead it makes the question even more important, as it directly raises questions about democracy and the inter-relation of national and international law.[24]

The question of legitimacy is raised not only by the system *per se*, but also by its effects. Legitimacy questions arise because the losses resulting from trade liberalization are localized and easy to identify, whereas the benefits often seem diffused, even inchoate.[25] The economic relationship between free trade and labor standards is the subject of much debate. It has been argued, for example, that high labor standards should not be imposed in developing countries until greater economic development has occurred, at which time increased protection of workers will happen naturally.[26]

Marceau suggests a nuanced approach to the question of interpreting WTO agreements in light of human rights. She argues that the WTO agreements must be interpreted consistently with international law and that a good faith interpretation of the respective provisions of WTO agreements and human rights treaties (and customary rules) should prevent states from violating human rights obligations in order to meet WTO requirements.[27] WTO panels are prohibited from *applying* international human rights treaties in dealing with disputes.[28] However, she argues that *interpretation* in light of human rights principles as part of general international law is permissible and even obligatory under the Vienna Convention on the Law of Treaties. She cites Article 31(3)(c) in particular, which requires interpretations to take into account "any relevant rules of international law applicable in the relations between the parties" and which, in her view, allows for an evolutionary interpretation of treaties.[29] This would require, in Marceau's view, at a minimum that human rights as rules of customary international law and general principles of international law must be taken into account.[30] Human rights treaties create more difficulties. She argues

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23 Deborah Z. Cass, *The "Constitutionalization" of International Trade Law: Judicial Norm Generation as the Engine of Constitutional Development in International Trade*, 12 EUR. J. INT'L L. 39, 40–41 (2001).

24 *Id*., 44–46.

25 Maupain, *supra* note 16, at 54. At *id*., 55, he predicts, accurately, that resistance to the new system will grow, leading to pressure on governments to act unilaterally to implement policies for labor conditionality.

26 *See id*., 57–59.

27 Marceau, *supra* note 14, at 755.

28 *Id*., 763–67, 773–74. She concludes that the WTO is a self-contained system of international law that was intended to exclude the normal rules of state responsibility and to restrict the use of countermeasures.

29 *Id*., 784.

30 *Id*., 780.

that it is not necessary for there to be identical membership between the human rights treaty and the WTO, contrary to the Appellate Body in *Shrimp/Turtle* referring to the Convention on the International Trade in Endangered Species, which did not have identical membership to the WTO.[31] She argues instead that the test for whether or not a treaty should be covered by Article 31(3)(c) when interpreting the WTO is one of relevance.[32] A further problem is elucidating human rights principles to the extent that they can be usefully applied in WTO proceedings. However, Marceau does not see this as insurmountable, in light of the development of these principles by international bodies through methods such as General Comments.[33]

In reconsidering the question of the legality of excluding goods made with child labor, I am separating the question of legality from the question of appropriateness and effectiveness. These are very different arguments and should be dealt with separately. If there is no possibility of legally restricting the import of goods made with child labor, then the question of appropriateness simply does not arise. Only if there is a way of legally framing an exclusion of such goods does the question of whether or not to employ it arise.

Furthermore, what is discussed below is the extent to which WTO law restricts the discretion of *states* to impose limits on the import of goods made with child labor. I will not consider the issue of whether the WTO should administer a regime of core labor rights conditionality itself.[34] While this alternative was widely discussed in the immediate aftermath of the establishment of the WTO,[35] it has been largely abandoned since the Singapore Ministerial meeting of the WTO rejected the integration of core labor standards into international

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31 *Id*., 781. An interpretation requiring identical membership would, ironically, be particularly problematic with respect to the CRC, which although it has the highest membership of any human rights treaty, does not include the United States among its members.

32 *Id*., 783.

33 *Id*., 789.

34 McGinnis & Movesian, *supra* note 2, at 516–27, call this the "regulatory model" of international trade law, as opposed to the "anti-discrimination model" currently in operation. These terms are, perhaps, controversial. Petersmann, *supra* note 4, argues that WTO law now includes not only negative harmonization (prohibiting discrimination against imports) but also positive harmonization in TRIPs (imposing common rules, regardless of the presence or absence of discrimination), which implies that the WTO is already moving towards a regulatory model. The question therefore is which areas are appropriate for regulation by international trade law, rather than whether or not international trade law should have a regulatory dimension.

35 *See, e.g*., Daniel Ehrenberg, *From Intention to Action: An ILO-GATT/WTO Enforcement Regime for International Labor Rights, in* Human Rights, Labor Rights and International Trade 163 (Lance A. Compa & Stephen F. Diamond eds., 1996); *see also* sources cited by McGinnis & Movesian, *supra* note 2, at 517 ns.29–31.

trade law.[36] Even without the resistance of the WTO itself, there are good reasons for not pursuing such an alternative. Dispute settlement proceedings in the WTO are comparatively nontransparent and do not have the same guarantees of neutrality that many rule of law states entrench.[37] It is questionable whether the WTO Appellate Body has the right type of expertise to evaluate legal claims relating to international human rights law and international labor law.[38] One way around this problem, namely involving the ILO in disputes relating to issues such as child labor, presents its own difficulties. The strength of the ILO relies on its traditions of cooperation and tripartitism—these features could be undermined through involvement with the WTO dispute settlement procedures.[39] I will therefore consider only the extent to which international trade law permits or limits the possibility of import restrictions on goods made with child labor.

1. Concept of "Like Products" Under Article III GATT

It is undeniable that the intention of the GATT is to preserve the regulatory discretion of states where such regulation does not involve protectionist discrimination, whether overt or covert.[40] A good working definition of covert protectionism is provided by McGinnis and Movesian, who argue that it exists where a measure "would not have been enacted but for the benefits it gives domestic industries by restraining imports . . . [and it] lack[s] a public interest foundation."[41] There is, however, considerable argument as to where such guarantees of regulatory discretion are located. Often, it appears that most commentators assume that only Article XX, which states the exceptions to the GATT rules, preserves state discretion. However, Howse and Regan argue that Article III also gives states regulatory discretion. Article III, entitled "National Treatment on Internal Taxation and Regulation," prohibits states parties from applying internal regulations, including taxes and charges, in a way that provides protection to domestic products. It therefore guarantees non-discrimination but does not prohibit any particular type of regulation.

The basis on which most commentators on human rights or labor conditionality build their arguments, whether for or against, is that GATT makes a

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36 Singapore Ministerial Declaration, Singapore WTO Ministerial, WT/96(MIN)/DEC (Dec. 18, 1996), *reproduced in* 36 I.L.M. 218 (1997).

37 McGinnis & Movesian, *supra* note 2, at 534–35.

38 Interestingly, both critics and supporters of the existing international trade law system have advanced this argument; *see* McGinnis & Movesian, *supra* note 2, at 563; Cullen, *supra* note 3, at 21.

39 Erika de Wet, *Labor Standards in the Globalized Economy: The Inclusion of a Social Clause in the General Agreement of Tariff and Trade/World Trade Organization*, 17 HUM. RTS. Q. 443, 444 and 446 (1995).

40 McGinnis & Movesian, *supra* note 2, at 550.

41 *Id*., 572.

clear distinction between products themselves and the process by which those products are made. Paragraph (4) of Article III states that "The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use." This has often been interpreted as prohibiting regulations that effectively exclude imported products on the basis of characteristics relating to the process by which they are made.[42] Defenders of the distinction argue that process-based regulations may often be disguised protectionism.[43] For example, if a state refuses to allow the import of carpets made by child labor, it is making a distinction not on the ground of features of the product itself (which is the same regardless of how it is made) but on the process of making it. Such a regulation may be, in the view of defenders of the product-process distinction, simply a measure to protect a domestic industry or, in the view of critics of the distinction, a legitimate exercise of regulatory discretion to prevent activities that are contrary to human rights. The text of GATT and the decisions made by dispute settlement bodies interpreting GATT, it is argued, have limited the discretion of states to import bans based on the characteristics of the product itself. Furthermore, the need to police covert protectionism requires the WTO to insist that labor regulations (among others) affecting international trade be expressed in terms of the objectives of the standards rather than production processes.[44] Howse and Regan, however, argue that this view of GATT is not actually justified either by the text, or by the interpretations of the text by dispute settlement bodies.

In part, the divergence of views derives from different understandings of the very essence of GATT.[45] Howse and Regan acknowledge that if the correct view of GATT is that it provides a positive right of access to the markets of the states parties, then a restrictive view of state discretion to limit imports is the natural consequence. If, however, as they argue, the central right in GATT is a right of *non-discrimination* in access to states parties' markets, then origin-neutral restrictions, regulatory measures that apply to products regardless of whether they are imported or produced domestically, are permitted by GATT without having to be justified under Article XX. Their argument that GATT is premised on a simple right of non-discrimination is based on the structure and the text of the treaty. If GATT creates a general right of access, then all articles are, to some extent, exceptions if they effectively allow states to exclude goods. This view has not been accepted by the Appellate Body, which has reversed dispute

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42 Howse & Regan, *supra* note 4.

43 Jackson, *supra* note 4.

44 McGinnis & Movesian, *supra* note 2, at 573–74.

45 Howse & Regan, *supra* note 4, at 257 and 276–77.

settlement panel findings that a general right of access is guaranteed by GATT.[46] Furthermore, Article III, on which Howse and Regan base the legality of origin-neutral process-based distinctions, is not phrased as an authorizing exception, but rather as a basic prohibition of certain types of measures, although some panels have treated it as such.[47]

The product/process distinction is often claimed to be based on decisions under GATT concerning "like products." While there is no specific authority for the legality of origin-neutral process-based distinctions, neither is there as clear authority as has often been claimed for their illegality.[48] While both the *Tuna/Dolphin* panels did indeed adopt the product/process distinction as the basis for their decisions, neither panel report was adopted by the membership of GATT.[49] This means that they cannot be treated as binding precedent, at best as guidance for future panels. Furthermore, the measure in those cases was *not* origin-neutral, but rather country-based. As a result, it is arguable that *Tuna/Dolphin* cannot be treated as determinative on process-based measures, since the panel did not have to consider the legality of origin-neutral measures.

The argument that origin-neutral process-based measures are illegal under Article III is similar to the argument for excluding such measures from the scope of Article III altogether: products that are physically similar must be treated as "like products" regardless of differences in processing measures, which means that process-based distinctions are illegal discrimination. This is justified on the ground that the processing history is irrelevant at the consumption stage. This is contestable on a number of grounds. One is the proliferation of ethical consumption schemes, where the consumer chooses from physically similar products specifically because of their processing histories.[50] Secondly, because retailers will tend to replenish stocks from the same sources, the sale of one item that is made by process X will tend to lead to further imports of that good made by that process.[51] Howse and Regan, furthermore, argue that

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46 *Id*., 276 n.41, and cases cited therein.

47 Howse & Regan, *supra* note 4, at 257.

48 *See also* Vellano, *supra* note 10, at 897.

49 Before the coming into force of the WTO agreement, panel reports were not adopted unless it was unanimously agreed by the contracting parties. Where reports were not adopted, they were not considered to be a legally binding solution to the dispute; *see* Howse & Regan, *supra* note 4, at 250. In some cases, the panel report was not even put forward for adoption by the victorious party. Under Article 16 of the Dispute Settlement Understanding, the panel report is automatically adopted unless the Dispute Settlement Body unanimously agrees *not* to adopt it. Unadopted panel reports may be used as guidance by later panels: *U.S.-Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/R, Report of the Panel (May 15, 1998).

50 *See* Chapter 8.

51 Howse & Regan, *supra* note 4, at 262.

likeness should be determined on the basis of similarities or differences that justify separate regulation rather than by a reflexive recourse to physical similarity.[52] This interpretation is justified by the context of the use of the word "like" in Article III.[53] Once a contextual meaning of "likeness" is accepted, then the process by which a product is made may be relevant to an evaluation of likeness, although it will not always be so. The determination of likeness will be more difficult and less predictable than a reflexive recourse to physical similarity. Nonetheless, a more flexible approach is consistent with the objectives of Article III, as set out in its paragraph (1), which is to prohibit discriminatory regulation.

A recent Appellate Body report gives some reason for optimism that a broader approach to "like products" may emerge. In the *Asbestos* panel decision, it was found that asbestos and asbestos substitutes were like products for the purposes of Article III. The Appellate Body reversed this decision on the ground that the panel should have taken into account the health risks associated with asbestos when evaluating the question of like products. As a result, it found that Canada had not discharged its burden of proof under Article III. This case does not deal with process-based restrictions but at least takes a broad view of what can count as a physical characteristic. Two products, even if they serve identical functions, are not "like" if one causes physical harm and the other does not. In addition, although the Appellate Body was not fully convinced that the products were even fully similar in functional terms, it indicated that a wider view of similarity should be taken, which would include consumers' preferences:

> In addition, even if the cement-based products were functionally interchangeable, we consider it likely that the presence of a known carcinogen in one of the products would have an influence on *consumers' tastes and habits* regarding that product. We believe this to be true irrespective of whether the consumer of the *cement-based* products is a commercial party, such as a construction company, or is an individual, for instance, a do-it-yourself ("DIY") enthusiast or someone who owns or lives or works in a building. This influence may well vary, but the possibility of such an influence should not be overlooked by a panel when considering the "likeness" of products containing chrysotile asbestos. In the absence of an examination of consumers' tastes and habits, we do not see how the Panel could reach a conclusion on the "likeness" of the cement-based products at issue.[54]

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52 *Id*., 260.

53 The reference to context was accepted in *U.S.-Measures Affecting Alcoholic and Malt Beverages*, BISD 39 (1992) 206, para. 5.71.

54 *EC-Asbestos, supra* note 8, para. 130. *See also id*., para. 139.

The applicability of this analysis to products made with child labor is difficult to evaluate. The Appellate Body in *Asbestos* emphasized the physical differences between the two products, as well as the health impact and views of consumers.[55] A product made with child labor will often be indistinguishable from the same product made with adult labor. The only distinguishing factor would be the tastes and habits of consumers.

The violation of non-trade values, it is argued, constitutes an externality that consumers of the product made with the disfavored process imposed on others. This was to some extent accepted by the Appellate Body in *Shrimp/Turtle*, which agreed that the United States could invoke the protection of health and environment in relation to animals located outside its jurisdiction. The only way to internalize that externality is to impose a restriction on the process itself.[56] Furthermore, the imposition of a process restriction on domestic producers only may lead to foreign producers having a competitive advantage that does not reflect a comparative advantage (one that relates to efficiency). Again, only by imposing a restriction on the import of goods made with the disfavored process can the situation be corrected.[57] In the area of labor standards process restrictions, it is important to proceed cautiously. The imposition of a minimum wage standard does affect comparative advantage, but some human rights-oriented labor standards will go beyond comparative advantage.[58] This distinction can be seen in the specific inclusion of goods made with prison labor as a permissible exception under Article XX, where the general consensus appears to be that this provision derives from concerns about unfair competition rather than morality.[59] The use of prison labor seems to go beyond acceptable comparative advantage. In some cases, therefore, GATT itself recognizes that values-based regulation and efficiency considerations lead to the same result. In such cases, process-based restrictions cannot be seen as inherently protectionist.

Value-based restrictions on trade are, however, fundamentally extraterritorial. While the Appellate Body in *Shrimp/Turtle* accepted that extraterritoriality may not always be a bar to import restrictions, it may raise questions of fairness. The argument against value-based restrictions involves imposing the values of one country, usually a wealthy developed country, on another, usually a poorer less-developed one.[60] One way around this is to ground such value-

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55 *Id*., paras. 134–137.

56 Howse & Regan, *supra* note 4, at 271 and 280–83.

57 *Id*., 282, correctly notes that it may not be fair to impose the costs of internalization on the exporting country, where the importer is a wealthy country and the exporter is a developing country. However, this goes to appropriateness, which I argue should be considered separately from legality. *See* Section C.

58 Howse & Regan, *supra* note 4, at 283–84.

59 Maupain, *supra* note 16; *contra* Diller & Levy, *supra* note 1.

60 McGinnis & Movesian, *supra* note 2, at 586–87. They also argue that value-based

based restrictions in common international standards. The United States has been widely criticized for applying "internationally recognized worker rights" that contain no reference to ILO conventions or other international law texts.[61] Restrictions based, therefore, on the values contained in the Universal Declaration of Human Rights or of the ILO Declaration on Fundamental Principles and Rights at Work would draw from a common standard.

Similarly, process-based trade restrictions are seen as a version of extraterritorial regulation in that it is said to impose the importing country's policy on the exporting country. At least some of the language in the decisions in *Tuna/Dolphin* and *Shrimp/Turtle* appears to reflect this consideration. In particular, the Appellate Body report in the *Shrimp/Turtle* dispute criticized the United States for applying its policy without flexibility, meaning that the policy required other states to adopt the same policy as that followed by the United States. In economic terms, the question appears to be moot: "From the point of view of economics, what we have been discussing as a moral interest of the importing country is just another preference, *and there is no economic criterion for the 'legitimacy' of preferences*."[62] In addition, it seems odd to raise the question of extraterritoriality, breach of the principle of non-intervention or unilateralism of policies that impose import restrictions, when the WTO rulings do not impose a domestically enforceable obligation to change internal law.[63] It is even a matter of controversy whether such rulings create an obligation of compliance at *international law* or whether the system simply establishes pragmatic incentives to comply.[64]

While Howse and Regan rightly argue that their argument in general applies only to origin-neutral bans on the particular goods made with the prohibited process, there are circumstances where the logic could be extended to justify a country ban. For example, in Burma, an ILO Commission of Inquiry has found that forced labor is being used extensively by the state in the development of infrastructure projects. The forced labor is therefore not being used directly to produce goods but is arguably implicated in the production of all internationally traded goods originating from Burma. It could therefore be justified, in such circumstances, to apply a ban on all goods originating from that country, regardless of how the goods themselves are produced. However, it might be said in counter-argument that the connection between the abhorrent practice and the production of the goods is too remote. It would probably be necessary to undertake an economic analysis of the production of goods to evaluate the

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restrictions could be a disguise for covert protectionism, but that would be a question of fact in each individual case rather than a question of principle.

61 Alston, *supra* note 1, at 71.

62 Howse & Regan, *supra* note 4, at 279 (emphasis in original).

63 McGinnis & Movesian, *supra* note 2, at 532.

64 *Id*., n.114 and sources cited therein.

contribution of infrastructure in bringing goods to market. As discussed below, the European Union has applied trade sanctions of a sort by suspending the benefit of its GSP in relation to Burma as a result of its use of forced labor.

2. Exemption Under Article XX GATT

Most advocates of trade sanctions as a means of enforcing child labor norms suggest that such bans may be justified by recourse to Article XX GATT. Such justification would be necessary if the above argument on the legality of process-based distinctions proves to be wrong. Since most writers have taken for granted the *prima facie* illegality of process-based distinctions as the basis for import bans, it is the possibility of exemption that has been the focus of most writing on the subject of child labor and trade.

One approach that has been suggested in order to open up the interpretation of Article XX to human rights principles is to see that provision as being deliberately open-textured, which requires panels or the Appellate Body to complete it with reference, if necessary, to other international legal rules.[65] In this way, a good faith interpretation of the WTO agreements will avoid most conflicts with human rights obligations undertaken by states. However, it may be difficult to define a conflict of international obligations in the case of import of goods made with child labor.[66] State obligations under ILO C 182 are directed primarily towards the elimination of child labor in the state itself. The only obligation that relates to situations outside the state itself is contained in Article 8, which obliges only international cooperation. As yet, the ILO has not determined that its conventions impose on state parties any implied secondary or default duties beyond the direct duties to implement the provisions of the conventions. Such duties might include a duty on a state party to an ILO convention to prohibit the import of goods made in violation of the principles of that convention in other states.[67] As the ILO has not interpreted such duties into its conventions, it is highly unlikely that the WTO would do so.

It must be noted at the outset that Article XX creates exceptions that are extremely narrow and restrictive.[68] Human rights and labor standards seem to

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65 Marceau, *supra* note 14, at 790.

66 *Id*., 792, defines a conflict as a situation where both obligations cannot be complied with simultaneously—in other words, where the WTO required an action which a human rights treaty prohibited or vice versa.

67 The concept of default duties, developed by Henry Shue, Basic Rights: Subsistence, Affluence and U.S. Foreign Policy (1996), where he asserts that the primary duty to ensure compliance with human rights lies with the state under whose jurisdiction the victims are found. However, if this state does not ensure compliance (sometimes because it is itself the violator), *by default* other states are obliged to take action to ensure compliance.

68 However, Marceau, *supra* note 14 and McGinnis & Movesian, *supra* note 2, both

be less secure in Article XX than environmental protection, which is directly mentioned and can be also considered in the context of health protection. Two paragraphs have been suggested as a possible basis for justifying restrictions on imports of goods made with child labor: paragraphs (a) on public morality and (e) on prison labor.[69] In addition to meeting the conditions set out in one of the paragraphs of Article XX, the contested measure must meet the conditions set out in its chapeau or Preamble. In practice, this has meant meeting a test of proportionality, an interpretation that has been criticized as too intrusive on states' legislative discretion.

a. Public Morality

Paragraph (a) of Article XX allows member states to adopt measures necessary for the protection of public morality.[70] Two issues need to be resolved in order to decide whether this paragraph can apply to import restrictions on goods made with child labor: what is covered by the concept of "public morality" and who may be protected by such measures. In one of the clear categories covered by Article XX(a), namely pornography,[71] the presumed aim is to protect the consumers of the importing state, whereas restrictions of goods made with child labor are intended to protect persons outside the importing state.[72] This distinction is not, however, as clear and obvious, or as determinative of the issue, as it may appear on first glance. First of all, since the Appellate Body ruling in *Shrimp/Turtle*, it is clear that states are entitled to take into account protection of the environment outside their own territory. It would seem odd if such reasoning was not extended to the protection of persons outside the importing state's territory. Second, the object of protection in the case of pornography may well be persons outside the importing state rather than its own consumers. A state may decide as a matter of policy that the production of pornography is degrading to its participants. This is a controversial matter when the participants are adults[73] but far less so when the participants are children.

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argue that Article XX gives states sufficient discretion to pursue non-protectionist public policies.

69 It could also be argued that where the conditions under which children work are particularly hazardous, paragraph (b) on protection of health could be invoked, particularly in light of the Appellate Body ruling in *Shrimp/Turtle* that this paragraph can be pleaded in respect of the protection of health outside the importing state.

70 There are no panel or Appellate Body decisions on this paragraph, although it has been pleaded; *see, e.g., U.S.-Alcoholic Beverages, supra* note 63, para. 3.125.

71 For a discussion of what types of issues might be foreseen by Article XX(a), based on drafting history and analysis of trade agreements pre-dating GATT, see Steve Charnovitz, *The Moral Exception in Trade Policy*, 38 VA. J. INT'L L. 689 (1998).

72 Vellano, *supra* note 10, at 895.

73 *See* CATHERINE A. MACKINNON, ONLY WORDS (1993); *contra* CAROL SMART, LAW, CRIME AND SEXUALITY: ESSAYS IN FEMINISM (1995).

The commercial sexual exploitation of children, in addition to being a criminal offense in most states, is one of the worst forms of child labor covered by C 182, and it is the subject of an Optional Protocol to the Convention on the Rights of the Child (CRC). Therefore, import restrictions on pornography, which commentators presume to be valid under Article XX(a) as long as they meet the requirements of the chapeau, may be in fact intended to protect persons outside the importing state rather than the consumers within the importing state. Similarly, a state may decide to restrict the import of goods made with child labor for the protection of its own consumers from exposure to goods made in a way that offends against the morality of that state.[74] Given that the harm caused by pornography, at least to its consumers, is often difficult to define or measure, it seems that there is no bright-line distinction between pornographic goods and goods made with child labor on the conceptual level of public morality.

The question of what is covered by public morality has emerged as a matter of debate only recently. Not all advocates of trade restrictions on goods made with child labor even raise it as a possible justification.[75] On one side is the argument that the meaning of "morality" may change over time, and that even if human rights were not considered to be covered by Article XX(a) when it was drafted,[76] genuine, non-protectionist policies to protect human rights should now be seen as falling within the concept of public morality. On the other side is a close textual argument that runs as follows: each exception in Article XX has an independent meaning; only paragraph (e) covers a process-based restriction; therefore paragraph (a) must be seen as covering goods that, as a matter of their inherent characteristics, offend against public morality; therefore paragraph (a) only covers obscene or pornographic products, or directly analogous products.[77] However, this argument relies on a version of the product/process distinction, and the challenges to this distinction may be extended to Article XX itself. In addition, as noted in Section B.2, such an interpretation would have the effect of denying states the possibility of restricting the import of

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74 See Charnovitz, *supra* note 71, at. 695.

75 Diller & Levy, *supra* note 1, do not mention Article XX(a).

76 Charnovitz, *supra* note 71, however, argues that there is evidence for a wide reading of public morality in Article XX(a), based on the practice in trade treaties pre-dating the GATT. He concludes, *id*. at 729, that Article XX(a) covers at least "slavery, weapons, narcotics, liquor, pornography, religion, compulsory labor and animal welfare."

77 This argument is set out, although not endorsed, by Christopher McCrudden, *International Economic Law and the Pursuit of Human Rights: A Framework for Discussion of the Legality of "Selective Purchasing" Laws under the WTO Government Procurement Agreement*, 2 J. INT'L ECON. L. 3, 38–39 (1999). Maupain, *supra* note 16, at 74, argues that the paragraph is intended to cover products which are *intrinsically* immoral, a statement which begs a host of questions.

pornography on the grounds of objections to how it is produced rather than its content. Finally, the idea of each paragraph being essentially a watertight compartment, with no overlap between the matters covered by each paragraph, is undermined by an obvious overlap between paragraph (b), protection of human and animal health, and paragraph (g), protection of the environment. If these paragraphs were intended to be exclusive, then one would expect the Appellate Body in the *Shrimp/Turtle* case to have drawn attention to the matter.

The main fear of opening up the concept of public morality to broader concerns is that of disguised protectionism.[78] The first answer to this is that the purpose of the chapeau of Article XX is to distinguish between genuine public policies and protectionist ones. However, there are good rule of law-based reasons, such as certainty and non-arbitrariness, for limiting the scope of public morality. McCrudden suggests that the ILO 1998 Declaration on Fundamental Principles and Rights at Work attracts sufficient consensus to form the basis of an internationally agreed public morality in the area of labor rights.[79] However, even if this is true, it may not be a sufficient basis for determining the scope of agreement on child labor. The Declaration refers to both ILO C 138, with its near-absolute prohibition on child labor under a minimum age, and to ILO C 182, which bans the worst forms of child labor when performed by anyone under 18. It may well be that only the latter could form the basis of an agreed public morality on child labor, as it has achieved a higher rate of ratification and may overlap in any event with the category of hazardous child labor, which is banned for all children under 18 in ILO C 138.

As noted in Section B.2, it has been argued that Article XX(a) can only apply to inwardly directed restrictions—in other words, those that seek to protect the population of the importing country. However, there is nothing in the text of paragraph (a) that would mandate such a restriction, and it is certainly the case that Article XX, taken as a whole, does not exclude outwardly directed restrictions. Article XX(e) on prison labor is certainly outwardly directed, whether it is based on humanitarian or competition concerns. The Appellate Body has accepted in principle the validity of outwardly directed restrictions being justified under Article XX(b) in *Shrimp/Turtle*. The conclusion we must draw, therefore, is that a justification for import restrictions on goods made with child labor is not excluded merely by the fact that the morality in question relates to the context of production rather than consumption. One useful suggestion is that a higher level of scrutiny under the chapeau of Article XX would apply to import restrictions that sought to address moral issues located outside the importing country.[80]

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78 McCrudden, *supra* note 77, at 41.

79 *Id*., 41–42. He would also include peremptory norms of human rights (*see also* Diller & Levy, *supra* note 1) and human rights treaties to which both parties in a given dispute have agreed.

80 Charnovitz, *supra* note 71, at 730–31.

b. Prison Labor

Paragraph (e) of Article XX allows member states to adopt measures against goods made by prison labor. While the prison labor exception does not *per se* address child labor, one question that has been raised is whether paragraph (e) is intended to deal only with prison labor or whether it covers similar practices, such as forced labor. Even such a wide reading of the exception would not include all instances of child labor but would cover some of the worst forms of child labor addressed in C 182. The argument relating to the inclusion of forced labor draws from debates at the U.N. Conference on Trade and Employment in 1947–48, where some states argued that the text of what became Article XX GATT should cover all types of forced labor.[81] This was not adopted into the text, but it has been argued that the wider scope should be understood as implicit in the text.[82] At the very least, the existence, in the form of Article XX(e), of a provision allowing states to restrict imports on the grounds of their manner of manufacture has been presented as an argument for the legitimacy of origin-neutral measures on methods of manufacture.[83] There has been no guidance from GATT law and practice. Not only has there been no dispute that raised this issue, there has been no commentary issued on the use of this provision.[84]

Ironically, one of the arguments that has in the past been put forward to justify a narrow reading of Article XX(e) may now, in light of the situation in Burma, be deployed to justify a more inclusive approach. It has been argued that the prison labor exception is not based on moral or social considerations, but rather on the conclusion that it is an example of unfair competition.[85] However, even on this analysis forced labor, in general, may be included. Burma is modernizing its infrastructure using forced labor, including child labor. This could easily be seen as an example of an unfair competitive advantage, particularly when comparing Burma with other countries at a similar stage of development.

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81 Vellano, *supra* note 10, at 894.

82 Diller and Levy, *supra* note 1, at 683–84, arguing that the intention of at least some countries, notably the United States, was that all forced labor should be covered by the exception, based on prior practice in international commercial agreements.

83 Vellano, *supra* note 10, at 895.

84 *Id*., 894 n.27.

85 Raj Bhala, *Mrs. Watu and International Trade Sanctions*, 33 INT'L LAW. 1, 19 (1999), provides a concise account of the argument. *See also* Friedl Weiss, 1996 *Internationally Recognised Labor Standards and Trade*, LEGAL ISSUES ECON. INTEGRATION 161, 174; Maupain, *supra* note 16, at 71. Vellano sees goods made with prison labor as an extreme example of social dumping, *supra* note 4, at 894—Article XX(e) is a provision which permits states to protect their markets from products made with extremely low labor costs.

c. Other Paragraphs of Article XX

In addition to paragraphs (a) and (e), it has been suggested that paragraph (b) on protection of human and animal health may be a relevant justification for excluding goods made with child labor. Once again, this would be based on the protection of health of the producers in the exporting country rather than the consumers in the importing country, so many of the same legal issues arise. Health is a difficult ground on which to base a trade restriction of goods made with child labor. Proof of a threat to health would have to be made and would likely be difficult, unless evidence was available through an independent international organization, such as IPEC, the WHO or UNICEF. Furthermore, the importing country would probably have to specify what goods are made under circumstances that threaten the health of child workers—a ban on all goods made with child labor from a particular country would be difficult to justify as a protection of health of the child workers.

d. Chapeau and Its Relation to the Enumerated Paragraphs

The chapeau or Preamble to Article XX sets out some general principles that must be adhered to before a trade restriction can be justified even if it falls into one of the exceptions listed in the paragraphs (a) through (j). The position that has emerged is not dissimilar to analysis undertaken under the second paragraphs of Articles 8-11 of the European Convention on Human Rights.[86] First, a legitimate goal must be identified, by reference to the enumerated paragraphs in Article XX. Then the state seeking to justify the measure must demonstrate that it meets a version of proportionality. The prospect of using Article XX to justify import bans based on values, whether environmental or labor/human rights, seemed at its lowest ebb after the panel decision in *Shrimp/Turtle*.[87] The panel inverted the process and required initial demonstration of necessity or proportionality *before* evaluating whether or not the measure fit into one of the specific exceptions in the enumerated paragraphs. However, while agreeing in result, the Appellate Body reversed many of the interpretations given by the panel.[88] The Appellate Body reversed the finding and reinstated the orthodox approach of looking first at whether the measure was directed to one of the goals listed in Article XX, and only then determining whether or not it was proportionate.

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86 *See* David J. Harris, Michael O'Boyle & Colin J. Warbrick, Law of the European Convention on Human Rights (1995).

87 *U.S.-Import Prohibition of Certain Shrimp and Shrimp Products*, Recourse to Article 21.5 of the DSU by Malaysia, WT/DS58/AB/RW, Report of the Appellate Body (Oct. 22, 2001).

88 *Id*.

The Appellate Body's approach to the chapeau has been criticized as too intrusive and insufficiently deferential to states' policy choices.[89] The burden of proof is on the party seeking to rely on Article XX to demonstrate that the measures not only fall into one of the paragraphs of the exception but are necessary. A particular source of concern appears to be the use of a strong version of a proportionality test. The test is one of least restrictive means[90] rather than one of reasonable relationship between the measure and its aim.[91]

The strong version of proportionality is demonstrated by the Appellate Body decision in *Shrimp/Turtle*. The measure, refusing to allow imports of shrimp that were fished without the use of turtle excluder devices (TEDs), was found to fall within Article XX(g) relating to environmental protection. However, the Appellate Body found that the measure was incompatible with GATT, because it did not meet the requirements of the chapeau. In essence, the measure chosen by the United States was not the least restrictive means for achieving turtle protection. The main reason was the lack of flexibility in the application of the measure, in that it required other countries to adopt the same approach to turtle protection as the United States. The Appellate Body did not consider whether this was the only reasonably effective measure for protecting turtles in the process of shrimp fishing. The application of the measure was also criticized on procedural grounds: the procedures for certifying countries were nontransparent and did not give countries a right to be heard. A subsidiary reason given by the Appellate Body was that the United States had not sought to achieve a negotiated agreement with the countries affected by the ban on shrimp fished without the use of TEDs. This takes the proportionality approach very far. The burden is on the state seeking to justify its policy to demonstrate that either the affected countries refused to negotiate in good faith, or that, after good faith attempts, negotiations broke down.[92] Marceau suggests that where international standards do exist, however, they should be treated as evidence of good faith and necessity for the purposes of the chapeau.[93]

The *Asbestos* decision demonstrates the capacity of international trade law at least to apply proportionality flexibly. As noted in Section B.1, the Appellate

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89 McGinnis & Movesian, *supra* note 2, at 589.

90 It is worth noting that the Agreement on Sanitary and Phyto-Sanitary Measures, Article 5.6 and Agreement on Technical Barriers to Trade, Article 2.2 expressly include a "least restrictive means" requirement, but GATT does not.

91 McCrudden, *supra* note 77, at 44–45. Cass, *supra* note 23, at 67, asserts that the Appellate Body did apply a reasonable relationship test in the *Hormones* case, although *id*. at 68, she does see the least restrictive means test being applied in *Shrimp/Turtle*.

92 Marceau, *supra* note 14, at 810, argues that the Appellate Body in *Shrimp-Turtle* was seeking some evidence of shared values in order to determine whether or not a state had a sufficient interest in an extraterritorial situation.

93 *Id*., 809.

Body went further than the dispute settlement panel and found no violation of Article III on the ground that the panel should have taken into account the health risk of asbestos in its determination of "like products." In addition, it specifically confirmed the approach of the panel on the issue of Article XX, even though its finding on Article III had made a consideration of Article XX moot. The French ban on importation of asbestos was found to serve a legitimate aim listed in Article XX, namely the protection of health, contained in paragraph (b). Credible scientific evidence was presented to demonstrate that the ban was within a range of appropriate policies. The Appellate Body confirmed that the panel had acted within the scope of its discretion.[94] On whether the ban was "necessary" as required by the chapeau, the Appellate Body stated that there is no minimum quantum of risk that has to be present and that states are entitled to set their own levels of health protection that they wish to provide.[95]

The strictness of the proportionality requirement in the chapeau is borne out by the fact that the panels have set a fairly high standard of review. In the *Hormones* case,[96] the panel considered the legality of the European Union's ban on meat from cattle treated with growth hormones. Here, unlike in the *Asbestos* case, there was no agreement on whether the hormones were harmful (in *Asbestos*, Canada only argued that asbestos was safe when used in accordance with certain guidelines but did not deny its inherent harmfulness). The Appellate Body, as in the later *Asbestos* case, accepted the right of the EU to set a higher level of protection of health than was contained in international guidelines. However, it set a fairly strict standard of proof, requiring specific evidence on the particular hormones rather than general evidence on the health effects of hormones. The Appellate Body, basing itself on Article 11 of the Dispute Settlement Understanding, decided that the standard was an "objective assessment" of the facts, thereby opening states' determinations up for review.[97] This approach could, among other effects, prevent states acting in accordance with the precautionary principle.[98] This high standard of review could also make it difficult to impose import bans on goods made with child labor, in that some form of objective proof of the harmfulness or the immorality of the practice would be required—proof that would often be impossible to obtain.

The Appellate Body has, in conclusion, taken a broad view of the discretion of states to set legislative goals, including in relation to non-trade values such as environmental protection. On the issue of how those goals are *imple-*

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94 *EC-Asbestos, supra* note 8, paras. 157–163.

95 *Id*., paras. 167–168.

96 *EC-Hormones*, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998).

97 Cass, *supra* note 23, at 58, describes this approach as a form of jurisdictional review.

98 At para. 124, of the *Hormones, supra* note 96, decision, the Appellate Body dealt with the precautionary principle in a formalistic way, by asserting the rule that treaty provisions override rules of customary international law.

mented, however, a strict standard of review is applied. It could be described as giving with one hand and taking away with the other. Particularly in the *Shrimp/Turtle* decision, the Appellate Body has restricted legislative and regulatory freedom, to a large extent, by imposing a strong version of proportionality in reviewing the implementation of the goal of protecting threatened species. Furthermore, the Appellate Body has yet to pronounce on the issue of the relationship between international trade law and areas of international law not specifically mentioned in the WTO agreements.[99]

C. Utility and Appropriateness of Trade Sanctions

Charnovitz defines a sanction as "a coercive act authorized by the international community in response to a breach of an obligation by a scofflaw state."[100] For example, he argues that the WTO system has the goal of sanctioning members to induce compliance rather than the previous GATT system, which sought to rebalance the concessions granted by member states to each other: the practice of states under the WTO is to impose 100-percent tariffs against states that do not comply with panel reports, which bears no correspondence to existing trade concessions.[101]

It is clear that most non-OECD (Organization for Economic Cooperation and Development) countries oppose the use of trade sanctions for violations of core labor standards. This has been evident since at least 1996, when the WTO ministerial meeting in Singapore released a statement that rejected direct links between labor rights and trade and, in particular, rejected anything that might impact on the comparative advantage of developing countries.[102] In addition, it has been argued that developing country economies need support rather than punishment in raising labor standards.[103] Finally, it is argued, there is a need to consider socio-economic issues in developing countries in a holistic way, taking into account the role of international financial institutions and multi-national corporations.[104] Certainly, developing countries may be more

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99 Cass, *supra* note 23, at 66.

100 Steve Charnovitz, *Rethinking WTO Trade Sanctions*, 95 Am. J. Int'l L. 792, 794 (2001).

101 *Id*., 805. Charnovitz notes that this shift has taken place despite the fact that the language concerning trade measures has not changed between GATT and the WTO. Instead it is a matter of the change in the dispute resolution process becoming more compulsory and more judicial.

102 Singapore Ministerial Declaration, Singapore WTO Ministerial, WT/96(MIN)/DEC (Dec. 18, 1996), *reproduced in* 36 I.L.M. 218, para. 4 (1997).

103 Elizabeth Cappuyns, *Linking Labor Standards and Trade Sanctions: An Analysis of Their Current Relationship*, 36 Colum. J. Transnat'l L. 659, 670 (1998).

104 *Id*., 671.

vulnerable to sanctions than developed ones. The more export-dependent the target state, the more deeply sanctions will bite, and most developing countries are very export dependent.[105]

The Singapore Ministerial Declaration, the language of which has been reproduced in subsequent ministerial meetings, including that in Doha, opening up the most recent round of trade negotiations, states that the ILO is the appropriate organ to deal with labor standards issues. This preference for the ILO's competence in the area is asserted rather than justified. It is worthwhile, therefore, to evaluate the relative merits of exclusive competence of the ILO as against shared competence by the ILO and the WTO. One could legitimately fear that the Singapore statement has the intention and the effect of eliminating the trade-labor link as an issue in the WTO. However, there are reasons that advocates of the elimination of harmful child labor might advance for primary or exclusive competence of the ILO on labor standards, including child labor. The ILO has expertise in the elaboration and interpretation of labor standards going back to the 1920s, whereas WTO bodies, particularly those involved with dispute settlement, do not. In addition, the ILO is unique in involving non-state actors at all stages of its activities, which again is not the case in the WTO. There is, as a result, the potential for the dilution of labor standards by having non-expert bodies interpreting them. An example of the problems arising where two international bodies interpret the same human rights instruments can be seen in relation to the ECHR, where both the European Court of Human Rights and the Court of Justice of the European Communities have interpreted the scope of that Convention, with many commentators arguing that the latter Court has interpreted the rights more restrictively than the former.[106] There are also cogent arguments in favor of a shared ILO-WTO competence to apply international labor standards. Notably, the binding sanctions that are available to the WTO are not available in the ILO system. However, this begs the question of the effectiveness of sanctions themselves, which, as noted in Section A, is not yet resolved.

Whether the ILO or the WTO is used, there is a problem of ensuring full participation and representation by affected groups. Increasingly, international human rights law procedures involve NGOs, which brings a wider range of voices into these procedures.[107] In the case of the ILO, while non-state actors are involved in adopting and implementing the conventions, the trade union movement and employer groups have a privileged status. Other types of NGO

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105 Charnovitz, *Rethinking WTO Trade Sanctions, supra* note 100, at 816–17.

106 Steve Peers, *Taking Rights Away?: Limitations and Derogations, in* THE EUROPEAN UNION CHARTER OF FUNDAMENTAL RIGHTS 141 (Steve Peers & Angela Ward eds., 2004).

107 Holly Cullen & Karen Morrow, *International Civil Society in International Law: The Growth of NGO Participation*, 1 NON-STATE ACTORS & INT'L L. 7 (2001).

have much more limited status within the ILO.[108] International trade law has not yet resolved the issue of the extent to which NGOs should be involved in dispute resolution procedures and in decisionmaking. In the *Shrimp/Turtle* case, discussed in Section B.2.d, the Appellate Body stated that material attached to a state's submission was to be considered *prima facie* a part of its submission, even if that material came from an NGO. However, it did not ultimately consider the NGO submissions attached to the U.S. pleadings, largely because the United States did not explicitly adopt the NGO's arguments.[109]

The question that must be asked first, in this context, is what do we wish to achieve through banning the import of goods made with child labor? The goal of the sanctions will be the point against which we measure the effectiveness of the trade sanction. Initially, it would appear that the main objective is to secure compliance with the international law rule being breached.[110] In addition, however, there may be an intention to make a political statement—that a population does not wish to be associated with goods made with child labor.[111] The question of the goal begins with an enquiry as to the intended beneficiaries of the policy. If the intended beneficiaries are anyone other than the child workers themselves (and their families), then the issue of protectionism will arise again.[112]

If we are banning goods made with child labor because we believe that it is a form of unfair competition, then there are a number of economic issues that have to be addressed and that would tend to argue against the use of trade sanctions *in most cases*. First, it seems to be generally accepted that children working in export industries are actually subject to fewer hazards and poor conditions than children working in sectors producing for domestic consumption

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108 Holly Cullen, *From Treaties to Labels: The Emergence of Human Rights Standards on Child Labor, in* CHILD LABOR AND HUMAN RIGHTS: MAKING CHILDREN MATTER 87, 95–96 (Burns H. Weston ed., 2005).

109 *U.S.-Shrimp, supra* note 87, paras. 75–77.

110 This is most notable in the case of sanctions under the WTO regime; *see* Charnovitz, *Rethinking WTO Trade Sanctions, supra* note 100, at 808–809, although he notes that settlement of disputes, a more amorphous objective, may also operate. *Id*. at 822, however, he identifies three functions of sanctions within the WTO regime: to re-equilibrate the balance of concessions between disputing countries; to provide reparation for a state injured by persistent non-compliance; to induce states to comply with WTO rules.

111 Howse & Regan, *supra* note 4, make this point. *See also* Charnovitz, *Rethinking WTO Trade Sanctions, supra* note 100, at 813–14, on the political advantages of sanctions: signalling outrage, venting steam, and for the target state, putting pressure on domestic constituencies to shift policies.

112 Arthur Gundersheim, *A Labor Perspective in International Trade*, 91 PROC. M. SOC'Y INT'L L. 94 (1997), is one example of an unfortunate trend within the American trade union movement to define the link between core labor standards and trade as being primarily for the purpose of preserving employment levels in developed countries.

only.[113] With the exception of Export Processing Zones, where states create areas where normal labor regulation does not apply,[114] it does not appear to be a deliberate strategy of states to maintain low levels of labor regulation for the specific purpose of attracting inward investment.[115] Furthermore, while child labor is not an easy phenomenon to quantify and to trace, it appears to be agreed that the proportion of child workers found in export sectors is low.[116]

While all of the factors above should give reason for great caution in applying trade sanctions against goods produced with child labor, there may be situations where such bans should be considered. If the situation of the child workers is such that it amounts to one of the worst forms of child labor as defined by C 182; if the country in question has refused to engage with the international mechanisms for assisting countries to eliminate child labor, and if in particular the state is itself involved in the use of child labor; if the ban will not cause a significant worsening of the life conditions of the child laborers—then a ban may be justified simply to dissociate ourselves from an objectionable practice that we cannot ameliorate or to isolate a state that persists in condoning it or engaging in it.[117]

To conclude, the arguments concerning the practical effect of trade sanctions to enforce child labor norms do not tend to support their use in most cases. They are a blunt instrument and cannot in themselves improve the situation of child workers. It is possible that they might have some utility in extreme cases, but this will be primarily of a political nature, in that states imposing the sanctions demonstrate their disapproval of the policies of the target state. Such cases will, however, be rare.

D. *Conditionality and Additionality in Trade and Development Measures*

1. History of Preferential Treatment of Developing Countries in International Trade Law

GATT, as originally designed, did not accommodate the needs of developing countries. Only when amended in 1948 was a provision inserted allowing

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113 Bhala, *supra* note 85, at 28.

114 Gundersheim, *supra* note 112, at 96–97.

115 Bhala, *supra* note 85, at 28–29. However, the emphasis of developing countries on maintaining their comparative advantage, for example in the Singapore Ministerial Meeting of the WTO in 1996, makes it difficult to exclude the possibility entirely.

116 *See, e.g.*, Maupain, *supra* note 16, at 83.

117 As Howse & Regan, *supra* note 4, at 274, explain, there may be a number of motivations behind trade restrictions, one of which is to dissociate the importing country's population from the disfavoured practice.

states to apply to their fellow GATT member states for permission to adopt protective measures to promote establishment, development or reconstruction of particular industries.[118] A later review comprehensively amended Article XVIII of GATT to allow developing countries to modify or to withdraw tariff concessions to protect developing industries.[119] It is worth noting that this approach allows developing countries that are members of GATT to protect their own economies from imports, but the approach gave them no advantages in terms of access to the markets of developed states. Over the 1950s and 1960s, concern grew in developing countries that agricultural protectionism in the developed world was increasing. In addition, GATT members adopted a number of declarations concerning the position of developing countries, but no new legal measures were adopted until the mid-1960s.[120] Then, a protocol was adopted, containing Articles XXXVI-XXXVIII, which finally accepted the principle of non-reciprocal trade advantages to be given to developing countries. No new legal obligations were created, however.[121]

The position changed finally in 1971. Since that time, international trade law has allowed for an exceptional regime on non-reciprocity of trade for developing countries, essentially allowing their goods tariff-free access to the markets of wealthy countries without having to grant reciprocal benefits.[122] The Decision of the Contracting Parties of GATT of June 25, 1971, on "Generalized System of Preferences" (GSP) gave a ten-year waiver from Article I GATT to developed countries to allow non-reciprocal non-discriminatory preferences to developing countries.[123] This waiver was replaced in 1979 by a decision, usually referred to as the "Enabling Clause," which authorized preferential treatment for developing countries on a permanent basis.[124] The GSP is the one

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118 Secretariat, Development Division, World Trade Organization, High Level Symposium on Trade and Development, Background Document: "Developing Countries and the Multilateral Trading System: Past and Present," at 11 (Geneva, Mar. 17–18, 1999).

119 *Id*., 11–12. Revised Article XVII also allowed for concessions relating to quantitative restrictions, and with the permission of fellow GATT members, any other GATT-incompatible measures which were necessary to promote particular industries.

120 *Id*., 12–13.

121 *Id*., 14.

122 This non-reciprocity of market access may support the argument made by some international trade lawyers, see Section B, "*Prima facie* illegality?," that GATT law provides for a right of market access rather than merely a right of non-discrimination. If market access on a non-reciprocal basis is the exception, then, arguably, *reciprocated* market access is the general rule rather that merely non-discrimination. The counter-argument, of course, is that it is the very reciprocity that demonstrates the idea of non-discrimination. For example, Petersmann, *supra* note 4, repeatedly refers to the basis of international trade law as being freedom and non-discrimination.

123 GATT BISD, 18th Supp., at 24 (June 28, 1971).

124 *Differential and More Favourable Treatment, Reciprocity and Fuller Participation*

example of international trade law taking into account developments in other areas of international law, namely, the U.N. Conference on Trade and Development (UNCTAD). The 1971 GSP waiver arose from an agreement made at the second UNCTAD in 1968.[125]

The GSP system under GATT is a waiver, and therefore a permission, rather than an obligation, to award non-reciprocal trade preferences to developing countries. Each state (or the EU, which operates a GSP for the entire Union) accords preferences according to its own inclinations. Not surprisingly, there have been complaints that two areas in which developing countries are increasingly strong, textiles and agriculture, are often limited or excluded in GSP schemes. A partial response to this concern is contained in the 1994 revision of Article XXXVII of GATT, which exhorts GATT member states to prioritize reduction and elimination of tariffs on products of particular interest to developing countries. Nonetheless, problems continued after the establishment of the WTO, with peak tariffs continuing to apply in many GSP schemes, and criticisms that the schemes themselves are too difficult administratively.[126] A further problem is that GSP regimes may be perceived as lacking permanence, for example the EU's GSP regulations apply for five-year periods only, which can also deter developing countries from participating in them.[127] Although GSP regimes may not be used as extensively as they might be, their use has been increasing.[128] The benefits to preference-receiving countries, however, have been uneven.[129]

Initially, the EU operated its GSP regime through the Lomé Conventions concluded between the EU and countries of the African, Carribean and Pacific (ACP) group. This meant that they were binding legal obligations and could not be unilaterally amended by any party.[130] Later, preferences were broadened

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of Developing Countries, GATT BISD, 26th Supp., at 203 (Nov. 28, 1979). Provisions relating to the GSP regimes in different GATT member states can be found on the UNCTAD Web site, *at* http://www.unctad.org.

125 Jürgen Huber, *The Past, Present and Future ACP-EU Trade Regime and the WTO*, 11 EUR. J. INT'L L. 427, 436 (2000); Bonapas Francis Onguglo, *Developing Countries and Unilateral Trade Preferences in the New International Trading System, in* TRADE RULES IN THE MAKING: CHALLENGES IN REGIONAL AND MULTILATERAL NEGOTIATIONS (Miguel Rodriguez Mendoza, Patrick Low & Barbara Kotschwar eds., 1999).

126 World Trade Organization, *High-Level Meeting on Integrated Initiatives for Least-Developed Countries' Trade Development, Note on the Meeting*, WT/LDC/HL/M/1 (Nov. 26, 1997).

127 World Trade Organization, Committee on Trade and Development, *Participation of Developing Countries in World Trade: Overview of Major Trends and Underlying Factors*, WT/COMTD/W/15, para. 33 (Aug. 16, 1996).

128 Onguglo, *supra* note 125.

129 *Id*.

130 *Id*.

to all developing countries by means of regulations adopted by the EU, which were, therefore, unilateral.

Increasingly, GSP regimes focus on the least-developed countries, with other developing countries engaging in reciprocal trade liberalization.[131] However, they are certainly important for the least-developed countries and are considered a significant option for those who cannot yet participate in free-trade regimes and therefore continue to be relevant.[132] In July 2004, the WTO recommitted itself to permitting member states to offer special and differential treatment (usually done by means of a GSP regime) to the least-developed countries.[133]

2. Conditionality in GSP Regimes

GSP benefits linked to labor standards can be made on a conditionality or additionality basis. The EU uses both methods, whereas the U.S. regime only provides for conditionality. Conditionality means that the full benefit of the GSP is lost if the recipient country does not respect the labor standards set out in the GSP legislation of the granting country. The EU's GSP regulation has expanded the range of labor rights, the violation of which may result in withdrawal of benefits under the GSP, to include general good governance matters. However, it is not necessary to demonstrate compliance with core labor rights before being admitted to the scheme, and withdrawal will only occur if flagrant violation of a core labor right is established. The U.S. GSP contains a wider range of conditions and has been criticized.[134] These criticisms relate to two areas: procedures and standards. The procedure, it has been argued, has become too politicized and lacks objectivity. The standards, similarly, have been criticized as following American rather than international labor standards. Additionality grants additional benefits to countries that fully respect certain standards. The EU's GSP regime requires states to respect the standards set out in the 1998 ILO Declaration of Fundamental Principles and Rights at Work and major U.N. human rights treaties. It has, however, been little used by developing countries, but efforts to make the scheme less onerous on states have been criticized by international trade union federations.

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131 *Id*. He cites NAFTA and the EU's Europe Agreements with Central and Eastern European countries in the 1990s as examples of reciprocity-based trade agreements between countries at different stages of development. *See also* 1999 *WTO High-Level Meeting, supra* note 126.

132 *Id*.

133 WTO, Text of the "July Package"—the General Council's post-Cancun Decision, WT/L/579 (Aug. 2, 2004), *at* http://www.wto.org/english/tratop_e/dda_e/draft_text_gc_dg_31july04_e.htm#development.

134 Alston, *supra* note 1.

The question of the labor standards applied within the U.S. GSP is of interest in the context of the argument presented here, that there is a need for interaction between different international law regimes. The United States has been criticized for applying, as "internationally recognized worker rights," standards that derive primarily from its own law. There is no reference to international labor law or human rights instruments, particularly ILO conventions, in the U.S. GSP.[135] In addition, the procedure followed by the government and the role of the main American trade union federation, the AFL-CIO, may be criticized as lacking objectivity. In particular, the government has been criticized for allowing Cold War political considerations, along with other foreign policy goals, to influence its selection of countries for review.[136] The AFL-CIO has been accused, in its turn, of acting for protectionist economic reasons.[137] In some cases, it has been criticized for failing to consult trade union federations in the countries concerned.[138] Despite the problems with the procedure, it does appear that the review process has occasionally led to improvements in respect for core labor rights by countries threatened with review.[139]

Benefits of the EU's basic GSP benefit may be withdrawn from a country if it is shown that the country engaged in serious violations of the standards covered by the ILO Declaration.[140] Two high-profile applications were made in the 1990s to withdraw benefit of the GSP on the basis of the prevalence of forced labor in a beneficiary country. In 1995, the International Confederaton of Free Trade Unions (ICFTU) and the European Trade Union Confederation made a joint submission that Burma should lose the benefit of the GSP because of the use of forced labor, including that of children, by the military. In 1997, the Council adopted a regulation, which has been periodically reviewed and renewed, withdrawing the benefit of the scheme from Burma.[141] The ICFTU also made a complaint about Pakistan concerning the use of bonded child labor.[142] This complaint, along with others concerning forced labor, have not

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135 *Id*.

136 George Tsogas, *Labor Standards in the Generalized Systems of Preferences of the European Union and the United States*, 6 EUR. J. INDUS. REL. 349, 353, 357–58 (2000).

137 *Id*., 353 and 357.

138 *Id*. Another frequent petitioner under the GSP system, the International Labor Rights Fund, has, in contrast, a policy of seeking common ground with local organizations, including trade unions, in the country concerned before making a petition; *id*.

139 *Id*., 359.

140 Council Regulation (EC) No. 980/2005 (June 27, 2005), (2005) O.J. L169/1., art. 16.

141 Council Regulation (EC) No. 552/97 (Mar. 24, 1997), temporarily withdrawing access to generalized tariff preferences from the Union of Myanmar, (1997) O.J. L85/8.

142 ICFTU, *Ending the Menace of Bonded Labor in Pakistan, Submission under the Generalised System of Preferences (GSP) of the European Union* (Feb. 1998), *at* http://www.icftu.org/displaydocument.asp?Index=990916055&Language=EN.

been successful.[143] Most recently, the EU has threatened to remove GSP benefits from Belarus, which has been found in violation of ILO conventions concerning freedom of association, by an ILO Commission of Inquiry.[144] While this instance does not deal with child labor, it goes some way to demonstrating that a finding of violation of a core labor standard by the ILO itself may be, in practice, a pre-condition for the withdrawal of GSP benefits, given that Burma has been the subject of ILO condemnation and action, whereas Pakistan has not.[145] Maupain argues that there may be a problem if the EU or any state whose GSP conditions derive directly from ILO conventions make a decision to suspend the benefit of the GSP to a country on the grounds of failure to live up to a convention, where the ILO itself has not made such a determination.[146] However, the EU suspended the benefit of the GSP to Burma a few years before the ILO Commission of Inquiry found that Burma was in violation of the ILO C29 on forced labor without any notable criticism or loss of credibility, although, crucially, there had been individual observations by the ILO made on Burma's non-compliance with ILO C29 prior to 1997 (when GSP benefits were withdrawn).[147] It therefore appears that the interaction between international standards need not involve a crippling dependency of one institution on another.

Non-economic conditionality has been cited as one of the reasons for the complexity of GSP regimes, and therefore of the low take-up of such schemes.[148] Conditions in non-reciprocal regimes can be seen as an imposition by developing countries. Only if the conditions are perceived to be legitimate in their objectives and proportionate in practice to those objectives, can they be expected to survive criticism.[149] This may certainly indicate that procedures need to be transparent, a problem that bedevils both the EU and American regimes to some extent.

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143 ICFTU, *Internationally-Recognised Core Labor Standards and the 15 Member States of the European Union, Report for the WTO Council Review of Trade Policies of the European Union* (July 24, 26, 2002), *at* http://www.icftu.org/www/pdf/euclsreportenglish.pdf, 16. *See also* Tsogas, *supra* note 136, at 362.

144 Speech by Peter Mandelson, Commissioner for External Trade, reported by ICFTU, *Belarus: Improve Record on Labor Rights or Risk Losing Trade Benefits* (June 8, 2005), *at* http://www.icftu.org/displaydocument.asp?Index=991221821&Language=EN.

145 On the difference between these two cases, see Holly Cullen, *The Interaction of Forms of Regulation in International Labor Law, in* LEGAL REGULATION OF THE EMPLOYMENT RELATION 461, 479–80 (Hugh Collins, Paul Davies & Roger Rideout eds., 2000).

146 Maupain, *supra* note 16, at 70.

147 *See, e.g.*, Individual Observation Concerning Convention No. 29, Forced Labor, 1930 (ratification: 1955), published 1996, where the Committee notes that it has been commenting on Burma's failures in this respect for over 40 years.

148 Onguglo, *supra* note 125

149 *Id.*

3. Additional Preferences in the EU's GSP Pegime

The problems highlighted above concerning the EU's General Preferences Committee apply also to the regime of additional preferences that the GSP regime allows for countries that demonstrate their full respect for core labor standards as set out the ILO's Declaration of Fundamental Principles and Rights at Work. The additional preferences, first introduced in 1994,[150] arise from a belief within the EU, particularly from the Commission,[151] that liberalization of international trade could indeed lead to the so-called "race to the bottom," where countries seek to compete on the basis of lower labor standards, not only on lower wages. Initially, the special incentive arrangements for the protection of labor rights only covered freedom of association and the prohibition of child labor,[152] but they now cover all the matters contained in the ILO Declaration and major human rights treaties.[153] These preferences apply to those sensitive products that would otherwise be subject to duties even for GSP beneficiaries.

One important feature of the additional preferences scheme is that it is only available at the request of the potential beneficiary. The requesting country must supply laws demonstrating incorporation of the substance of the ILO conventions referred to in the ILO Declaration and also the practical measures of implementation and must commit itself to monitoring compliance. Although the requesting state must demonstrate compliance with all the fundamental principles and rights, it may exclude some sectors. However, it is not clear whether only the exporting parts of a sector must be in compliance. Otherwise, it would be difficult, if not impossible, for a country to ensure compliance in the agricultural sector. Small, non-exporting farms will be, in practice, impossible to monitor.

Requests to receive the additional preferences are, under the most recent regulation, subject to a fairly simple procedure. The Commission examines the request, taking into account findings of international organizations and agencies.[154] Under the pre-2005 system, very few countries applied and were accepted for the additional preferences, leading to this simplification.[155] The procedure nonetheless remains bureaucratic, with no involvement of the European

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150 *See* Tsogas, *supra* note 136, at 360.

151 Commission of the European Communities, *User's Guide to the European Union's Scheme of Generalised Tariff Preferences*, sec. 8 (Apr. 2000).

152 Regulation (EC) No. 2820/98, (1998) O.J. L357/1.

153 Regulation 980/2005, *supra* note 140, art. 9.

154 *Id*., art. 11.

155 European Commission, *Communication Concerning Amendment of the Commission's Proposal for a Council Regulation Applying a Scheme of Generalised Tariff Preferences for the Period 1 July 2005 to 31 December 2008*, COM (2005) 43 (Feb. 10, 2005).

Parliament, and lacks transparency.[156] Furthermore, although a country whose application for additional preferences was refused would have a right to judicial review before the Court of First Instance under Article 230 EC, as the law stands, it would be impossible for an NGO that opposed the application to obtain judicial review of a decision to grant additional preferences.[157]

The EU's system, therefore, contains both incentives and threats. The 2001–2005 Regulation, moreover, consolidates and rationalizes the system. Until 2001, withdrawal of preferences related to forced labor, but additional preferences were awarded for full respect for freedom of association and the prohibition on child labor. The system therefore appeared arbitrary. It was then linked with the ILO Declaration, and the same range of core labor rights applies both to conditionality and to additionality. There are therefore three possible levels of observance of core labor rights: serious violation of any right, which disentitles a country to any benefit of the GSP; less than full compliance with all rights, which entitles a country only to the basic GSP; and full compliance with all core labor rights in the ILO Declaration, which entitles a country to additional preferences.

The current GSP regulation involves a recasting of the additional preferences.[158] This involves a single scheme based more broadly on sustainable development and good governance rather than two separate schemes based on core labor rights and environmental principles. As a result, 16 human rights and labor treaties and 11 environmental treaties are included in Annex III for consideration by the Commission. Candidate countries must have ratified and implemented all 16 treaties in the first category and seven in the second category, with a commitment to moving towards ratification of the remaining ones. International trade union federations expressed concern, however, that some member states wanted to further dilute the Regulation, by removing the requirement of actual ratification of the relevant treaties, but would instead consider practical implementation of the treaties' principles to be sufficient.[159] They argue that the additional preferences scheme is intended as a reward for exist-

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156 Tsogas, *supra* note 136, at 364, where he notes that he had difficulty in obtaining any information about the EU's Generalized Preferences Committee.

157 Article 230 EC allows natural or legal persons to whom a decision is addressed to seek judicial review of that decision. However, persons not the addressees of a decision must demonstrate that they are "directly and individually concerned" by the decision in order to gain standing for judicial review. The leading case on the lack of standing rights of NGOs is Case C-321/95, Greenpeace International v. Commission of the European Communties, [1998] E.C.R. I-1651.

158 Regulation 980/2005, *supra* note 140, Articles 8–11.

159 ICFTU, letter re Campaign on the New European Generalised System of Preferences (Apr. 11, 2005), *at* http://www.icftu.org/www/pdf/gspeuro2005.pdf. (Letter also signed by the World Confederation of Labor and the European Trade Union Confederation.)

ing good practice, which must include acceptance of the relevant international legal obligations.[160] In addition, they have expressed concern that such a provision could amount to a form of discrimination that would render the GSP in violation of WTO rules.[161] Ultimately, the Regulation, in Article 9(2), allowed states with "specific constitutional constraints" to apply if they had not ratified a maximum of two of the 16 listed treaties, as long as they make a formal commitment to ratification.

The most significant change to the procedure is the reduction of formality—applications are no longer to be published in the *Official Journal*, as they were under the previous Regulations. This lack of publicity could lead to reduced input from NGOs. However, the Commission is able to take into account information received from outside sources. Removal of GSP benefits, basic and additional, from countries with serious violations of the listed treaties will still be possible.[162] The procedure for withdrawal of preferences remains formalized.[163]

4. WTO-Compatibility Issues

The GSP regulation has become more significant for the EU's relations with developing countries in future. The previous practice was for former colonies of EU member states (the ACP states) to be covered by the Lomé Conventions, which provided for a special trade regime. The most recent Lomé Convention had raised issues of compatibility with GATT, as it discriminated between similarly situated countries (in development terms) on the basis of their historic relationship to EU member states.[164] It had been necessary to obtain a waiver from the application of Article I(1) GATT for the duration of the Convention. This limited waiver did not save the privileged access of ACP states to the EU market with respect to bananas from challenge under GATT, as the regime was found to violate Article XIII on tariff quotas.[165] Because of the limited scope and the limited time duration of the waiver granted, the EU has sought to make future trade regimes compatible with WTO rules rather than to seek an indefinite waiver. For those states for which it is economically suitable, there will be a regime more closely approximating full free trade in future, follow-

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160 ICFTU, letter to EU trade Commissioner Peter Mandelson (Mar. 21, 2005), *at* http://www.icftu.org/www/pdf/lettermandelsonfinal.pdf. (Letter also signed by the World Confederation of Labor and the European Trade Union Confederation.)

161 *Id*.

162 Regulation 980/2005, *supra* note 140, Article 16.

163 *Id*., art. 19.

164 Jürgen Huber, *The Past, Present and Future ACP-EU Trade Regime and the WTO*, 11 Eur. J. Int'l L. 427 (2000).

165 *EC-Regime for the Importation, Sale and Distribution of Bananas*, Appellate Body Report, WT/DS 27/AB/R, para. 183 (Sept. 25, 1997).

ing a transitional period during which further WTO waivers will be necessary.[166] However, for states for whom free trade is not economically suitable, it appears that the only WTO-compatible option is to apply the GSP.[167] As a result, a greater number of states will come into the GSP regime. The regime itself will have to be reviewed, as the EU has promised that the future arrangements for ACP states will be as favorable as the Lomé Convention.[168] While there may be differentiation within a GSP, it must be based on objective criteria such as level of development—a special category could not be created solely for the ACP states.[169] For the least-developed countries (LDCs), there will be another regime, such differential treatment for LDCs being allowed by the Enabling Clause.[170] This regime was initially created by means of an interim regulation extending duty-free access without quantitative restrictions to all LDCs,[171] and it is now covered by the current GSP regulation.

The EU appears to be committed to the use of a promotional approach to the linkage of core labor standards and trade. At the Seattle Ministerial Conference of the WTO, it proposed the use of incentives in the form of additional trade benefits to developing countries that respected core labor standards.[172] Even these proposals met with opposition from developing countries, however.[173] In its bilateral and non-WTO trade and development agreements, however, the EU now routinely includes clauses stating that respect for democratic principles and human rights forms part of the agreement.[174] These clauses,

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166 Huber, *supra* note 164, at 432–33.

167 *Id*., 435–437.

168 *Id*., 436.

169 *Id*., 436–437.

170 *Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, supra* note 124, para. 2(d).

171 Council Regulation (EC) No. 416/2001 (Feb. 28, 2001), amending Regulation (EC) No. 2820/98, *supra* note 152, applying a multiannual scheme of generalized tariff preferences for the period July 1, 1999, to December 31, 2001, so as to extend duty-free access without any quantitative restrictions to products originating in the least developed countries, (2001) O.J. L 60/43. Despite the extension of the GSP to all least-developed countries, Thailand initiated consultations under the Dispute Settlement process of the WTO concerning the GSP, including the revised system then under discussion which is now the new GSP Regulation: *EC-Generalized System of Preferences, Request for Consultations by Thailand*, WT/DS242/1, G/L/506 (Dec. 12, 2001). The communication argued that the EU's GSP violated Article I of GATT and the Enabling Clause itself.

172 Mark Anner, Evaluation Report: Icftu Campaign for Core Labor Standards in the Wto 16 (2001).

173 *Id*., 17.

174 Elena Fierro, *Legal Basis and Scope of the Human Rights Clauses in EC Bilateral Agreements: Any Room for Positive Interpretation?*, 7 Eur. L.J. 41 (2001).

controversially, include the possibility of cancellation of the agreement if the principles are not respected, although this appears to be foreseen as a very remote possibility, probably only envisaging the total breakdown of liberal democratic institutions. It has also been suggested, however, that these clauses, at least in a permissive fashion, create positive obligations to promote human rights, particularly in the context of European Community development aid.[175] Such a positive duty would simply reinforce existing European Community policy in this area.[176]

E. Conclusion

While there are many good reasons for states not to exclude imports of goods made with child labor as a means of combating the use of child labor, there are also good reasons for sustaining the argument that international trade law does not, at present, exclude the possibility of import bans on goods made with child labor. One reason why attempts to integrate core labor standards into the WTO have failed is because of confusion as to what these standards include. This has hindered campaigning and has enabled a great deal of misinformation to be circulated, such as claims that the campaign for core labor standards was, in reality, a campaign for a global minimum wage.[177] The development of the ILO's Declaration of Fundamental Principles and Rights at Work could help to eliminate this difficulty in the future. The issue is certainly not going to disappear, and even the WTO itself accepts this.[178] Even if an agreement to integrate core labor standards into the international trading system occurs, there will be difficult practical questions to answer, in particular whether such integration should include the dispute settlement process. If so, the question is whether and under what conditions trade sanctions could be considered.[179] Given the concerns about perverse effects of trade sanctions against child labor, at least in this area there should be conditions that make trade sanctions a remedy of last resort.

In examining the relationship between the need to regulate child labor and the international trading system, it becomes clear that there are different ways of conceiving of the inter-relationship between different areas of international

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175 *Id*.

176 *See, e.g*., European Commission, Communication from the Commission to the Council and the European Parliament, *The European Union's Role in Promoting Human Rights and Democratic Principles in Third Countries*, COM (2001) 252 final (May 8, 2001), especially at 17, where the Commission defends its emphasis on civil and political rights in its thematic priorities by asserting that economic and social rights are promoted through its development policy.

177 Anner, *supra* note 172, at 13.

178 *Id*., 18.

179 *Id*., 23.

law, and not all ways are equally useful in implementing child labor norms. If international trade norms become the dominant paradigm, there is a danger that implementation of child labor bans could become less effective because human rights will be seen as primarily a form of negative freedom rather than positive entitlements requiring action for their fulfillment. Alston, critiquing Petersmann, has warned against the "colonization" of human rights by trade law.[180] The main concern should be the intellectual colonization—a particular way of thinking about legal entitlements. Human rights law has developed distinctive concepts, such as the trilogy of respect, protect and fulfill, to describe its operation.[181] It involves claims of individuals against states. International trade law still involves inter-state complaints only, although behind a state's complaint will be undertakings whose businesses are negatively affected. In such a context, where individual interests are only indirectly represented, a presumption in favor of individual freedom to trade probably makes sense, even in human rights terms. However, human rights disputes bring the individual and collective human interests more clearly in focus.

The trade sanctions available under the Dispute Settlement Understanding of the WTO may seem to be a useful method of enforcing the prohibition on the worst forms of child labor. Coercive sanctions seem closer to the model of law enforcement that exists in domestic legal systems. However, drawing such analogies is often unhelpful. International law still relies on state consent and therefore, usually, more on negotiation than enforcement. Charnovitz suggests that a broader range of methods, coercive, cooperative and transparency-based, would deepen the culture of compliance within the WTO.[182] Marceau, on the other hand, suggests that the necessary tools are already at hand. If an effort is made to ensure an interpretation of international trade law that is consistent with international human rights law, then integration of different systems of international law can be achieved.[183]

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180 Philip Alston, *Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann*, 13 EUR. J. INT'L L. 815 (2002).

181 SHUE, *supra* note 67.

182 Charnovitz, *Rethinking WTO Trade Sanctions, supra* note 100, at 823–31. *Id*. at 831, he argues, "the WTO needs to design better ways to get governments to follow WTO rules. This exercise can be informed by studying the practices of other international organizations that promote compliance without trade sanctions."

183 Marceau, *supra* note 14; *see also* Gabrielle Marceau, *A Call for Coherence in International Law*, 33 J. WORLD TRADE 87 (1999).

Chapter 8
Technical Assistance and Private Enforcement

A. Introduction

Treaties, whether on labor standards, trade or human rights, are binding legal obligations for states. States are then expected to transform these international laws into national regulations applying to other actors. However, there are a number of obstacles to the effective implementation of international standards in a way that they change the behavior of private actors. Obstacles include the territorial limitations on national regulations, which render difficult the regulation of multi-national corporations; lack of resources in many states to implement programs for discovering where harmful child labor exists and providing rehabilitation for child workers; lack of coordination between state and non-state actors working for the elimination of harmful child labor; and in extreme cases an environment such as armed conflict that may make application of law virtually impossible.

Some of these obstacles may be addressed by the use of measures other than binding regimes of international law. These include technical assistance programs at the international level. In the area of child labor, the most prominent of these is the International Labor Organization's (ILO's) International Program on the Elimination of Child Labor (IPEC). Since its establishment in 1992, it has implemented programs in a wide range of states to address particular problems of child labor. Its programs are focused on the needs of particular countries or industries. This has the advantage of being more detailed and precise than examination of compliance with international treaties can be. It also involves promotion of standards rather than condemnation or sanctions against states that do not comply with those standards. Technical assistance is specifically recognized in ILO C 182 (Article 8) and ILO R 190 (Articles 11 and 16). Technical assistance has attracted little criticism as a way of implementing child labor standards, but programs such as IPEC have been subject to little external analysis, so it is difficult to evaluate their effectiveness. In any event, effectiveness is likely to vary between programs, given their diversity of content and circumstances.

Regulation of child labor outside the context of international treaty implementation has developed as well, in the context of the growing field of corporate social responsibility. Partly due to the resistance of states, particularly developing states, to trade conditionality based on human rights or core labor

standards, campaigners have increasingly moved towards pressuring multinational corporations to use codes of conduct or social labels. Codes of conduct are sets of standards that a corporation agrees to follow in relations with its subsidiaries and sub-contractors in developing countries. These codes usually include a provision banning the use of child labor. Social labels are less frequently used. These enable ultimate consumers to express preferences for purchasing goods made in accordance with particular standards, such as the non-use of child labor or the diversion of part of the profits from the goods to the rehabilitation of child workers. These are obligations voluntarily undertaken by corporations, although usually as a response to pressure from trade unions in developed countries or from other activists for labor rights. As a result, they cannot be challenged under international trade law. However, they may still be subject to criticisms on the level of appropriateness and effectiveness. Furthermore, as these are essentially private obligations, there are difficulties in ensuring their full observance in the countries of production. Finally, private obligations may not reflect the content of the most recent international treaties. Many corporate codes of conduct are still based on ILO C 138 rather than ILO C 182.

The negative pressure of state resistance to trade conditionality is not the only reason for the growth of private enforcement mechanisms. There is increasing interest in sustainable forms of consumption, that promotes environmentally and ethically positive choices by consumers. Fair trade,[1] in particular, has grown remarkably over the past few years.[2] The U.K. company, Traidcraft plc, has shown a profit since 1997, and in financial year 2005–2006, its turnover rose by 6 percent and its post-tax profit by 34 percent.[3] The U.K.'s largest co-operative retailer now stocks only fair trade coffee and chocolate under its own label, although it continues to stock other non-fair-trade brands.[4] While social

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1 Fair trade differs from standard commerce in five ways, according to Traidcraft: it focuses on trading with poor and marginalized producer groups, helping them develop skills and sustainable livelihoods through the trading relationship; it pays fair prices that cover the full cost of production and enable a living wage and other fair rewards to be earned by producers; it provides credit when needed to allow orders to be fulfilled and pays premiums to be used to provide further benefits to producer communities; it encourages the fair treatment of all workers, ensuring good conditions in the workplace and throughout the supply chain; it aims to build up long-term relationships, rather than looking for short-term commercial advantage. *See* http://www.traidcraft.co.uk/template2.asp?pageID=1650&fromID=1643.

2 *See* John Vidal *Fairtrade Sales Hit £100m a Year*, GUARDIAN (LONDON), February 24, 2004, at 13, and Terry Macalister, *How Consumer Power Sparked a Fairtrade Revolution on Our High Streets*, GUARDIAN UNLIMITED, Mar. 8, 2006, *available at* http://business.guardian.co.uk/story/0,,1725789,00.html.

3 Traidcraft plc, Financial Statements for the year ended Mar. 31, 2006, at 5, *available at* http://www.traidcraftinteractive.co.uk/docs/68.pdf.

4 *See* http://www.co-opfairtrade.co.uk/. Marks and Spencer, another food retailer,

labels and corporate codes of conduct are more restricted than fair trade programs, they both feed into the increased consumer interest in the conditions under which goods are produced. Both, however, are reliant on consumer confidence that can only come from rigorous monitoring and accountability.

B. ILO Technical Assistance: IPEC and the Focus on Child Labor

IPEC was established in 1992, with initial funding from the German government. It is funded by such direct grants from governments (and some social partner organizations and international organizations)[5] rather than from the ILO's general budget.[6] As such, it is project driven. It has developed and administered projects in a wide range of countries, focusing on a specific issue or locality. There is some ambiguity as to its focus within child labor issues. Early reports from IPEC emphasize that not all child work counts as child labor and focus on harmful forms of work.[7] These reports, in part, helped to lay the groundwork for the development of ILO C 182 on the worst forms of child labor. However, its more recent reports have begun to use ILO C 138 as an equal legal foundation for its work,[8] which could have the effect of moving IPEC away from the focus on harmful child labor to a more abolitionist approach. Such an approach would be largely inconsistent with its earlier work and would be controversial, given the criticisms of ILO C 138 as unrealistic and unworkable.[9] The diversity of IPEC's work, if it remains focused on the prioritization approach of ILO C 182, could make a significant contribution to the interpretation of Article 3(d) of that Convention, calling for the elimination of "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 content of this paragraph is elucidated somewhat by R 190 but still raises difficult questions of scope.[10] The

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also stocks only fair trade tea and coffee; *see* http://www.marksandspencer.com/gp/browse.html/ref=sc_fe_c_13_1_51360031_1/202-7653630-5410240?ie=UTF8&node=51447031&no=51360031&mnSBrand=core&me=A2BO0OYVBKIQJM.

5 For a current list of donors, see ILO, IPEC Action against Child Labor: Highlights 2004 Annex B (2005).

6 For an overview of contributions to IPEC from 1992–2004, see ILO, IPEC Action against Child Labor: Highlights 2004 27, Table 4 (2005).

7 International Labor Organization, *Child Labor: Targeting the Intolerable* (1996).

8 ILO, IPEC Action against Child Labor 2002–2003 (2004); ILO, IPEC Action Against Child Labor: Highlights 2004, Annex A, and in particular *id*., 33 (concerning technical support on legal implementation). However, there is evidence that the enthusiasm of IPEC may not be matched by states: IPEC set a goal of 20 additional ratifications of ILO C 138 during the biennium 2004–2005, but by the halfway mark, only four additional states had ratified (*id*., 34, Table 6).

9 *See* Chapter 5, Section B.

10 On the difficulty of defining the scope of Article 3(d), see Judith Ennew, William

recent move to an equal emphasis on ILO C 138 can obscure the effort to determine what counts as a worst form of child labor beyond the categories listed in paragraphs (a) through (c) of Article 3 of ILO C 182.

Primarily, IPEC operates by means of projects in individual states for the elimination of child labor, with the worst forms of child labor a priority. However, it also works to increase the knowledge base about child labor through surveys, and it develops general tools for states to use in addressing child labor problems. The surveys are nationally based and may even be sector specific.[11] The tools include manuals for planning time-bound programs, guidelines for labor inspections and teaching materials, as well as more conventional research and statistical publications.[12]

In terms of project development, IPEC describes its method of work as follows:

> Following the signing of a Memorandum of Understanding with a Government, IPEC support is based on a phased, multi-sectoral strategy with the following elements:
>
> — Encourage ILO constituents and other partners to begin dialogue and create alliances
>
> — Determine the nature and extent of the child labor problem
>
> — Assist in devising national policies to counter it
>
> — Set up mechanisms to provide in-country ownership and operation of a national program of action
>
> — Create awareness in the community and the workplace
>
> — Promote development and application of protective legislation
>
> — Support direct action aimed at preventing child labor or withdrawing children from work
>
> — Replicate successful projects
>
> — Integrate child labor issues systematically into social and economic development policies, programs and budgets
>
> — Comprehensive and integrated projects.[13]

Myers & Dominique Plateau, *Defining Child Labor as if Human Rights Matter, in* CHILD LABOR AND HUMAN RIGHTS: MAKING CHILDREN MATTER 27 (Burns H. Weston ed., 2005).

11 For a recent list of surveys conducted under the auspices of IPEC, see ILO, IPEC ACTION AGAINST CHILD LABOR: HIGHLIGHTS 2004 Annex C (2005).

12 *Id.*, Annex E.

13 *See* http://www.ilo.org/public/english/standards/ipec/governments/index.htm.

Typically, IPEC programs include several of the elements mentioned above. One example cited with approval by the EU is intervention into the football-making industry in the Sialkot district of Pakistan.[14] This program, notably, did not initially remove children from employment but arranged for their attendance at education centers and part-time work based at home rather than in factories.[15] It is one of the programs of longest standing, having begun in 1997.[16] By 2004, the program had led to the education of 10,572 students (with a particular emphasis on vocational education)[17] and provided health care to 5,408 children.[18] Ninety-five percent of the local industry is now child-labor-free.[19] Not surprisingly, it is seen by the ILO as a very successful program. However, like IPEC in general, it is difficult to find reviews of the program that are not published by the ILO itself, even if they are conducted by independent parties.

Article 7 of ILO C 182 calls on states to introduce time-bound programs to eliminate the worst forms of child labor. In practice, such programs have been built on the experience of states working with IPEC. The first three states to develop time-bound programs in cooperation with the ILO had previously signed Memorandums of Understanding (MOU) with IPEC: El Salvador, Nepal and Tanzania.[20] By the end of 2004, 19 countries had negotiated MOUs with ILO-IPEC and secured funding to develop a Time-Bound Program (TBP).[21] TBPs are intended to be more comprehensive than earlier projects under IPEC, but, in its view, require more technical support than previous programs in order to be successful.[22]

Business and trade union organizations are often partners in IPEC's programs. In the Sialkot programs, the local chamber of commerce and the wider

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14 Commission of the European Communities, *Communication to the Council, the European Parliament and the Economic and Social Committee, Promoting Core Labor Standards and Improving Social Governance in the Context of Globalisation*, COM (2001) 416, at 26 (July 18, 2001).

15 *Id.*

16 IPEC, From Stitching to School: Combating Child Labor in the Soccer Ball Industry in Pakistan (2004).

17 *Id.*, 27–28.

18 *Id.*, 4.

19 *Id.*, 20–21.

20 See the following ILO-IPEC country profiles: http://www.ilo.org/public/english/standards/ipec/timebound/salvador.pdf (El Salvador); http://www.ilo.org/public/english/standards/ipec/timebound/nepal.pdf (Nepal); and http://www.ilo.org/public/english/standards/ipec/timebound/tanzania.pdf (Tanzania).

21 ILO, IPEC Action against Child Labor: Highlights 2004 17, Table 1 (2005).

22 *Id.*, 46.

industry (FIFA, the international football association), were involved in the implementation.[23]

Non-governmental organizations (NGOs) play a large role in IPEC's programs. One part of IPEC's goals is to build local capacity and this means working with and developing local NGOs. In the football-stitching industry in Sialkot, Pakistan, one of the points that counted towards the success of the program was the fact that by 2004, six local NGOs were regarded as capable of dealing with child labor issues.[24] In Latin American countries, local NGOs with development work experience have been active in delivering projects supported by IPEC.[25] Initially, IPEC worked primarily with national NGOs, but it has moved towards greater cooperation with international NGOs.[26] Notably, it has worked with the Global March against Child Labor.[27] International organizations, particularly UNICEF and UNESCO, have been involved with IPEC projects.[28]

The Sialkot project emphasized permanent monitoring to go on after the end of the IPEC project. In the second phase, the Independent Monitoring Association for Child Labor was established locally to ensure that the goals of the project continue.[29] However, there was a recognition that external monitoring was not the main key to sustainability. The project emphasized the development of social acceptability of the projects aims and objectives as fundamental to ensuring success in both the short and long term.[30]

IPEC clearly regards the Sialkot project as a success, particularly because of the fact that its approach spread to two other high-profile industries: carpet making and surgical instrument manufacture.[31] However, it appears that outside these industries, there has been little progress in the elimination of harmful child labor in Pakistan.[32]

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23 IPEC, FROM STITCHING TO SCHOOL: COMBATING CHILD LABOR IN THE SOCCER BALL INDUSTRY IN PAKISTAN 5 (2004).

24 *Id*., 4.

25 For examples, see IPEC, *How IPEC works with NGOs, at* http://www.ilo.org/public/english/standards/ipec/ngos/index.htm.

26 IPEC, ACTION AGAINST CHILD LABOR 2000–2001: PROGRESS AND FUTURE PRIORITIES 11 (2002).

27 *Id*.

28 *Id*., 11–12, and ILO, IPEC ACTION AGAINST CHILD LABOR: HIGHLIGHTS 2004 Annex C (2005).

29 IPEC, FROM STITCHING TO SCHOOL: COMBATING CHILD LABOR IN THE SOCCER BALL INDUSTRY IN PAKISTAN 15, 22–24 (2004).

30 *Id*., 22.

31 *Id*., 11.

32 Committee on the Rights of the Child, *Concluding Observations, Pakistan*, CRC/C/15/Add.217 (Oct. 27, 2003).

Increasingly, IPEC is concerned with monitoring and evaluation of projects. During the 2000–2001 period, it introduced individual program monitoring plans, setting targets and indicators for all projects.[33] It also began recruiting national design, monitoring and evaluation officers. It has also developed a greater interest in the long-term impact of its projects, culminating with the recent development of Strategic Program Impact Framework (SPIF), which has enabled it to conduct a larger number of evaluations than in the past—42 in 2004.[34] This now includes direct follow-up of children involved in its projects to assess the impact of such programs on their lives.[35]

In recent years, IPEC has attempted to identify broader lessons learned from its activities. These reveal the complexity of attempting to eliminate child labor effectively. Partial withdrawal of children from work and integration into part-time education before mainstreaming is a successful strategy, but social protection measures and social mobilization need to be in place before even partial withdrawal is attempted.[36] The organizational aspect is crucial: linking into existing processes, clarifying roles of bodies involved in projects and creating national committees on child labor are examples of this.[37] A long-term commitment is required, notably in the case of attempting to assist children forced into prostitution.[38]

It is difficult to assess the effectiveness of IPEC in a comprehensive fashion. This is partly because of a lack of independent literature evaluating IPEC projects.[39] To a large extent, however, it is the inevitable result of what is probably a strength of the program—its flexibility and basis in local projects that will vary according to the circumstances of the area and the child labor problem. Its popularity with ILO member states, both donors and participants, is undeniable. Furthermore, its success may not always lie in removing children from child labor in the short to medium term, but, in some cases, in enabling

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33 IPEC, Action against Child Labor 2000–2001: Progress and Future Priorities 43 (2002). *See also* ILO, IPEC Action against Child Labor 2002–2003 49 (2004), on Project Monitoring Plans.

34 ILO, IPEC Action against Child Labor: Highlights 2004 45 (2005). The list of evaluations is contained in Annex D of this document.

35 *Id*. No results of this type of evaluation were available at the time of writing this chapter.

36 IPEC, Action against Child Labor 2000–2001: Progress and Future Priorities, 43–44 (2002).

37 *Id*.

38 *Id*. No reason is given for this in the report. Possibly it is due to longer-term needs for social and psychological rehabilitation.

39 However, it should be noted that IPEC is audited by the ILO's external auditor. *See, e.g*., IPEC, Action against Child Labor 2000–2001: Progress and Future Priorities 48–50 (2002).

them to have education alongside employment. At a minimum, it provides a framework through which the objectives of ILO C 182, which mandate international cooperation to eliminate the worst forms of child labor, may be achieved. One obvious concern, therefore, is the broadening of the legal base for IPEC's activities from ILO C 182 to include ILO C 138 as well, since the two conventions take very different approaches to child labor.[40]

C. Regulating Child Labor Through Private Action: Corporate Social Responsibility Issues

It has been argued that the globalization of the world's economies deprives governments of the possibility of regulating the behavior of corporations under their jurisdiction, as it is increasingly easy to relocate production to low-regulation states.[41] As a result, it may be more appropriate, and more effective, to shift the focus from what states can do to what consumer pressure can do. There is nothing in international trade law that prohibits consumers from expressing a preference for products that have been produced in conformity with labor, human rights and environmental standards. It is only state regulation that is restricted by the WTO. Increasingly, therefore, NGOs are using consumer pressure to motivate corporations to observe core labor standards in their operations, whether in their domestic markets or abroad. Certainly, one of the side effects of the campaign for core labor standards to be incorporated into international trade law is the greater attention paid to corporate codes of conduct and similar mechanisms.[42]

Voluntary mechanisms for ensuring that multi-national corporations observe core labor standards have the advantage of being able to address problems particular to each industry. Some, like apparel, now rely heavily on outsourcing and sub-contracting,[43] which make violations of labor standards harder to trace, particularly because origin labels will only indicate one country.

1. Social Labeling

Social labeling in respect of child labor began as a way of indicating that goods were made without child labor. Its origins therefore lie close to the debate

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40 Holly Cullen, *From Treaties to Labels: The Emergence of Human Rights Standards on Child Labor, in* CHILD LABOR AND HUMAN RIGHTS: MAKING CHILDREN MATTER 87 (Burns H. Weston ed., 2005).

41 *See, e.g.*, Francis Maupain, *La protection internationale des travailleurs et la libéralisation du commerce mondiale: un lien ou un frien?*, 100 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 45, 96 (1996), *citing* former U.S. Labor Secretary Robert Reich.

42 MARK ANNER, EVALUATION REPORT: ICFTU CAMPAIGN FOR CORE LABOR STANDARDS IN THE WTO (2001).

43 *Id.*, 8. This type of process often has the effect of weakening unions.

over whether or not goods made with child labor could lead to import bans. However, social labels have developed to include programs to assist child workers and their families, as well as to indicate child-labor-free goods. As a result, it is appropriate to consider them alongside technical assistance programs and corporate social responsibility programs. Social labels are sponsored by charitable foundations and other NGOs. It is conceivable, however, that states or international organizations could set up frameworks for social labels[44] in order to raise their profile and to provide some form of independent monitoring of standards. It is also conceivable that states could require information about use or non-use of child labor to be included on products, but this could face challenges under international trade law and is subject to a weaker version of the same policy objections to import bans on goods made with child labor.[45]

Rugmark is probably the best-known of the social labels relating to child labor, and it is a foundation based in a number of countries, including Germany and the United States.[46] It certifies producers and retailers who agree to produce carpets without illegal child labor. The criteria for the label require producers not to employ children under age 14, although, in family-run loom businesses, family members may work if they also attend school.[47] As with trade sanctions, concerns have been expressed about the use of measures that may remove children from employment, and thereby impoverish them further, or drive them into less safe forms of employment.[48] Certainly, it is disappointing that Rugmark seems to base its work on the ban on child labor in ILO C 138 rather than the prevention of harmful child labor required by ILO C 182. However, Rugmark's activities have expanded, and since 1995, it also supports community-based projects for children, particularly in the area of education.[49] Positive support for the health and education of child workers and former child workers is now part of Rugmark's social labeling, as well as the guarantee of a child-labor-free product.[50]

Social labels are often based, as Rugmark is, in the countries that import goods that may be made with child labor and may be seen as alien to the coun-

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44 Both the ILO and the European Parliament have explored the possibility of social labeling frameworks in the past; *see* Holly Cullen, *The Limits of International Trade Mechanisms in Enforcing Human Rights: The Case of Child Labor*, 7 INT'L J. CHILDREN'S RTS. 1 (1999).

45 *See* Chapter 7.

46 *See* http://www.rugmark.org/home.php.

47 See Rugmark International Web site, at http://www.rugmark.de/english/navi/frnauest.htm. Also, producers must pay adult workers at least the local minimum wage.

48 Janet Hilowitz, *Social Labelling to Combat Child Labor: Some Considerations*, 136 INT'L LAB. REV. 215, 231 (1997).

49 *See* http://www.rugmark.de/uk/social.htm.

50 *See, e.g.*, IPEC, WORKING PAPER 2000: SOCIAL LABELLING AGAINST CHILD LABOR—BRAZILIAN EXPERIENCES 21 (2000).

tries where child labor is prevalent. One counter-example, where social labels target both consumers and producers in the same country, is Brazil. The Abrinq Foundation in Brazil, working with ILO-IPEC, as well as UNICEF, created the label "Empresa Amiga da Criança" (child-friendly label).[51] This label does not purport to guarantee a child-labor-free product (although non-use of child labor is a condition of company certification), but to certify that the company has a broad respect for children's rights. In addition to committing to the non-use of child labor, companies seeking certification must undertake programs to benefit children. This is a business-oriented label, which is national in scope. Its strength is the level of publicity associated with the label, but its weakness is the lack of any monitoring program.[52]

Also in Brazil, the Instituto Prò-Criança has established the "Prò-Criança" label in the footwear industry.[53] Ironically, however, despite the fact that Brazil exports a large amount of its footwear production, the label often does not appear on goods imported from Brazil into other countries, because many importers substitute their own labels for those of the manufacturers.[54] This label focuses exclusively on the elimination of child labor in the footwear industry and is not directly involved in other activities for the benefit of children. In contrast with the Empresa Amiga da Criança, it has an element of independent monitoring but has a disappointingly low profile with the Brazilian public.[55]

A recent variation on the social label model is the development of certification standards modeled on those of the International Standards Organization (ISO). The ISO, a network of national standards institutes, describes itself as "the world developer of standards," particularly in the area of technical standards.[56] Social Accountability International (SAI) has attempted to adapt this model to develop a universal label designating companies that respect core labor standards and human rights. SAI established the first version of its accreditation standard in 1997.[57] It is a human rights NGO, unlike the ISO. It convenes the main actors in the area, including businesses, trade unions and NGOs, to develop and to operate consensus-based standards.[58] Their standard on social accountability is called SA8000. Like corporate codes of conduct, it sets out a wide range of standards, whereas most social labels, such as Rugmark, only address child labor. However, like social labels, the SA8000 label is a visible

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51 *Id*., 33–34.

52 *Id*., 52.

53 *Id*., 40–50.

54 *Id*., 52 and 85.

55 *Id*., 52.

56 *See* http://www.iso.ch/iso/en/aboutiso/introduction/index.html.

57 *See* http://www.sa-intl.org/index.cfm?fuseaction=Page.viewPage&pageId=473.

58 *Id*.

public notice of conformity with relevant standards, whereas corporate codes of conduct tend to have a lower profile. SA8000 draws largely from the conventions referred to in the ILO 1998 Declaration of Fundamental Principles and Rights at Work and the Universal Declaration on Human Rights, but it includes some more detailed standards in areas such as health and safety.[59] The child labor standard in SA8000 is that of C 138 rather than C 182. This, together with the detailed standards on labor conditions, may make SA8000 ill-adapted for many contexts. On the more positive side, SAI's guidance on child labor calls for remedial measures to assist children removed from work and the need to support children to remain in education, including financial support.[60] While this more holistic approach is admirable, the obligation on employers and former employers may be perceived as so onerous as to constitute an incentive to deny the existence of child labor. It would perhaps be easier to motivate employers to acknowledge child labor if children in non-harmful jobs are allowed to combine work and school. Otherwise there is always a risk that children will be dismissed by employers seeking to comply with international standards, only for them to end up in more harmful work.[61] Employers are obliged, under SA8000, to ensure that "young workers" (aged 16–18) are not subjected to hazardous work, but again, this follows the approach of C 138. As children are not expected to be working, they are not specifically protected.

SAI's accreditation system has been described as an "organizational integrity" approach, emphasizing prevention and remedy rather than punishment.[62] It emphasizes transparency by publishing companies' compliance reports on its Web site and neutrality by ensuring independent auditing. On the prevention and improvement side, it emphasizes factory-level management and involvement of all stakeholders.[63] As of September 30, 2006, there were 1,112 facilities certified under the SA8000 standard.[64] The list of industries reflects a concentration on exporting businesses rather than those producing for domes-

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59 The standards include limits on working hours, which appear to be inspired by the European Union's Working Time Directive, Directive 93/104/EC, O.J. 1993 No. L307/18, *available at* http://www.sa-intl.org/index.cfm?fuseaction=document.showDocumentByID&nodeID=1&DocumentID=136.

60 Social Accountability International, SA8000 Guidance Document (2d ed. 2004).

61 A classic example occurred in Bangladesh in the 1990s and is described by, among others, William E. Myers, *The Right Rights? Child Labor in a Globalizing World*, 575 Annals Am. Acad. Pol. & Soc. Sci 38, 42 (2001).

62 Michael A. Santoro, *Beyond Codes of Conduct and Monitoring: An Organizational Integrity Approach to Global Labor Practices*, 25 Hum. Rts Q. 407, 413–15 (2003).

63 *See* http://www.sa-intl.org/index.cfm?fuseaction=Page.viewPage&pageId=617&parent ID=473.

64 *See* http://www.sa-intl.org/index.cfm?fuseaction=Page.viewPage&pageId=745&grandparentID=473&parentID=617.

tic consumption.[65] Even the agricultural businesses listed are those producing for export, particularly of bananas, pineapples and tobacco products.[66] This is probably not surprising, given that the substantive standards seem to reflect those of Europe and other Western countries. SAI may encounter a further difficulty in that it must try to balance its emphasis on promotion and education with the demands of consumers that corporate social responsibility standards be rigorously monitored.[67] It may be questioned whether organizational integrity can co-exist with consumer skepticism over the sincerity of companies that adopt social labels or codes of conduct.

Social labels, if they were to be administered by a state rather than by a private charitable foundation, raise the question of compatibility with international trade law. There is, however, a clear distinction between restricting imports of goods made with child labor and enabling goods made without child labor to benefit from a social label. A social labeling regime would be more proportionate than import restrictions.[68] It also meets the fundamental requirement of international trade law, namely non-discrimination.[69] Social labels, in order to be WTO-compliant, particularly in respect of the Agreement on Technical Barriers to Trade, Annex III, Code of Good Practice for the Preparation, Adoption and Application of Standards, should be based on internationally recognized standards, must not discriminate between domestic and foreign products and should be developed in cooperation with foreign producers.[70] Increasingly, there may be a need for accreditation of social labels, as corporations are using labels that appear to guarantee fair trade or fair treatment of workers but that may be based on more limited guarantees than existing labels such as the U.K.'s Fair Trade label.[71]

Ultimately, social labels' effectiveness is difficult to measure.[72] As measures to change consumer behavior, they will have limited impact, as consumer

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65 *Id*.

66 *Id*.

67 This point is discussed further under "Corporate Codes of Conduct" in Section C.2.

68 See, by analogy, the language of the European Court of Justice in the *Cassis de Dijon* case (Case 120/78), [1979] E.C.R. 649, where it stated that the objectives of the German policy of protecting consumers could be served by labeling requirements rather than restricting imports from other Community member states.

69 *See* John O. McGinnis & Mark Movesian, *The World Trade Constitution*, 114 HARV. L. REV. 511, 582 (2000–2001).

70 Janelle M. Diller & David A. Levy, *Child Labor, Trade and Investment: Toward the Harmonisation of International Law*, 91 AM. J. INT'L L. 663, 686 (1997).

71 Oliver Balch, *Are You Smelling the Right Coffee?*, GUARDIAN UNLIMITED (LONDON), Jan. 21, 2005, *available at* http://www.guardian.co.uk/ethicalbusiness/story/0,,1395749,00.html.

72 IPEC, WORKING PAPER 2000: SOCIAL LABELING AGAINST CHILD LABOR—BRAZILIAN EXPERIENCES 90–94 (2000). See also the earlier report by Hilowitz, *supra* note 48.

choices may be based on a variety of factors. It also seems likely that social labels will be more influential on decisions for lower-priced goods, such as coffee, rather than high-priced goods, such as hand-knotted carpets.[73] For this reason, it can only be welcome that social labeling programs have broadened to include activities that directly benefit child workers, such as educational programs rather than just targeting consumers. Nonetheless, a central problem remains. Social labels are often based on C 138 rather than C 182. They therefore integrate all the problems with this Convention identified elsewhere in this book and may therefore be difficult to apply in practice.

2. Corporate Codes of Conduct

The origins of corporate codes of conduct (CCCs) go back to concerns over corporations, particularly American corporations, doing business in politically controversial contexts, such as Northern Ireland during the Troubles or South Africa under Apartheid.[74] In the 1990s, CCCs began to be developed as part of broader concerns, often raised by human rights NGOs, about abuse of workers in developing countries where Western multi-nationals were moving production or contracting-out activities. CCCs and other measures were intended to ensure that the positive effects of foreign direct investment in terms of providing new employment opportunities were matched by high-quality employment and observance of internationally recognized labor and social standards.[75] It is in this context that child labor standards became part of CCCs.

CCCs, unlike social labels, generally cover a wide range of standards rather than a single guarantee of child-labor-free products. These codes often go beyond labor standards to include environmental and general social standards. Herein lies their weakness when compared with social labels. Non-use of child labor is just one of many standards that multi-national corporations and their subcontractors must respect in order to comply with the code to which they subscribe. Child labor may not, in all cases, be the most high-profile issue facing corporations.

While most CCCs today include child labor, many are based on outdated notions of appropriate approaches to the issue. Most focus on a single aspect—the setting of a minimum age for employment. Some make direct reference to C 138, but even where they do not, the standards they contain follow the pro-

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73 Compare the growth in sales of fair trade coffee with the evaluation by Hilowitz, *supra* note 48, of the impact of Rugmark.

74 Christopher McCrudden, *Human Rights Codes for Transnational Corporations: What Can Sullivan and MacBride Principles Tell Us?*, 19 Oxford J. Leg. Stud. 167 (1999).

75 Bob Hepple, *The Importance of Law, Guidelines and Codes of Conduct in Monitoring Corporate Behaviour, in* Multinational Enterprises and the Social Challenges of the XXIst Century 3, 3 (Roger Blanpain ed., 2000).

visions of C 138 closely. This is perhaps understandable, as the basic approach of C 138 is clear and easy to monitor—it requires the non-use of any child worker below a certain age. C 182, on the other hand, because it calls for the elimination of harmful child labor, is more difficult to apply and therefore to monitor. The only standard within C 182 that would be easy to monitor and relevant to most corporations is the non-use of children in slavery-like practices (Article 3(a)). This issue will probably be relevant primarily in commercial agriculture and industries that rely on it, such as food processing (as was the case in the cocoa plantations of West Africa, hence the Cocoa Protocol, discussed in Section C.3, being based on C 182). Nonetheless, the continued use of child labor standards drawing directly or indirectly from C 138 could be seen as demonstrating that NGOs and corporations have not re-examined their attitudes to child labor, despite the high profile of the debates leading to the adoption of C 182, with its emphasis on prioritization of the worst forms of child labor.

NGO-based generic codes of conduct, which companies may opt into rather than developing their own, may have an advantage in terms of public perception as they have been drafted by bodies independent of corporate interests. On the other hand, they have the disadvantage of being generic—they are designed to appeal to a wide range of companies and are, as a result, less detailed and less demanding than the best of the in-house codes. The Clean Clothes Campaign is directed towards the garment industry, as its name suggests. Its child labor standards make direct reference to C 138 only and are therefore oriented towards eliminating the employment of children below the ages stipulated in that Convention (15 in developed countries and 14 in developing countries).[76] The Ethical Trading Initiative is a U.K.-based NGO that provides a generic code of conduct for companies in any sector. Its Base Code provisions on child labor make only a general reference to ILO conventions, without specifying what ones inspire its standards. These standards call for no *new* recruitment of child labor and the exclusion of children under 18 from hazardous labor. The Base Code also calls on employers removing children from work to assist them in the transition to education.[77] It therefore places a more detailed obligation on employers and implicitly recognizes that removal of child workers from employment may be, in itself, a harm. Social Accountability International's SA8000 standard has been discussed in Section C.1 in the context of social labels. The certification itself operates like a social label, but the code behind it, the SA8000 Standard Elements, is a form of CCC. The Standard Elements make direct reference to C 138, setting a minimum age of 15 for all employment by corporations adhering to the Standard Elements. However, the Standard Elements also call on employers to provide remedial measures for former child workers, again

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76 *See* http://www.cleanclothes.org/codes/ccccode.htm#2.

77 *See* http://www.ethicaltrade.org/Z/lib/base/code_en.shtml, para. 4.

recognizing the need to ensure that former child workers do not simply move into other work that may be equally or more harmful.[78]

Although the non-use of child labor is standard in generic codes, it is less common in CCCs developed within corporations. A study of CCCs in 1999 found that norms concerning child labor were included in fewer than half of the codes.[79] Not surprisingly, that survey found that child labor was more likely to be an issue addressed in CCCs in sectors with a more family-oriented consumer base: clothing, sporting goods, furniture and toys.[80] Most of these CCCs only addressed the issue of minimum age for employment. Two that went beyond this basic provision were Hennes and Mauritz (better known outside Sweden as the clothing retailer H & M) and the furniture company IKEA.[81] Both are Swedish-based multi-nationals. Their current CCCs continue to include detailed provisions on child labor.

H & M's CCC provisions, which are directed to its contractor factory operations, are based on the Convention on the Rights of the Child (CRC) and on C 138, although they go far beyond what these treaties specifically require.[82] The Code defines child as a person below 15 or, in accordance with C 138, 14 in developing countries. It is important in this CCC to distinguish between the standard and the measures that the corporation takes to enforce it. As a statement of principle, the H & M CCC states that the company does not accept child labor. However, the Code goes on to state that:

> If a child (see definition under 2.2) is found working in any of the factories producing our garments, we will request the factory to make sure that the measures taken are in the child's best interest. We will, in cooperation with the factory, seek to find a satisfactory solution, taking into consideration the child's age, social situation, education, etc. We will not ask a factory to dismiss a child without a discussion about the child's future. Any measures taken should always aim to improve, not worsen, each individual child's situation. Any costs for education, etc. have to be paid by the factory. We will firmly demand that the factory employs no further children.[83]

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78 *See* http://www.sa-intl.org/index.cfm?fuseaction=document.showDocumentByID&nodeID=1&DocumentID=136, paras. III-7, 8 and 9; IV-1.

79 Antoine Jacobs, *Child Labor, in* MULTINATIONAL ENTERPRISES AND THE SOCIAL CHALLENGES OF THE XXIST CENTURY 199, 199 (Roger Blanpain ed., 2000).

80 *Id.*

81 *Id.*, 201–04

82 *See* http://www.hm.com/filearea/corporate/fileobjects/pdf/common/COMMON_CODEOFCONDUCT_ENGLISH_PDF_1124202692491_1150269822085.pdf, sec. 2.

83 *Id.*, sec. 2.3, which also states that: "We acknowledge the fact that child labor does exist and can't be eradicated with rules or inspections, as long as the children's social

The Code therefore takes a holistic view of the child labor problem rather than seeing child labor as a taint on its business reputation from which it must dissociate itself at all costs. H & M also requests that factories with primarily female workforces provide day care for their children,[84] which eliminates the likelihood that older children, usually girls, are kept out of school in order to look after younger children. The H & M CCC is also one of the few that makes provision for the protection of legally employed child workers. Children between 12 and 15, employed on apprenticeship programs, should work no more than seven hours per day, in accordance with C 33, and such work should not interfere with their education.[85] Such work must be light work and "clearly" directed at training.[86] Children between 15 and 18, although permitted as workers, should be given special consideration, especially concerning hours of work and overtime.[87]

IKEA's CCC, supplemented by a separate document entitled "The IKEA Way on Preventing Child Labor,"[88] makes reference to the CRC and both C 138 and C 182.[89] Moreover, IKEA's definition of child labor is explicitly harm-based, rather than age-based:

> Child labor is defined as work performed by children, which interferes with a child's right to healthy growth and development and denies him or her the right to quality education.[90]
>
> Contractor companies are required to sign an undertaking that they accept the IKEA policy on child labor, and must take measures designed to prevent the use of child labor, including the keeping of a register of

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situation is not improved." In Section 2.4, it states that it will discontinue business with factories that do not accept H & M's child labor policy.

84 *Id*., sec. 2.2.

85 *Id*., sec. 2.5.

86 *Id*.

87 *Id*., sec. 2.6.

88 *See* http://www.ikea-group.ikea.com/corporate/PDF/IWAY-C~1.PDF [hereinafter, IKEA Way]. The language of this document is very similar to that of H & M's CCC provisions on child labor. It is likely that IKEA adopted H & M's language, since, as appears from Jacobs' comments, *supra* note 79, at 201–02, H & M's current CCC has remained unchanged from its 1999 formulation, whereas it appears from Jacobs' discussion of IKEA's CCC that the company had recently revised its Code.

89 *See* http://www.ikea-group.ikea.com/corporate/PDF/IWAYST~1.PDF [hereinafter IKEA CCC].

90 *Id*., Section 11.a. It is, however, important to note that the age ranges to which this standard applies are derived from ILO C 138: children up to school-leaving age in principle, but 14 is the minimum upper limit. The IKEA Way document, *supra* note 88, sec. 1, largely reproduces the corresponding provisions of the H & M CCC, but adds explicit reference to ILO C 182.

> workers.[91] If any contractor is then discovered to be using prohibited child labor, it must establish a corrective action plan:
>
> The action plan shall take the child's best interests into consideration, i.e. family and social situation and level of education. Care shall be taken not merely to move child labor from one supplier's workplace to another, but to enable more viable and sustainable alternatives for the children.[92]

Like H & M, therefore, a holistic approach is taken to child labor with a view to ensuring the child's welfare. IKEA's provision on workers over school-leaving age generally follows that of H & M, although there are no provisions concerning apprenticeship. It requires that they be kept out of hazardous work, reflecting the demands of ILO C 138,[93] requires that their work be outside school hours and that their hours of work in general take into account the young age of the workers.[94]

These two companies' codes are uncommonly detailed in their provisions concerning child labor. Other companies' commitments to eliminate child labor do not tend to set out rehabilitative measures or protective measures for young workers over the minimum age for employment. Marks and Spencer, a retail company based in the United Kingdom that sells clothing, housewares and food, subscribes to the Ethical Trading Initiative Base Code, which is supplemented by its own code. The latter provides simply that contractors must observe local and national laws with respect to minimum age for employment, and that "Regardless of local regulations, workers should normally be at least 15 years old, and free to join lawful trade unions or workers' associations."[95] Marks and Spencer is one of the rare companies that explicitly guarantees young workers' freedom of association rights. Nike, the sportswear manufacturer that has been frequently criticized for the treatment of its workers in places like Indonesia,[96] also does not make explicit reference in its CCC to international conventions; however, its standards broadly reflect the terms of C 138, and to some extent, C 182.[97] A mini-

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91 IKEA Way, *supra* note 88, para. 4.

92 IKEA CCC, *supra* note 89, sec. 11.a, n.16. *See also* IKEA Way, *supra* note 88, para. 2.

93 IKEA CCC, *supra* note 89, sec. 11.b.

94 IKEA Way, *supra* note 88, sec. 3.

95 *See* http://www2.marksandspencer.com/thecompany/ourcommitmenttosociety/ethical_trading/pdfs/global_sourcing_principles/global_sourcing_principles_28May percent202003.pdf.

96 *See, e.g.*, Mahmood Monshipouri, Claude Emerson Welch & Evan T. Kennedy, *Multinational Corporations and the Ethics of Global Responsibility: Problems and Possibilities*, 25 HUM. RTS. Q. 965, 975–76 (2003).

97 *See* http://www.nike.com/nikebiz/gc/mp/pdf/English.pdf;bsessionid=WJ2KGRNN30ZMKCQCGJESF4YKAIZEUIZB [hereinafter Nike CCC], Section entitled "Child Labor."

mum age of 16 is set for workers producing clothing, accessories or equipment, and 18 for workers producing footwear. The higher age for footwear production probably reflects the fact that producing footwear involves glues that may be particularly harmful if inhaled by children,[98] which reflects the standard for hazardous work in ILO C 138 and Article 3(d) of ILO C 182. There are no provisions concerning the rehabilitation of former child workers, although there is a transitional measure for contractors beginning work for Nike: "[i]f at the time Nike production begins, the contractor employs people of the legal working age who are at least 15, that employment may continue, but the contractor will not hire any person going forward who is younger than the Nike or legal age limit, whichever is higher."[99]

The key to the effectiveness, or not, of CCCs lies in their implementation and monitoring mechanisms. This is where the generic codes tend to be stronger than those drafted in-house by a corporation. In addition, generic codes may be seen as inherently more effective, given that they are supervised by a body outside the structures of the corporation. The Ethical Trading Initiative Base Code includes detailed Principles of Implementation.[100] The philosophy of the Principles is that the Base Code standards should be integrated into corporate practice.[101] A member of senior management is to be designated as responsible for the implementation of the Base Code,[102] thereby attempting to provide a clear line of accountability. Member companies commit to independent monitoring and inspection,[103] but it appears that such inspections are not done by the Ethical Trading Initiative itself. Instead, it reviews reports submitted by member companies.[104] Finally, member companies commit to making everyone in their supply chains aware of the Base Code and providing a confidential complaints system for employees.[105] Companies are expected to terminate relations with any supplier who engages in serious persistent breaches of the Base Code.[106] The Clean Clothes Campaign similarly emphasizes implementation throughout the corporate structure with ultimate responsibility at a high level within the company.[107] Furthermore, the Campaign requires that companies subscribing to its CCC make compliance with the Code a condition of all contracts entered

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98 DUNCAN GREEN, JUST HOW CLEAN ARE YOUR SHOES? 12–13 (1997).

99 Nike CCC, *supra* note 97.

100 *Principles of Implementation, at* http://www.ethicaltrade.org/Z/lib/base/poi_en.shtml.

101 *Id*., para. 1; *see also* para. 5.

102 *Id*., para. 1.3.

103 *Id*., para. 3.

104 *See* http://www.ethicaltrade.org/Z/actvts/rprtg/index.shtml.

105 *Principles of Implementation, supra* note 100, paras. 2.4 and 3.

106 *Id*., para. 4.

107 *See* http://www.cleanclothes.org/codes/ccccode.htm#3, III, Implementation.

into by the company with its contractors, sub-contractors and suppliers.[108] Independent monitoring of the Code is to be undertaken by a foundation whose members include representatives of the companies, trade unions and relevant NGOs.[109] The Code emphasizes that monitoring must include actual observation and unannounced visits.[110]

Individual corporations tend to provide less detail on monitoring in their CCCs but often elaborate on their monitoring processes elsewhere. H & M's CCC imposes an obligation on suppliers to inform the company as to where each order is produced and to accept unannounced site inspections.[111] Since 2006, H & M has been a member of the Fair Labor Association, which undertakes its own independent audits in addition to those organized by H & M.[112] In general, H & M seeks to work with suppliers to improve conditions, but it reserves the right to terminate its contract if no satisfactory conclusion can be reached.[113] IKEA, likewise, undertakes unannounced inspections either itself or through third parties.[114]

Marks & Spencer's Global Sourcing Principles place the primary responsibility for implementation on the suppliers themselves.[115] This is reinforced by an obligation to conduct operations on agreed sites and not to engage in subcontracting (although suppliers are expected to apply the Principles in any dealings they have with their own suppliers) and an undertaking by Marks & Spencer to engage in regular assessments and inspections. Inspections involve reviews of documentation and site visits, during which the auditor has interviews with randomly selected employees.[116]

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108 *Id*. Any contractors not currently observing the Code are to be given a period for rectification, but no further opportunities to change. These include specific measures for child labor, requiring no new child workers to be engaged, and temporary measures for reduction of hours and educational opportunities, although the goal is an all-adult workforce.

109 *Id. at* http://www.cleanclothes.org/codes/ccccode.htm#4, IV, Independent Monitoring, Accreditation and Certification.

110 *Id*.

111 H & M CCC, *at* http://www.hm.com/us/corporateresponsibility/csrreporting/aboutthisyearsaudits__csraboutthisyearsaudits.nhtml, sec. 8.2. In 2006, 1,474 inspections were made, of both existing and potential suppliers: H & M's 2006 report on Corporate Social Responsibility, *id*. While this was a smaller number of audits than in previous years (over 2,000 audits were made in each of 2003–2005), the audits are now more thorough.

112 *See* http://www.hm.com/us/corporateresponsibility/independentmonitoring__independentmonitoring.nhtml.

113 *Id*., sec. 8.3.

114 IKEA Way, *supra* note 88, sec. 5.

115 Marks and Spencer, *Global Sourcing Principles, at* https://images-na.ssl-images-amazon.com/images/G/02/00/00/00/24/28/58/24285882.pdf.

116 *Supplier Auditing, Monitoring and Target Setting, at* http://www2.marksand-

The Nike Code of Conduct emphasizes the existence of correct documentation and records rather than the situation in practice. Contractors are put on notice that they may be subject to unannounced inspection, but the CCC does not specify whether this relates only to the documentation.[117] Child labor standards do, however, seem to be a particular focus of concern. To make verification of compliance with the minimum age standard easier, Nike requires contractors not to use home working for its production.[118] Independent monitoring is conducted by the Fair Labor Association (FLA), which includes unannounced audits of premises.[119] Such monitoring does include workplace inspections and interviews.[120] In addition, Nike's 2004 corporate social responsibility report, its first in three years, moves towards greater transparency.[121] In particular, the report admits mistakes and failures in applying CCC standards in its supplier factories. Nike therefore has taken the decision to disclose the location of all its suppliers on its Web site,[122] which will facilitate independent monitoring and investigations by NGOs and journalists into whether Nike's implementation of its CCC improves.

It is clear from the above review that in monitoring CCCs, independent, unannounced inspections of workplaces have become the benchmark for credibility. The growth of unannounced inspections was a response to widespread skepticism about the commitment of companies to using CCCs as instruments for change rather than as public relations exercises to placate Western consumers. The Clean Clothes Campaign has acknowledged that the introduction of more intense independent monitoring of corporate compliance with codes was necessary for their credibility and effectiveness.[123]

Although monitoring of at least some CCCs has improved, there is still a concern that the emphasis is too much on the punitive, particularly on withdrawing contracts from contractors who fail to observe the standards set out in a CCC. As with child labor issues in general, there is a concern that preventative measures are often ignored, nor is there a holistic approach that views child labor as part of a complex chain of socio-economic and cultural relationships,

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spencer.com/thecompany/ourcommitmenttosociety/ethical_trading/pdfs/making_it_happen/supplier_auditing_monitoring_28May2003.pdf. It is not clear from the documentation whether these inspections are pre-arranged or unannounced.

117 Nike CCC, *supra* note 97, Section entitled "Documentation and Inspection."

118 *Id*., Section entitled "Child Labor."

119 *See* http://www.nike.com/nikebiz/nikebiz.jhtml?page=25&cat=compliance&subcat=independentmonitoring.

120 *See* http://www.fairlabor.org/all/monitor/compliance.html.

121 Nike, FY 04 Corporate Social Responsibility Report, *at* http://www.nike.com/nikebiz/gc/r/fy04/docs/FY04_Nike_CR_report_full.pdf.

122 *See* http://www.nike.com/nikebiz/gc/mp/pdf/disclosure_list_2005-06.pdf.

123 *See* http://www.cleanclothes.org/codes/transparancy.htm.

including that of child workers with their families. Some generic codes are beginning to address this concern, and some companies are working with international organizations on projects that support children in a broader sense than just in their role as workers or not. One description of this holistic approach is an "organizational integrity" approach,[124] which emphasizes support for responsible behavior and instilling appropriate standards throughout the organization. The three main elements of organizational integrity are cooperation with NGOs;[125] training and remediation; and integration of proactive policies with strategy.[126] These elements are already present, to some extent, in existing codes. Many corporate codes of conduct involve some cooperation with NGOs, for example to ensure independent monitoring. Codes such as that of H & M and IKEA emphasize remedial rather than punitive approaches to dealing with the use of child labor by contractors. Generic codes sometimes oblige companies to designate a senior executive to be ultimately responsible for implementation of the code, which would help to facilitate integration of ethical standards and strategy. However, the demands of organizational integrity go further and require that the distinction between economic and social policies within companies be effectively eliminated.[127]

Child labor presents particular difficulties. However defined, illegal child labor is a practice that often cannot be fully eliminated except by removal of the children in question. For this reason, it is essential that child labor standards are defined on a harm basis rather than a minimum age basis. Nonetheless, because remedying child labor cannot generally be accomplished simply through workplace changes, a holistic approach to child labor requires an emphasis on prevention and support of families where children are likely to work. Some companies, in addition to codes of conduct, support projects that could reduce the likelihood of child labor. IKEA supports projects that could help to prevent child labor by improving educational opportunities and supporting women's economic activity, as well as a project for the rehabilitation of former child soldiers in Angola and Uganda.[128] H & M supports UNICEF's Girls' Education project.[129]

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124 Santoro, *supra* note 62, at 410.

125 The importance of working with NGOs, due to their expertise, is also noted by Monshipouri, Welch and Kennedy, *supra* note 96, at 970.

126 *Id*.

127 Santoro, *supra* note 62, at 420–23. In particular, see *id*., 420, involving ensuring that financial incentives are in line with the goals of the ethical policies of the company.

128 *See* http://www.ikea-group.ikea.com/corporate/responsible/projects.html. Many of these projects involve work with UNICEF.

129 *See* http://www.hm.com/us/corporateresponsibility/wesupport/projectsandcooperation/unicefinindia__projectsarticle3.nhtml.

Despite the move to a holistic, or organizational integrity, approach to corporate codes of conduct, the most pressing concern for most NGOs concerned with corporate behavior is compliance with CCCs. Monitoring and compliance issues seem still to be at the heart of the debate. Ironically, as CCCs are becoming more widely accepted by multi-national business, despite the criticisms of CCCs by libertarian economic writers,[130] some NGOs are becoming disillusioned with them as a means of delivering labor rights and environmental standards. At the 2005 World Social Forum, a consensus seemed to be emerging that binding legal measures were preferable to private enforcement through CCCs.[131] This is partly because NGOs see the prospect of U.N. initiatives becoming legally binding, or at least for them to exert greater political pressure on multi-national corporations.[132] Partly, however, the cooling of NGOs on CCCs arises from the belief that it is too easy for companies to sign up to CCCs without real commitment to change. The disagreement over the benefit of CCCs, is, to some extent, part of a wider debate as to whether the activities of multinational corporations benefit the countries in which they operate, particularly developing countries, and particularly in relation to observing human rights.[133]

Nonetheless, there is a need for attention to all elements of CCCs: the choice of standards, levels of compliance and the capacity to take a wider view. This is particularly the case in relation to child labor. It is not clear how much the participants in the World Social Forum represent the interests of children in general or child workers in particular,[134] and therefore a preference for binding legal measures rather than cooperative voluntary measures may be driven by other priorities than the protection of children from exploitation.[135] Given that most CCCs seem to be grounded in ILO C 138 rather than C 182, a move to U.N. measures as the global standard for corporate social responsibility may

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130 Survey, *The World According to CSR*, Economist, Jan. 20, 2005, *available at* http://www.economist.com/surveys/displaystory.cfm?story_id=E1_PVVVNSN.

131 Oliver Balch, *Discussing Corporate Injustice*, Guardian Unlimited, Jan. 31, 2005, *available at* http://www.guardian.co.uk/ethicalbusiness/story/0,,1402544,00.html.

132 The integration of corporate social responsibility issues into the activities of international organizations is discussed in Section C.4.

133 Monshipouri, Welch & Kennedy, *supra* note 96, at 971–75, review the arguments on both sides of the debate, but *id*. at 979–80, they argue for legally-binding codes, with stronger monitoring machinery.

134 The World Social Forum, http://www.forumsocialmundial.org.br/, is held in different countries each year at the same time as the World Economic Forum in Davos, as a counter-point to it, to highlight issues of economic and social justice; *see World Social Forum opens in Kenya*, BBC Online, Jan. 20, 2007, *available at* http://news.bbc.co.uk/1/hi/world/africa/6281649.stm.

135 Santoro, *supra* note 62, at notes at 413–14 n.8, that there is disagreement among NGOs as to whether a cooperative or confrontational approach should be taken with multi-national companies.

lead to an understanding of child labor as a more complex issue than a minimum age approach allows. However, an emphasis on binding legal standards and litigation, such as the American Alien Torts Statute used against the oil company UNOCAL in relation to its activities in Burma,[136] could undermine the move towards preventative activities being undertaken under the most complete CCC regimes.

3. Commodity-Based Agreements on Labor Standards

One recent development in corporate social responsibility is the emergence of commodity-based agreements between companies. Rather than one company addressing child labor, or other core labor rights issues, a number of companies within a commodity sector have come together to establish common codes, with some remedial measures. To date, this is restricted to commodities, notably cocoa and coffee rather than manufactured goods. There are many factors that could have influenced the decisions to accept the need to combat child labor (and other abuses of core labor rights), but it is probably significant that coffee and chocolate are two major products in the fairly traded sector. In the case of cocoa, the agreement was partly a response to a scandal concerning child slavery in the cocoa plantations of some African countries,[137] although the scale of the problem in disputed by researchers in Africa.[138] The so-called Cocoa Protocol of September 21, 2001, between the Chocolate Manufacturers Association and the World Cocoa Foundation, relative to the growing and processing of cocoa beans, illustrates how that regulatory gap between states and corporations can be effectively closed.[139] Incorporating by reference C 182, it establishes a quasi-legal regime among relevant actors concerned with eliminating abusive child labor in the cocoa industry.[140] Part of its significance, from an implementation point of view, is the range of actors involved, which includes politicians (notably U.S. Senator Tom Harkin (D-

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136 This is discussed in Chapter 2 on slavery-like practices.

137 *Pact to End African "Chocolate Slavery,"* BBC Online, May 2, 2002, *at* http://news.bbc.co.uk/1/hi/world/africa/1963617.stm. On the background to the Cocoa Protocol, see also Cullen, Treaties, *supra* note 40, at 106–07.

138 *African Cocoa Slavery "Exaggerated,"* BBC Online, Aug. 20, 2002, *at* http://news.bbc.co.uk/1/hi/world/africa/2205741.stm.

139 Chocolate Manufacturers Association, Protocol for the Growing and Processing of Cocoa Beans and their Derivative Products in a Manner that Complies with ILO Convention 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor. [hereinafter Cocoa Protocol], *available at* www.harkin.senate.gov/specials/chocolate-protocol.pdf.

140 Elliot J. Schrage, *Promoting International Worker Rights Through Private Voluntary Initiatives: Public Relations or Public Policy?*, Report to the U.S. Department of State 148–50 (2004).

Iowa) and U.S. House Representative Elliot Engel (D-NY)), corporations, unions, NGOs and the ILO.[141]

The Protocol makes compliance with ILO C 182 the first of its "Guiding Principles" and calls for (1) a survey of the affected areas; (2) an advisory council to oversee the survey; (3) a consultative group comprising industry, NGOs, government agencies, and labor groups; (4) a pilot program; (5) a monitoring group; (6) an international foundation; and (7) public certification that cocoa used in chocolate or related products has been grown and processed without forced child labor.[142] The Guiding Principles acknowledge "the ILO's unique expertise" and accept that the ILO must have an active role in all aspects of addressing the problem of child labor in cocoa plantations.

The international foundation envisioned in the Protocol led to the establishment, in July 2002, of the Geneva-based foundation called the World Cocoa Foundation.[143] The foundation's aims are to provide financial and operational support to field projects, to serve as a clearinghouse for best practices, to conduct a joint research program and to develop a means of monitoring and public reporting. As of mid-2003,[144] the follow-up to the Protocol included pilot programs in cocoa-growing countries,[145] efforts to help cocoa farmers to increase their incomes (and thereby be less dependent on abusive child labor) and moves toward a credible certification program to ensure that cocoa is grown responsibly. This certification will be limited to guaranteeing the non-use of the worst forms of child labor. In April 2004, the World Cocoa Federation signed an agreement with Winrock International, an NGO involved in agricultural sustainability in developing countries, "to support vocational education in schools in the cocoa-growing regions of the Ivory Coast."[146] The education program, which will be supported by the U.S. Department of Labor, the World Cocoa Federation and several large confectionery companies, will be aimed at improving literacy and teaching vocational skills in the area of agriculture.

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141 See signatures and witnesses to the Cocoa Protocol, *supra* note 139.

142 Schrage, *supra* note 140, at 149.

143 *See* http://www.worldcocoafoundation.org/default.asp.

144 World Cocoa Foundation, *Responsible Cocoa Farming Timeline* (July 9, 2003), *at* http://www.fhidc.com/cocoa/cocoa.asp.

145 World Cocoa Foundation, *"Pilot Programs" Move Ahead*, (July 9, 2003), *at* http://www.fhidc.com/cocoa/pilot.asp. The Côte d'Ivoire was a special case given the conflict going on in that country. Programs there were fully operating only in areas of stability, and only farmer training was being undertaken in potentially unstable areas. No work at all was being undertaken in areas of high instability; *see* http://www.fhidc.com/cocoa/update.asp.

146 *WCF and Chocolate Industry Pledge to Support Vocational Education in Schools in the Ivory Coast*, (Apr. 15, 2004, updated Oct. 4, 2006), *at* http://www.worldcocoafoundation.org/for-the-media/wcf_pr-04-15-04.asp.

Later in 2004, the International Labor Rights Fund (ILRF) questioned the degree of progress on implementing the Cocoa Protocol.[147] Questions that were raised by NGOs in the context of a public briefing held by Senator Tom Harkin, one of the Protocol's initiators, included:

- whether child labor in the cocoa industry had decreased in the two years of the Protocol's operation;
- the extent to which projects for the elimination of child labor in the cocoa industry were being funded by the cocoa industry itself;
- what the industry was doing to improve the welfare of families working in the cocoa industry, including whether it was willing to move to a fair-trade price for cocoa;
- what will the industry do to ensure monitoring of the Protocol's standards—at present it appears that the intention is that the governments of countries where cocoa is grown will have the primary responsibility for monitoring.[148]

Overall, the ILRF argues that insufficient progress has been made in implementation of the Protocol.[149] In addition to encouraging the cocoa industry to move to a fair-trade model of commodity purchasing of cocoa (which is not within the commitments set out in the Protocol), the ILRF argues that the following should be done to achieve full implementation:

- there should be design and implementation of a monitoring and certification program;
- in addition to supporting existing programs within cocoa-producing states, the cocoa industry should set up its own programs to deal with the underlying causes of child labor in the cocoa industry;
- programs should cover all of the cocoa industry, whereas at present they cover only a small part of it;
- the industry should involve the ILO and other relevant international organizations and NGOs in training staff;
- the industry should work with local NGOs and trade unions.[150]

The ILRF has reiterated these points, most recently in 2006,[151] arguing that the Protocol was flawed from the start, partly because of its reliance on the stan-

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147 *See* http://www.laborrights.org/projects/childlab/cocoa_063004.htm.

148 *Id*.

149 International Labor Rights Fund, Cocoa Industry Obligations Chart, *at* http://www.laborrights.org/projects/childlab/cocoa_obligations.htm.

150 *Id*.

151 International Labor Rights Fund, *October 2006—Report on Cocoa and Forced Child Labor, at* http://www.laborrights.org/projects/childlab/CocoaProtocolUpdate101906.pdf.

dards in C 182 alone, without a further commitment to a minimum age for young workers as required by C 138. The ILRF also supports the expansion of fair trade principles in the cocoa industry.[152]

In September 2004, a second commodity area introduced a code of labor rights. The Common Code for the Coffee Community (the Coffee Code) goes beyond a single issue such as child labor, covering a range of social and environmental issues.[153] Like the Cocoa Protocol, its child labor standard draws on ILO C 182, specifically banning as "unacceptable practices" the worst forms of child labor. It also bans the use of forced labor as defined by ILO C29 and C105,[154] and trafficked labor within the meaning of the 2000 U.N. Convention against Transnational Organized Crime, Protocol on trafficking.[155] The Coffee Code goes further than most CCCs by including not only labor and environmental standards but also some general social rights standards, notably the rights to adequate housing and clean water.[156] The Code commits participating companies to implement "a right to childhood and education," emphasizing not only the removal of children from the worst forms of child labor but also promoting access to education.[157] However, it would be better if obligations in this area were more precisely defined, preferably obliging corporations to provide education to the children of workers or to child workers themselves if local educational opportunities are inadequate.

The Coffee Code's initiators are German: the German Coffee Association, German Development Cooperation and the federal Ministry for Economic Cooperation and Development.[158] The Coffee Code is administered by a tripartite (producers, traders and processors; trade unions; NGOs) steering committee, which is empowered to establish expert working groups, which are overseen by a management unit.[159] The number of NGOs participating in the project is relatively small, but it includes major development and environmental groups such as Oxfam and Greenpeace.[160] The working groups developed the standards that went into the Coffee Code.[161] The goal of the Coffee Code

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152 *Id*.

153 *See* http://www.sustainable-coffee.net/download/4c-drafts/common-code-en.pdf [hereinafter Coffee Code].

154 For a discussion of the application of these conventions to child labor, see Chapter 2.

155 For a discussion of the application of this protocol to child labor, see Chapter 3.

156 Coffee Code, *supra* note 153.

157 *Id*.

158 *See* http://www.sustainable-coffee.net/partners/index.html.

159 *See* http://www.sustainable-coffee.net/project/structure.htm.

160 Coffee Code, *supra* note 153.

is to promote sustainability of coffee production in the ecological, social and economic senses, and "Prerequisites for entering the system are a self-assessment, the exclusion of unacceptable practices and a commitment to continuous improvement."[162] Producers are admitted to the Coffee Code system on the basis of a self-assessment, which is verified by an independent audit.[163] Their future compliance is then monitored by National Common Code Bodies, which are based on the same tripartite model as the steering committee, and auditing is conducted by independent third parties.[164] All unacceptable practices and areas of the Code where functioning is poor (so-called "red-lights")[165] are to be eliminated, usually within two years.[166] Unannounced random checks are part of the monitoring system.[167]

The development of the Coffee Code is not surprising in light of the comparatively high profile of the coffee industry in terms of its lack of social responsibility. Coffee production has often attracted the attention of campaigners for justice in the developing world. In 2002, the world's largest coffee company, Nestlé, was subject to a threat by NGOs, such as Oxfam, to organize a European consumer boycott of Nestlé products after the company pressured the government of Ethiopia to pay $6 million in compensation for nationalization of one of its companies by the Ethiopian military government in the 1970s.[168] Nestlé ultimately abandoned its claim.[169] The Coffee Code itself has received criticism. Oxfam, which participates in the tripartite steering committee, has criticized the Coffee Code, preferring a more fair-trade oriented approach.[170] In 2005, Oxfam further criticized the operation of the Code on the basis of inadequate monitoring procedures and failure to address the problems of small producers.[171]

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161 *See* http://www.sustainable-coffee.net/activities/working_groups.htm.

162 Coffee Code, *supra* note 153.

163 *Id*.

164 *Id*.

165 *Id*., The Coffee Code operates on the basis of a system of identifying compliance as good (green-light), requiring improvement (yellow-light) or non-existent (red-light).

166 *Id*.

167 *Id*.

168 Charlotte Denny, *Retreat by Nestlé on Ethiopia's $6m Debt*, GUARDIAN (LONDON), Dec. 20, 2002, at 2.

169 Charlotte Denny, *Nestlé U-Turn on Ethiopia Debt*, GUARDIAN (LONDON), Jan. 24, 2003, at 2.

170 For a detailed report setting out Oxfam's approach to issues relating to coffee production, see OXFAM INTERNATIONAL, MUGGED: POVERTY IN YOUR COFFEE CUP (2002).

171 Oxfam America, *Common Code for the Coffee Community Yet to Respond to Small Scale Family Coffee Farmers and Farm Workers* (Sept. 23, 2005), *available at* http://www.socialfunds.com/news/release.cgi?sfArticleId=4464.

The agreements on cocoa and coffee are therefore much more limited than fair trade schemes, which go beyond the issue of labor rights, or even basic social rights, but instead guarantee a fair price to farmers, plus supporting community-based projects such as education. It is therefore unsurprising that the ILRF, like Oxfam and Cafédirect in relation to coffee, now encourages the cocoa industry to go beyond trying to eliminate child labor and instead to move to a fair trade model of commodity purchase, which would, in its view, reduce child labor by reducing overall poverty among cocoa growers and by removing the incentive to use the cheapest labor available.[172]

4. Internationalizing Corporate Social Responsibility

The first international instruments to catalogue the obligations of companies operating outside a single national legal framework were soft law measures intended to be promotional rather than obligatory. The procedures they set out therefore bore little or no resemblance to the implementation methods for international treaties.[173] The first soft law measure to set out a corporate social responsibility framework was the Organization for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises, which were revised in 2000.[174] The 2000 revision was done in light of the adoption by the ILO of the 1998 Declaration of Fundamental Principles and Rights at Work. Paragraph 1 of Chapter I of the Guidelines stipulates that they are addressed by governments to multi-national enterprises. Two provisions are relevant in consideration of child labor. Paragraph 2 of Part II exhorts companies to respect human rights in accordance with the host state's international obligations. Since virtually every state has ratified the CRC, the host state's obligations would almost always include some obligation to restrict or eliminate child labor. Paragraph 1 of Chapter IV states that enterprises should respect core labor rights, listing those set out in the ILO 1998 Declaration.[175] The specific provision on child labor requests enterprises to "contribute to the effective abolition

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172 International Labor Rights Fund, *supra* note 151.

173 Reporting and complaint mechanisms under international treaties are set out in Chapter 6.

174 OECD, Directorate for Financial, Fiscal and Enterprise Affairs, Committee on International Investment and Multinational Enterprises, Working Party on the OECD Guidelines for Multinational Enterprises, *The OECD Guidelines for Multinational Enterprises: Text, Commentary and Clarifications*, DAFFE/IME/WPG(2000)15/FINAL (Oct. 31, 2001), *at* http://www.olis.oecd.org/olis/2000doc.nsf/4f7adc214b91a685c12569fa005d0ee7/d1bada1e70ca5d90c1256af6005ddad5/$FILE/JT00115758.PDF. The original Guidelines were drafted in 1976; *see* OECD, Review of the OECD Guidelines for Multinational Enterprises, Framework for the Review (1999), *at* http://www.oecd.org/dataoecd/38/9/2071909.pdf.

175 *Id*., Commentary on Employment and Industrial Relations, para. 19.

of child labor."[176] The commentary on this part, which mentions C 138 and C 182, does not, however, give very clear guidance on what the contribution of multi-national enterprises should be:

> Through their labor management practices, their creation of high quality, well paid jobs and their contribution to economic growth, multinational enterprises can play a positive role in helping to address the root causes of poverty in general and of child labor in particular. It is important to acknowledge and encourage the role of multinational enterprises in contributing to the search for a lasting solution to the problem of child labor. In this regard, raising the standards of education of children living in host countries is especially noteworthy.[177]

The Guidelines are implemented by National Contact Points and by the Committee on International Investment and Multinational Enterprises.[178] The National Contact Points are established by each adhering state for undertaking promotional activities related to the Guidelines.[179] The Committee's responsibilities in relation to the Guidelines are: periodically to hold exchanges of views on matters covered by the Guidelines and their effectiveness; periodically to invite social partner organizations and other NGOs to express their views on such matters; to issue clarifications of the Guidelines; and to report periodically to the Council.[180] The Committee is explicitly deemed not to be a judicial or quasi-judicial body.[181]

This OECD Guidelines were followed by the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (the Tripartite Declaration),[182] adopted by the ILO Governing Body in 1977 and revised in 2000 and 2006.[183] The revision in 2000 primarily took the form of two addenda, one of which incorporated the principles contained in the ILO 1998 Declaration on Fundamental Principles and Rights at Work, although reference to the 1998 Declaration was also incorporated into the main text, for example, in paragraph 8. States are encouraged to ratify the conventions referred to in the 1998

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176 *Id*., para. 1(b) of Part IV (Employment and Industrial Relations).

177 *Id*., Commentary on Employment and Industrial Relations, para. 22.

178 *Id*., Decision of the OECD Council, of June 2000.

179 *Id*., para. 1 of ch. I of the Decision.

180 *Id*., ch. II of the Decision.

181 *Id*., Commentary on Decision of OECD Council, para. 22.

182 83 OFF. BULL. Ser. A, No. 3 (ILO, 2000), *available at* Series A, No. 3: http://www.ilo.org/public/english/employment/multi/download/english.pdf.

183 On the history of the Declaration, see http://www.ilo.org/public/english/employment/multi/tripartite/history.htm. The updates in 2006 made reference to newer ILO instruments, primarily recommendations and other soft law measures.

Declaration, including the two child labor conventions, C 138 and C 182,[184] and multi-national enterprises are exhorted to respect minimum age as set out in these conventions.[185] The implementation of the Tripartite Declaration is overseen by the Subcommittee on Multinational Enterprises, which is a subcommittee of the ILO Governing Body's Committee on Legal Issues and International Labor Standards.[186] The Tripartite Declaration includes a procedure for dispute resolution through requests for interpretation.[187] The procedure has been used very infrequently,[188] probably because its text excludes its use for interpretation of national law, ILO conventions and recommendations, or freedom of association issues, all of which are subject to other procedures within the ILO.[189] The Subcommittee also undertakes surveys of governments and workers' and employers' organizations on progress implementing the Tripartite Declaration, which are then reviewed as part of the Governing Body's procedures.[190] It also undertakes a wide range of promotional and research activities in relation to the Tripartite Declaration.[191]

One way of enhancing the publicity and possibly the credibility of corporate social responsibility schemes is to give them the imprimatur of an international organization such as the United Nations or the European Union. Both these organizations have worked on developing policies in this area, although neither has yet achieved a clear scheme that can attract the support of businesses, consumers and workers in developing countries (including child workers) and their advocates.

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184 Para. 9 of the Tripartite Declaration.

185 Para. 36 of the Tripartite Declaration.

186 *See Guide to the Procedure and Functioning of the Governing Body and its Committees, at* http://www.ilo.org/public/english/standards/relm/gb/refs/gbguide.htm. The Tripartite Declaration, in the section on Procedure for the Examination of Disputes concerning the Application of the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy by Means of Interpretation of its Provisions, 69 OFF. BULL. Ser. A, No. 3, at 197–97 (ILO, 1986) (the Interpretation Procedure), mentions a Committee on Multinational Enterprises, but the Committee has been renamed; *see* the ILO Web page on the Interpretation Procedure, *at* http://www.ilo.org/public/english/employment/multi/tripartite/interpretation.htm.

187 Interpretation Procedure, *id*.

188 Only five cases are listed on the ILO's Web site for the Tripartite Declaration, *at* http://www.ilo.org/public/english/employment/multi/tripartite/cases.htm. None of these cases involved child labor issues.

189 Interpretation Procedure, *supra* note 186, para. 2.

190 *See* http://www.ilo.org/public/english/employment/multi/tripartite/governingbody.htm.

191 *See, e.g.*, ILO Governing Body, Sub-Committee on Multinational Enterprises, *Promotion of the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy: Activities Report for 2003*, 289th Sess., GB.289/MNE/1 (Mar. 2004), *at* http://www.ilo.org/public/english/standards/relm/gb/docs/gb289/pdf/mne-1.pdf.

The United Nations has produced two systems to facilitate corporate social responsibility. The first is the Global Compact, an initiative of the Secretary-General described as "a voluntary corporate citizenship initiative," introduced in 2000 and amended in 2004.[192] It promotes ten principles relating to human rights, environment, labor standards and anti-corruption. The abolition of child labor is the fifth principle. However, the explanation of the principle does not appear to adhere to the rigid abolitionism of C 138. A minimum age approach, based on that Convention is advocated, but businesses are expected to prioritize the worst forms of child labor as set out in C 182, and, in particular, they "should not use child labor in ways that are socially unacceptable and that lead to a child losing his or her educational opportunities."[193] More significantly, they are asked to apply the abolition principle sensitively: "[t]he complexity of the issue of child labor means that companies need to address the issue sensitively, and not take action that may force working children into more exploitative forms of work."[194] Businesses are expected to act in three steps: identifying where child labor is being used in their supply chains, removing children from exploitative work and providing them with alternatives (including education for the children and employment opportunities for adult members of their families).[195] They are encouraged to work with local communities and with relevant NGOs.[196]

The Global Compact is not yet a super-CCC. This is principally because it does not yet have the level of sophistication in its monitoring activities that the best CCCs have. Businesses that wish to participate simply communicate their intentions to the Secretary-General in writing.[197] They are then expected to integrate the principles of the Global Compact into their strategy, culture and operations. They do not report directly to the Secretary-General on their progress in implementing the principles, but they are instead expected to publish such information in their annual reports.[198] This goes no further than CCCs did when they were first introduced. The major innovation of the Global Compact is to encourage networking among stakeholders involved in the Compact through local networks, exchange of good practice through its Web portal and global policy dialogue seminars.[199]

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192 *What Is the Global Compact, at* http://www.unglobalcompact.org/AboutTheGC/index.html.

193 Principle Five of the Global Compact, *at* http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/principle5.html.

194 *Id.*

195 *Id.*

196 *Id.*

197 *How to Participate in the Global Compact, at* http://www.unglobalcompact.org/HowToParticipate/index.html.

198 *Id.*

199 *Id.*

An independent assessment of the impact of the Global Compact was undertaken by the consulting firm McKinsey and Co. and published in 2004.[200] It was seen to be successful in attracting participants and at easing or accelerating change in participating companies—most participating companies appeared to be involved in some form of corporate social responsibility engagement prior to joining the Global Compact.[201] The most common area of policy change reported[202] was in human rights. Only 21 percent of participating companies changed policies affecting the use of child labor or forced labor, although this could be, in part, because these areas were not problems for the majority of participating companies.[203] Of note is the fact that there is relatively weak participation from American companies, and the authors of the independent assessment identified fear of legal liabilities as a reason for this reluctance.[204] This seems counter-intuitive given the lack of formal monitoring mechanisms attached to the Global Compact and the constant emphasis on its voluntary nature. To respond to this fear, the American Bar Association has prepared an opinion letter that the Global Compact Office can provide to prospective American participants to alleviate their fears.[205] The main challenge for the Global Compact in the future, however, is identified as the management of the conflicting expectations of the different participants: companies want more practical tools for delivering the principles, and civil society groups are skeptical of the effectiveness of the purely voluntary approach.[206] The authors of the report recommend improving governance structures, particularly through decentralization, to address this, but they do not advise fundamental change in its approach. Instead, they recommend communicating the advantages, and the limitations, of the Global Compact more clearly to the different participants.[207]

Academic commentary has supported the introduction of the Global Compact. Monshipouri, Welch and Kennedy have argued in favor of moving from a proliferation of CCCs to a single standard.[208] They envisage the U.N. Global Compact as potentially filling that role if it were to develop "mechanisms

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200 *Assessing the Global Compact's Impact, at* http://www.unglobalcompact.org/docs/news_events/9.1_news_archives/2004_06_09/imp_ass.pdf.

201 *Id*., 3–5. The Global Compact has the largest membership of any initiative of its kind; *see id*., 9–10.

202 Note that these changes were those reported by the companies themselves.

203 *Id*., 6, Table 3.

204 *Id*., 11. Other barriers were reluctance to accept the principles on labor rights and the general reputation of the United Nations in the United States at present.

205 *Id*.

206 *Id*., 17–18.

207 *Id*.

208 Monshipouri, Welch & Kennedy, *supra* note 86, at 979–83.

for monitoring and evaluating corporate compliance."[209] However, they express concern about the lack of political power and legal competence of the bodies within the United Nations that could potentially hold corporations to account. Ultimately, they conclude that the Compact is a "step in the right direction."[210] However, given the comments in the independent review, it seems unlikely that the Global Compact will move towards more rigorous monitoring.

The second recent U.N. initiative is the adoption by the Sub-Commission on the Promotion and Protection of Human Rights of the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights.[211] The Norms begin by setting out that, although states are the primary guarantors of human rights, "transnational corporations and other business enterprises have the obligation to promote, secure the fulfillment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including the rights of indigenous peoples and other vulnerable groups."[212] The Norms therefore constitute the most comprehensive statement of the human rights obligations of businesses. The commentary on this paragraph sets out the obligation in somewhat less sweeping language, requiring businesses to "use due diligence in ensuring that their activities do not contribute directly or indirectly to human rights abuses, and that they do not directly or indirectly benefit from abuses of which they were aware or ought to have been aware."[213] Subsequent paragraphs set out the specific categories of rights that businesses must take into account. These cover broadly similar ground to that of the principles of the Global Compact, although they are stated in stronger language. In Paragraph 6, the obligations in relation to child labor are set out: "[t]ransnational corporations and other business enterprises shall respect the rights of children to be protected from economic exploitation as forbidden by the relevant international instruments and national legislation as well as international human rights and humanitarian law." This text is closest to Article 32 CRC and Article 10(3) ICESCR, although the commentary refers to ILO C 138 and C 182.[214] The commentary also calls on businesses to support governments in eliminating the worst forms of child labor,

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209 *Id*., 980. *See also id*., 983.

210 *Id*., 988.

211 Adopted Aug. 13, 2003, 55th Sess., E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003) [hereinafter Norms].

212 *Id*., para. 1.

213 *Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, E/CN.4/Sub.2/2003/38/Rev.2 (Aug. 26, 2003). This paragraph also calls on businesses to avoid undermining the rule of law or other efforts to ensure respect for human rights and to inform themselves of the human rights impact of their activities.

214 *Id*.

and to develop plans to remove children from harmful work and to provide alternative opportunities.

The implementation regime envisaged by the Norms is much more demanding for businesses than that of the Global Compact. It begins with an obligation to implement the Norms in their operations, including disseminating them to all contractors and suppliers.[215] However, the implementation regime also demands "periodic monitoring and verification" by the United Nations,[216] national frameworks for ensuring implementation[217] and reparations by businesses to victims of violations of the Norms.[218] This regime goes much further than any previous international corporate social responsibility regime and decisively moves away from voluntarism. Unsurprisingly, the Norms have been controversial. In 2005, the High Commissioner for Human Rights published a report on business responsibility for human rights, following several months of consultations with interested groups.[219] She saw the Norms as "an attempt in filling the gap in understanding the expectation on business in relation to human rights,"[220] but she noted that opinion was polarized on the subject of their utility. Employer groups, many states and some individual businesses criticized the Norms for, among other more technical reasons, moving away from voluntarism, taking a generally negative attitude towards business, putting state-like obligations of implementation on business and thereby allowing states to evade their international legal responsibilities and creating burdensome forms of implementation.[221] The supporters of the Norms, largely NGOs, academics, consultants and lawyers (along with some states and individual businesses), found virtues where the critics found vices: they approved of the comprehensiveness of the Norms, providing a tool for evaluating current and future practices, establishing the correct balance between states and businesses with regard to human rights, moving beyond voluntarism, which had attracted the mistrust of civil society, and offering the possibility of remedies.[222] The High Commissioner

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215 Norms, *supra* note 211, para. 15.

216 *Id*., para. 16. The Commentary, *supra* note 213, suggests that monitoring would be done by human rights treaty bodies, country rapporteurs and thematic procedures, and it calls on the Commission on Human Rights to consider establishing a group of experts, special rapporteur or working group.

217 Norms, *supra* note 211, para. 17.

218 *Id*., para. 18.

219 Commission on Human Rights, 61st Sess., *Report of the United Nations High Commissioner on Human Rights on the Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights*, E/CN.4/2005/91 (Feb. 15, 2005).

220 *Id*., para. 19.

221 *Id*., para. 20.

222 *Id*., para. 21.

concluded that the interest in the Norms justified further work on them, such as identifying the useful elements within them and operating a pilot scheme.[223]

The Global Compact and the Norms, therefore, offer two alternative visions of the way ahead for internationalized corporate social responsibility. The Global Compact has extensive business support and at least contributes to spreading the message about the need for good corporate citizenship. However, it has no means of addressing violations, being based on a fully voluntary system. The Norms create strong obligations. However, it may be difficult to secure support for these norms from business and even from a majority of states.

The European Union has stated a commitment to the core labor standards set out in the ILO 1998 Declaration on Fundamental Principles and Rights at Work.[224] It has pledged to support the ILO in providing technical assistance towards promotion of core labor standards.[225] In addition, it has pledged to advance the elimination of the worst forms of child labor by developing time-bound programs with countries through its bilateral external relations.[226]

EU action on corporate social responsibility began in 2001, when it issued a Green Paper on corporate social responsibility.[227] The Green Paper addressed corporate social responsibility in the broadest sense and placed its greatest emphasis on business operations within the EU. However, it also addressed the external dimension, including human rights. The EU draws, in this respect, from the 1998 ILO Declaration on Fundamental Principles and Rights at Work, as well as guidelines on multi-national enterprises from the ILO and the OECD.[228] In defining social responsibility as a duty of the EU as well as of private enterprise, the Commission stated that "[t]he European Union itself has an obligation in the framework of its Cooperation policy to ensure the respect of labor standards, environmental protection and human rights and is confronted with

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223 *Id*., para. 52(d). On the request of the Human Rights Commission in Resolution 2005/69, the Secretary-General has appointed a Special Representative on human rights and transnational corporations and other business enterprises. His 2006 interim report, E/CN.4/2006/97, at paras. 59–61 (Feb. 22, 2006), criticized the Norms for moving away from voluntarism and being inconsistent with the nature of international law. Instead, at paragraphs 62–64, he advocated greater use of domestic law mechanisms to hold corporations to account for human rights violations.

224 Commission of the European Communities, *Communication to the Council, the European Parliament and the Economic and Social Committee, Promoting Core Labor Standards and Improving Social Governance in the Context of Globalization*, COM (2001) 416 (July 18, 2001).

225 *Id*., 16.

226 *Id*., 19.

227 Commission of the European Communities, *Green Paper: Promoting a European Framework for Corporate Social Responsibility*, COM (2001) 366 (July 18, 2001).

228 *Id*., 13–15.

the challenge of ensuring a full coherence between its development policy, its trade policy and its strategy for the development of the private sector in the developing countries."[229] On child labor, the Commission asserted that there was a need for a developmental approach, ensuring the promotion of child welfare and education, not only the punitive sanction of dismissing sub-contractors who used child labor contrary to international norms.[230] The Commission also emphasized the need for monitoring and verification of compliance with codes of conduct.[231]

The Green Paper led to a consultation process, where a wide range of actors were invited to offer opinions on the way forward for the EU on corporate social responsibility issues. A large number of replies were received.[232] Many business responses emphasized the need for voluntarism in this area,[233] and some expressed overt resistance to any regulatory activity at the EU level on corporate social responsibility.[234] In addition, the Council's Resolution on the Green Paper stated that corporate social responsibility complements rather than replaces legal regulation of human rights or environmental standards.[235] Usually,

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229 *Id*., 13. *See also* the statement, *id*., 14, that codes of conduct are not an alternative to binding rules, including from the EU.

230 *Id*., 15.

231 *Id*.

232 According to the Commission, over 250 responses were received; Commission of the European Communities, *Communication Concerning Corporate Social Responsibility: A Business Contribution to Sustainable Development*, COM (2002) 347 final, at 3 (July 2, 2002). The full list of responses, and links to the individual responses, may be found at http://europa.eu.int/comm/employment_social/soc-dial/csr/csr_responses.htm.

233 Commission Communication, *id*., 4. Examples include the French organization AFEP-AGREF, *at* http://europa.eu.int/comm/employment_social/soc-dial/csr/pdf2/044-COMPNETNAT_AFEP-AGREF_France_020110_en.pdf, and the German sportswear company Adidas-Salomon, *at* http://europa.eu.int/comm/employment_social/soc-dial/csr/pdf2/046-COMP_Adidas-Salomon_Germany_011221_en.pdf.

234 *See, e.g*., the response of the British Chambers of Commerce, *at* http://europa.eu.int/comm/employment_social/soc-dial/csr/pdf2/044-COMPNETNAT_British-Chamber-of-Commerce_UK_011220_en.pdf.

235 *Council Resolution on the Follow-Up to the Green Paper on Corporate Social Responsibility*, O.J. 2002 No. C86/3, para. 14. *The Opinion of the Economic and Social Committee on the Green Paper: Promoting a European Framework for Corporate Social Responsibility*, O.J. 2002 No. C125/44, paras. 1.11–1.13, also emphasized voluntarism, as did the European Parliament, in its resolution on the Commission's subsequent Communication on corporate social responsibility; European Parliament, *Report on Communication Commission Concerning Corporate Social Responsibility: A Business Contribution to Sustainable Development*, Doc. A5-0133/2003, para. 3 (Apr. 28, 2003) of draft resolution. The Parliament did want to see an EU social label, however; *id*., paragraph 30.

Commission Green Papers are followed by White Papers with specific policy proposals. Probably as a result of the lack of consensus arising from the consultation process, the Green Paper was instead followed with a Communication in 2002[236] and another in 2006.[237] The 2002 Communication's main purpose appears to be setting out the case for future action by the EU, including arguing that corporate social responsibility adds value for businesses.[238] Here, the Commission's role is to be primarily one of facilitation. Only a few concrete proposals are made. For our purposes, the most interesting is to review the effectiveness of private labeling schemes, including social labels.[239] The main outcome of the 2002 Communication was the launching of the European Multi-Stakeholder Forum on Corporate Social Responsibility (the Forum).[240] The Forum's objectives are promotional, but they include not only improving knowledge about the relationship between corporate social responsibility and sustainable development but also exploring the possibility of developing common guidelines based on international instruments.[241] These include human rights instruments that contain child labor norms, notably the European Social Charter, the ILO Conventions included in the 1998 Declaration of Fundamental Principles and Rights at Work and the International Covenant on Economic, Social and Cultural Rights.[242] The Forum, however, has rejected the possibility of legislation on social labels either at the national or EU level.[243] Its final report

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236 *Id*.

237 Commission of the European Communities, *Implementing the Partnership for Growth and Jobs: Making Europe a Pole of Excellence on Corporate Social Responsibility*, COM (2006) 136 (Mar. 22, 2006).

238 2002 Communication, *supra* note 232, for example at 8, point (1) in the list of areas in which the Commission proposes to focus its strategy.

239 *Id*., 15–16. This is confirmed in the most recent consumer policy strategy document; Commission of the European Communities, *Consumer Policy Strategy 2002–2006: Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions*, COM (2002) 208 final, at 35 (May 7, 2002). The review was ultimately delegated to the European Multi-Stakeholder Forum on CSR, asking it to define commonly agreed guidelines: *Commission Staff Working Paper: Review of the Rolling Programme of Actions of the Consumer Policy Strategy 2002–2006*, SEC(2003) 1387, at 25–26 (Nov. 27, 2003). Neither of the two reports of the Forum have contained such a review of social labeling; EU Multi-Stakeholder Forum on Corporate Social Responsibility, Report of August 2003, *at* http://europa.eu.int/comm/employment_social/soc-dial/csr/last_forum_complete2.pdf, European Multi-Stakeholder Forum on CSR, Final Results and Recommendations (June 29, 2004), *at* http://forum.europa.eu.int/irc/empl/csr_eu_multi_stakeholder_forum/info/data/en/CSR percent20Forum percent20final percent20report.pdf.

240 Commission Communication, *id*., 17–18.

241 Final Results and Recommendations, *supra* note 239, at 2–3.

242 *Id*., 6.

243 Forum 2003 Report, *supra* note 239, at 34.

only recommended, in rather vague language, that "public authorities ensure that there is both a legal framework and the right economic and social conditions" for companies to adopt corporate social responsibility if they wish[244] and that the EU be consistent across policy areas in promoting sustainable development.[245] The 2006 Communication maintains the position that the Commission's, and therefore the EU's, role will continue to be one of promotion and support rather than providing a legal framework.

D. Conclusion

In light of the difficulties identified in previous chapters with formal international law methods of implementing child labor norms, it is not surprising to see the growth in informal methods, whether sponsored by international organizations or by private bodies. The advantages of these methods are clear. The have greater flexibility and adaptability—it is much easier to change the method of monitoring a CCC than it is to amend an international legal procedure contained in a treaty. IPEC is able to adapt measures to reduce harmful child labor to the conditions prevailing in a particular state or industry. An even more significant feature of the methods discussed in this chapter is that they are able to focus on the positive improvement of situations rather than merely identifying a breach of international law and possibly imposing sanctions against a state in breach. Related to this is the ability to move beyond dialogue between states, or states and international organizations, to include a wide range of actors: NGOs, businesses, unions, local authorities and even individuals.

Nonetheless, there are important weaknesses in informal methods of implementing child labor. The localized nature of informal methods makes monitoring compliance difficult. The moves within some CCCs away from self-reporting and towards independent auditing are an attempt to address these concerns. Related to monitoring issues is the conclusion that informal implementation, largely based on a voluntarist approach, only works with states (and businesses) that already have a reasonable level of commitment to the elimination of child labor. Burma has failed to accept offers of ILO technical assistance to help to ensure its compliance with C 29, showing that, at least in this instance, informal methods are no more successful than formal ones. The advantage of a variety of actors being involved in measures such as CCCs, is counter-balanced by the disadvantage that the interests of these actors are often in conflict. The High Commissioner on Human Rights' recent review of consultation responses on the Sub-Commission Norms demonstrates the gulf between business and NGO priorities. Finally, in relation specifically to child labor, there is the lack of clarity over what international legal standards are the ones that should inform meas-

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244 Forum Final Results, *supra* note 239, 15.

245 *Id*., 16.

ures such as CCCs. C 138 and C 182 have very different approaches to child labor, the first emphasizing the setting of a minimum age for employment and the latter emphasizing the removal of children from the worst forms of labor. Some measures refer to C 138, some to C 182 and some to both. The Global Compact refers to both, in addition to using language drawn from Article 32 CRC and Article 10(3) ICESCR. Given the criticisms of C 138, a focus on C 182 would be preferable.

The proliferation of informal methods of implementation, particularly those developed by private bodies, may leave the public with some confusion and skepticism as to their significance. There is a very real danger that unscrupulous businesses will use the idea of CCCs or social labels without living up to the high standards of the best of these (the Fair Trade label in the United Kingdom; the CCCs of Swedish-based companies H & M and IKEA).[246] In light of this, it is right that the United Nations is beginning to think seriously about what contribution it can make to the development of business-focused human rights standards. The Norms are a step in that direction, but in their current form, they are clearly controversial, particularly in light of their emphasis on formal monitoring and legal remedies. Another approach that the United Nations, or on a smaller scale, the EU, could take is to develop a certification system for social labels and CCCs, along the lines of Social Accountability International's work, but with the profile and independence of an international organization behind it. Undoubtedly, informal methods of implementing child labor norms will continue to gain acceptance by states and businesses. Whether those methods deliver results for children, and can be seen to deliver, is a continuing challenge for a wide range of actors in the international community.

246 Balch, *supra* note 71.

Chapter 9
Conclusion

In May 2006, the International Labor Organization (ILO) issued its second global report on child labor as part of the follow-up process to the 1998 Declaration of Fundamental Principles and Rights at Work.[1] In that report, the ILO stated that child labor had decreased since the publication of the previous global report in 2002[2] and looked forward to a foreseeable time when child labor is eliminated altogether. Assuming that the optimism of the ILO is well-founded, it is worth questioning the role of international law in this success. In particular, has the proliferation of international treaty provisions relating to child labor issues had much, if any, impact on the campaign against exploitative child labor? As has been noted throughout this book, there has been, over the past decade, a convergence of human rights standards relating to trafficking of children, sexual exploitation of children and child soldiers. The question then becomes to what extent the convergence is more than text deep.

Undeniably, international law alone cannot end child labor. The complex economic, cultural and social causes of child labor cannot be addressed solely, or even primarily, through legal means. This can be seen from the activities of the International Program on the Elimination of Child Labor (IPEC), where some of its programs, which address the causes as well as the manifestations of child labor, have succeeded in ending patterns of exploitative child work.[3] The need for a multi-faceted approach, involving a wide range of actors, can also be seen in countries that have successfully tackled child labor problems.[4] There is nonetheless, a significant role for international standards.

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1 ILO, *Global Report 2006, The End of Child Labor: Within Reach: Global Report Under the Follow-Up to the ILO Declaration on Fundamental Principles and Rights at Work* (2006) [hereinafter Global Report 2006].

2 *Id*., 6–9.

3 One example is the elimination of child labor from the soccer ball industry in Sialkot, Pakistan; *id*., 76.

4 Donald Mmari, *Combating Child Labor in Tanzania: A Beginning, in* Child Labor and Human Rights: Making Children Matter 169–85 (Burns H. Weston ed., 2005), Victoria V. Rialp, *Combating Child Labor in the Philippines: Listening to Children, in* Child Labor and Human Rights: Making Children Matter 187–207 (Burns H. Weston ed., 2005), Benedito Rodriguez dos Santos, *Combating Child Labor in Brazil: Social Movements in Action, in* Child Labor and Human Rights: Making Children Matter, 209–31 (Burns H. Weston ed., 2005)

A. Goals and Achievements of International Law

On the evidence presented in this book, it can be said that international law developments have influenced the campaign to end exploitative child labor. This evidence is not uniformly positive but on balance demonstrates an impact.

1. Creating Consensus

As Weston notes, international treaties "carry significant authority as official agreements about the kind of world countries at least claim they want to live in and about the rules and obligations to which they say they will commit to bring that vision into reality."[5] They can become the basis for further action. However, as was the case with C 138 for many years, standards that do not truly express the consensus of a wide range of states will lack the authority highlighted by Weston. The Convention on the Rights of the Child (CRC) demonstrated that a consensus could be achieved on the scope of a wide range of children's rights.[6] Its virtually universal ratification paved the way for the current wave of child labor standards, by entrenching a clear set of ideas about children's rights and by establishing child labor as a human rights issue rather than a technical matter of labor regulation. C 182 on the worst forms of child labor focuses on child labor practices that constitute violations of children's rights. The consensus confirmed by C 182 is strengthened by the inclusion of the worst forms of child labor in other international treaties, particularly the two Optional Protocols to the CRC.

The consensus is undermined, however, by the ILO continuing to try to place equal emphasis on C 138. Throughout the 2006 Global Report, it uses language from both C 138 and C 182. It is true that the categories listed in Article 3 of C 182 do not exhaust the forms of child labor that might count as exploitative, and there is some merit to focusing on sectors, such as agriculture and domestic service, where child labor is prevalent. Nonetheless, the minimum age approach of C 138 is too inflexible and too clearly reflects the practices of a minority of countries. C 138 is an inadequate basis for an international consensus, and runs the risk of undermining the strong consensus around C 182.

2. Creating a Common Language of Children's Rights

The era of the CRC has led to a more rights-oriented approach to children's issues, including child labor. The result that is that child labor is approached

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5 Burns H. Weston, *Conclusion, in* CHILD LABOR AND HUMAN RIGHTS: MAKING CHILDREN MATTER, 429–30 (Burns H. Weston ed., 2005)

6 But see the range of reservations entered by states; William Schabas, *Reservations to the Convention on the Rights of the Child*, 18 HUM. RTS. Q. 472 (1996).

as a holistic issue rather than as a mere matter of labor regulation. In other words, setting a minimum age for employment is not enough, nor is even identifying the most exploitative forms of child labor, as C 182 does, sufficient. Seeing child labor in human rights terms means understanding the wide range of rights implicated in resolving child labor problems—the right to an adequate standard of living, the right to education and the right to health, as well as rights in relation to non-exploitation (Articles 32-39 CRC). More radically, a human rights approach to child labor also requires listening to children's views and giving them sufficient weight, as set out in Article 12 CRC. International forums still discuss and make decisions on issues relating to children's rights without hearing the views of affected children. Few international meetings make any effort to allow children to participate in debates on children's rights. While the Second World Congress Against Commercial Sexual Exploitation of Children provided space for children's participation, and includes their own concluding document,[7] the ILO famously received the Global March Against Child Labor but did not permit it to participate in the International Labor Conference debates leading to the adoption of C 182.[8] The Global March was an idea initiated by the South Asian Coalition on Children in Servitude and developed by a coalition of non-governmental organizations (NGOs) and trade union groups.[9] The March began in Manila, the Philippines, in January 1998, ending in June at the International Labor Conference in Geneva, where the draft C 182 was undergoing its first discussion.[10] Ironically, the emergence of the Global March raised the profile of organized groups of working children that rejected the March's advocacy of standards abolishing forms of child labor, instead favoring an emphasis on protecting child workers.[11] Despite the disagreements, the ground of debate on child labor is now that of children's rights. The origins of this common language are at least partly in international human rights instruments on child labor and children's rights more generally.

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7 *Final Appeal of Children and Young People, at* http://www.ecpat.net/eng/Ecpat_inter/projects/monitoring/wc2/final_appeal_of_young_people.pdf.

8 Holly Cullen, *Child Labor Standards: From Treaties to Labels, in* Child Labor and Human Rights: Making Children Matter 87, 97 (Burns H. Weston ed., 2005).

9 Laurie S Wiseberg, *Nongovernmental Organizations in the Struggle against Child Labor, in* Child Labor and Human Rights: Making Children Matter 347 (Burns H. Weston ed., 2005).

10 *Id*., 351.

11 Michael F.C. Bourdillon, *Translating Standards into Practice: Confronting Local Barriers, in* Child Labor and Human Rights: Making Children Matter 144–45 (Burns H. Weston ed., 2005).

3. Helping to Raise the Profile of Child Labor as an Issue and Maintaining Its Significance

The proliferation of international legal standards on child labor has helped to keep the issue in the forefront of international concern. International human rights treaties and international labor law treaties have periodic reporting systems, where states submit reports on a regular basis, plus several have complaint procedures as well as reporting systems The continual examination of issues at the international level before different international committees can put pressure on states to address child labor problems. However, given the problems with international monitoring systems identified in Chapter 6, particularly the limited time and resources of international committees, the role of non-state actors is crucial. States will feel little pressure unless international criticism is widely disseminated. In this, NGOs are crucial. In addition, international committees, with their limited resources, rely heavily on NGOs for supplementary information. Finally, in practice, it is usually NGOs (including social partner organizations) that initiate complaint procedures in the ILO and the European Social Charter. As a result, while the existence of a number of international reporting and complaint procedures constitutes an international law contribution to the continuing high profile of child labor as an issue, the degree of success of these systems is dependent on the cooperation of states and on the supporting work of NGOs.

4. Ending Impunity

One area where the impact of international law has been very strong over the past few years is in prosecuting those using abusive child labor and in imposing clear obligations on states to prosecute. The first arrest warrants issued by the International Criminal Court related to the recruitment and use of child soldiers and other abuses of children.[12] The Special Court for Sierra Leone has also prosecuted for the recruitment of child soldiers.[13]

Treaty rules increasingly impose obligations on states to prosecute those who use exploitative child labor. Article 7(1) of C 182 obliges states to take appropriate steps to ensure the enforcement of the Convention, including through penal sanctions. The two Optional Protocols to the CRC also require states to respond through their criminal law to the abuses prohibited by the Protocols.[14]

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[12] Doc. No. ICC-02/04-01/05, Warrant of Arrest for Joseph Kony issued on 8 July 2005 as amended on 27 September 2005.

[13] Prosecutor v. Sam Hinga Norman, Case No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment) (May 31, 2004).

[14] Optional Protocol on Children in Armed Conflict, art. 4; Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, arts. 3, 4 and 6.

The trafficking conventions place a strong emphasis on the prosecution of people traffickers. These developments emboldened the European Court of Human Rights to read in a positive obligation on states to prosecute persons using forced child labor in the 2005 decision in *Siliadin v. France*.[15] The Court cited various legal developments, including the opening for signature of the Council of Europe Convention Against Trafficking in Human Beings, as justification for expanding the scope of obligations under Article 4 of the European Convention on Human Rights (ECHR) on slavery, servitude and forced labor.[16]

Outside criminal responsibility, the picture is less clear, whether the responsible entity is a state or a non-state actor. As discussed in Chapter 2, the ILC Articles on State Responsibility have raised hopes of greater action by states against states that violate peremptory norms of international law or norms creating *erga omnes* obligations. However, as yet there appear to be no examples of recourse to this aspect of the Articles by states. This is perhaps unsurprising, given that inter-state complaints mechanisms are very rarely used in international human rights law. In the national law context, the Alien Tort Statute in the United States has given rise to actions against American companies that benefit from violations of international human rights in other states, but it is a rare use of international law against non-state actors.[17]

5. Giving Authority to Private Methods of Enforcement

Child labor is an issue often addressed through private methods of enforcement, such as social labels and corporate codes of conduct. Increasingly, child labor is defined with reference to international standards, especially C 138, C 182 and the CRC. As argued in Section A.1, the continued reliance on C 138 may not always be an optimal strategy, as its provisions may not be appropriate for application to some developing countries. It is therefore a welcome development to see C 182 directly referred to in the Cocoa Protocol, and all three treaties referred to in IKEA's Corporate Code of Conduct. Even codes of conduct that do not refer directly to international treaties now usually reflect the content of the main international standards, as discussed in Chapter 8.

In addition, private enforcement mechanisms are now being integrated into the work of international organizations including the United Nations. These mechanisms follow the ILO's 1998 Declaration on Fundamental Principles and Rights at Work, which includes C 138 and C 182. The U.N. Secretary-General's Global Compact, however, seems to place greater emphasis on the principles of C 182 than those of C 138. The Norms on the Responsibilities of Trans-

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15 Siliadin v. France, 43 European Human Rights Reports 16 (2006).

16 *Id*., paras. 49–51.

17 Doe I v. Unocal Corp., 41 I.L.M. 1367 (2002) (U.S. Court of Appeals for the Ninth Circuit).

national Corporations and Other Business Enterprises with Regard to Human Rights, adopted by the Sub-Commission on the Promotion and Protection of Human Rights in 2003, contains a principle on child labor deriving from Article 32 CRC, supported by the two ILO conventions. However, the resistance to the Norms' move to more compulsory forms of implementation and enforcement suggests that while international law has a role in providing substantive standards that attract a high degree of support from a wide range of actors, moving towards responsibility of non-state actors through international legal means is not a development for the immediate future.

B. Limitations and Failures of International Law

Alongside the positive contributions of international law as set out in Section A, it is important to recognize where international law cannot, because of its inherent features, help in situations of child labor. Furthermore, we must include on the negative side of the balance sheet those areas where international law might have had an impact on child labor, but failed to do so. Even the successes noted in Section A are limited and have restricted potential for future development.

1. Inherent Limitations of International Law

International law is primarily, even now, a dialogue between states. It governs the behavior of states primarily with respect to each other. Conventionally, it can only indirectly regulate the behavior of individuals, including corporations, through the actions of states implementing their international obligations.[18] As a result, international obligations are phrased in highly general terms, allowing for implementation in states with differing political, economic and cultural arrangements. This extreme position has been somewhat mitigated by the use of international standards in measures such as corporate codes of conduct, but it remains the case that states are the primary actors in international law.[19] The principle of state sovereignty retains considerable force. As a result, in cases like the use of forced labor in Burma, the capacity of international law methods to challenge violations of human rights is severely limited. In order to implement international law, state consent is necessary. States may be influenced to give their consent by outside pressures, but Burma's intransigence demonstrates the inherent limits of international law.

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18 Holly Cullen, *The Interaction of Forms of Regulation in International Labor Law, in* THE LEGAL REGULATION OF THE EMPLOYMENT RELATION 461 (Hugh Collins, Paul Davies & Roger Rideout eds., 2000).

19 I prefer, in this context, the use of the term "actors" rather than "subjects," as used by Rosalyn Higgins in PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT (1994).

2. Failure to Change the Terms of International Trade

While no one would expect international law, in itself, to eliminate the poverty that is a primary cause of the persistence of child labor, international legal regimes govern many aspects of international trade. Therefore, a distinction must be made between what international law cannot do (alleviate poverty directly) and what it could do but failed to do (integrate child labor concerns into the trading system). The rejection of a link between trade and core labor standards, including child labor, at the WTO Ministerial Conference in 1996 closed off an important debate. There are undeniable difficulties in trying to design a way of recognizing non-trade values in the international trading system. Furthermore, much child labor does not, at least directly, involve internationally traded goods and services. Nonetheless, the rejection of a trade-labor link in 1996, and its effective removal from the agenda of the WTO for the foreseeable future, demonstrates the impermeability of the WTO to non-state actors concerned with child labor issues. The example of the EU in using compliance with core labor standards as the basis for additional preferences in its Generalized System of Preferences demonstrates that there is room for creative and sensitive linkages between child labor and trade. The silence from the WTO on this issue remains a matter for regret.

3. Failure to Entrench a Children's Rights Perspective into the Activities of International Organizations

Although there is now a common language of children's rights, it sometimes disguises continuing paternalism towards children by international organizations. As noted above, few international conferences have included children's participation in any meaningful way. White argues that of the major international organizations, only UNICEF has consistently used the language of children's rights, and had this approach inform its programs.[20] It has made clearer links between child labor, children's rights, and their education, than any other international organization concerned with this issue.[21]

One continuing problem is that that the international trade union movement, which has been a strong advocate of international legal measures of all kinds against child labor, has retained an abolitionist approach to the subject.[22] While the International Confederation of Free Trade Unions (and its successor organization, the International Trade Union Confederation) has focused much of its research and country-based work on clearly abusive forms of child labor,

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[20] Ben White, *Shifting Positions on Child Labor: The Views and Practices of Intergovernmental Organizations, in* CHILD LABOR AND HUMAN RIGHTS: MAKING CHILDREN MATTER 335–37 (Burns H. Weston ed., 2005).

[21] *Id*., 333.

[22] *Id*., 332–33.

such as the brick kiln industry in Pakistan, its approach to child labor within the ILO has continued to focus on the abolition of all child labor. Its response to the 2006 Global Report on child labor, which links the elimination of child labor to the Education for All campaign, was to assert that every child should be in school and not working.[23] The abolitionist approach of many trade union bodies has led, as noted in Chapter 7, to charges within the WTO that their stance is in fact intended to protect jobs in wealthy countries rather than children in developing countries.

C. Choices for the Future

Some commentators have expressed fears that IPEC could lose support of the donor community and run down, thereby depriving the campaign against child labor of one of its most important elements.[24] The end of IPEC might also signal the end of child labor as a priority of the international community. Fortunately, this has not yet occurred, and the ILO's 2006 Global Report on child labor indicates that IPEC continues to have a future.[25] There are, nonetheless, challenges and choices for the future, which raise some international law-related questions. While the period for substantive standard-setting may now be past, the question of implementation of child labor norms remains.

The first set of challenges for international law is the continuing tension between voluntarism and compulsion, particularly in relation to non-state actors. There is considerable pressure from NGOs to strengthen international standards through sanctions against multi-national corporations that benefit from child labor and to enable individuals to seek remedies against those corporations. However, this debate could become a rerun of the WTO social clause debate and result in deadlock, which favors the current bias towards voluntarism.

The collection of new standards in relation to trafficking of persons, including children trafficked for sexual exploitation and forced labor, raises issues of international cooperation. Some of the relevant standards require states to cooperate to prosecute and punish traffickers, but these obligations are defined in general terms.[26] It remains to be seen how these obligations will fit in with other

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23 ICFTU, *International Trade Unions Welcome ILO Child Labor Debate* (June 9, 2006), *at* http://www.icftu.org/displaydocument.asp?Index=991224572&Language=EN.

24 *See, e.g.*, White, *supra* note 20, at 337.

25 Global Report 2006, *supra* note 1, at 83–84.

26 *See* Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, art. 6, and Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, art. 10, supplementing the U.N. Convention against Transnational Organized Crime. Articles 32–35 of the Council of Europe Convention on Action against Trafficking in Human Beings are somewhat more specific, and include an obligation to cooperate with civil society groups, as well as to cooperate with other states parties.

aspects of international criminal law, such as extradition of suspects and the exercise of extraterritorial jurisdiction. Expanded extraterritorial jurisdiction may be necessary to prosecute some forms of commercial sexual exploitation of children. This will require cooperation between investigators in different countries with differing approaches to the rights of suspects. Would a prosecution fail in the United States, for example, if police in the country where the accused was arrested secured a confession by means that violate the Bill of Rights?[27]

A constant question is whether child labor can keep its high profile on the international agenda. The 2006 Global Report links child labor to the right to education, thereby connecting the campaign against child labor with the "Education for All" agenda.[28] This link with another important human rights issue contained in the Millennium Development Goals, can strengthen the idea of child labor as a human rights issue, and keep it within the sights of every major international organization. A hoped-for side effect will be to keep international lawyers thinking about how to use their discipline to continue in the struggle to eliminate child labor.

In 2007, the United Kingdom marks the 200th anniversary of the adoption of the Slave Trade Abolition Act, which ended British involvement in the transatlantic slave trade, although full emancipation of slaves in British colonies was not achieved until more than 20 years later.[29] Out of that struggle, campaigning groups like Anti-Slavery International were born. Among its contemporary campaigns is the ending of abusive child labor. It is important to recognize that children's lives vary in terms of economic, social and cultural conditions and the type and quality of education that is available to them. When we speak of ending child labor, it is in the sense of ending exploitation and abuse rather than ending all forms of work by children and young people. Efforts to end child labor as a human rights abuse are unlikely to be effective without an international legal dimension. Just as the Slave Trade Abolition Act of 1807 did not end the slave trade, only British participation in it, the acts of individual states today cannot end the economic exploitation of children. International law is a necessary, although not sufficient, condition.

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27 The decision of the U.S. Supreme Court in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), relating to a search conducted by U.S. officials in Mexico, concluding that the Fourth Amendment did not apply to the search, suggests that the protections of the Bill of Rights will not be available in such cases. This is the conclusion reached by Zachary Margulis-Ohnuma, *The Unavoidable Correlative: Extraterritorial Power and the United States Constitution*, 32 N.Y.U. J. Int'l L. & Pol. 147, 173 (1999–2000).

28 The World Declaration on Education for All was the product of the 1990 World Conference on Education in Jomtien, Thailand. It committed states to achieving universal access to primary education. *See* http://www.unesco.org/education/efa/ed_for_all/background/jomtien_declaration.shtml.

29 Adam Hochschild, Bury the Chains: The British Struggle to Abolish Slavery (2005).

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