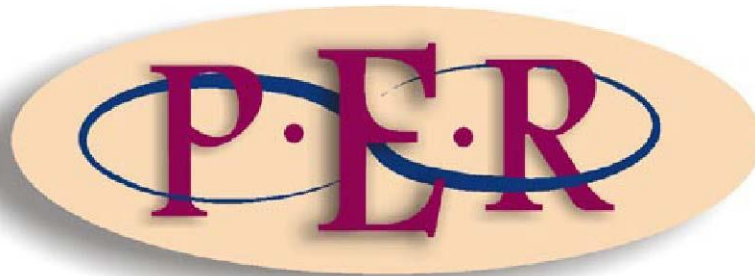


Author: RA Mavunga

A CRITICAL ASSESSMENT OF THE *MINIMUM AGE CONVENTION* 138 OF 1973 AND THE *WORST FORMS OF CHILD LABOUR CONVENTION* 182 OF 1999



2013 VOLUME 16 No 5

<http://dx.doi.org/10.4314/pej.v16i5.3>

A CRITICAL ASSESSMENT OF THE *MINIMUM AGE CONVENTION 138 OF 1973* AND THE *WORST FORMS OF CHILD LABOUR CONVENTION 182 OF 1999*

RA Mavunga*

1 Background

The International Labour Organisation (ILO) (2010) estimates that there could be more than 306 million children worldwide currently involved in work.¹ Of those children, 215 million are considered to be child labourers.² Of the percentage of children who are child labourers, 115 million are exposed to hazardous conditions.³ Such figures are merely estimates as precise numbers of children in labour are difficult to decipher because many cases of child labour go unreported.⁴ Children work in informal settings where they participate in activities such as scavenging, shining shoes, or on family enterprises.⁵ Such cases of child labour are not easily visible and are, thus, difficult to regulate. Children also work in the formal sector in a variety of industries such as in agriculture, manufacturing, fishing, construction, and domestic services.⁶ The ILO estimates that, of all child labourers, about two thirds (64 percent) are unpaid family workers, while only 21 percent are involved in paid employment, and five percent are self-employed. Children in the rural areas are more likely to work than children in the urban areas.⁷ The child labour distribution by

* Rufaro Audrey Mavunga. LLD Candidate, University of Pretoria; Assistant: Institute for International and Comparative Law in Africa (ICLA). Email: mavungarufaro@gmail.com.

¹ These are children between the ages of 5 and 17 years doing some kind of work, which in some cases may be permissible in terms of ILO standards, but in other cases is not permissible owing to the nature and extent of the work. Some work is permissible as long as it does not cause harm to the child. See ILO 2010 www.ilo.org.

² They are considered child labourers because they are below the minimum age for employment which, in terms of the *ILO Minimum Age Convention 183* (1973), is 15 years for developed countries or 14 years in developing countries. Child labourers can also be children above the minimum age of employment but below the age of 18 years, who are exposed to work that poses a threat to their health, safety, or morals.

³ Hazardous work is work which by its nature or the circumstances in which it is carried out is likely to jeopardise or harm the health, safety, and morals of children. See art 3 of the *Minimum Age Convention 183* (1973), art 3(d) of the *ILO Worst Forms of Child Labour Convention 182* (1999). ILO 2010 www.ilo.org.

⁴ ILO *Child Labour* 8.

⁵ ILO *Child Labour* 22. Work in the informal sector is particularly difficult to regulate.

⁶ ILO *Child Labour* 22.

⁷ ILO 2010 www.ilo.org.

sex tilts towards boys with 54 percent participating in labour while only 46 percent of those who work are girls.⁸

Although child labour is a worldwide problem, it has been particularly challenging in developing countries.⁹ The largest numbers of child labourers are found in the Asia-Pacific region with 113,6 million children working, followed by Sub-Saharan Africa with 65,1 million, and Latin America and the Caribbean with 14,1 million.¹⁰ In terms of relative extent, Sub-Saharan Africa presents the most alarming picture. One in four children in Sub-Saharan Africa is involved in child labour compared with one in eight in Asia-Pacific.¹¹ The ILO also reveals that 15 percent of all children in Sub-Saharan Africa are involved in some form of hazardous work.¹² In Pacific-Asia only 5.6 percent, and 6.7 percent in Latin America are exposed to hazards.¹³ Between the period of 2004 and 2008 the number of children in labour in Sub-Saharan Africa actually increased sharply from 49.3 million to 58.2 million.¹⁴ Such disturbing incidences of child labour have also raised doubts as to whether the region will be able to fulfil the millennium development goals, especially those of free, compulsory, and universal education.¹⁵ Most countries in Sub-Saharan Africa have adopted domestic laws prohibiting child labour.¹⁶ Such legislation, however, mostly covers formal labour relationships; those children working in the informal economy do not often benefit from legal protection.¹⁷

⁸ See ILO 2010 www.ilo.org.

⁹ About six hundred million children in developing countries live on less than one dollar a day, with one person dying of starvation every second. Children in these dire situations are forced to seek employment to sustain their families. The lack of adequate health facilities and the AIDS/HIV epidemic have increased the incidence of child-headed households contributing to the rise in child labour. Sometimes cultural practices also contribute to the rise in child labour statistics owing to the fact that they may enforce the belief that children need to be taught a skill through work. See UNICEF 2006 www.unicef.org. See also ILO 2010 www.ilo.org; UN 2012 www.un.org.

¹⁰ ILO 2010 www.ilo.org.

¹¹ ILO 2010 www.ilo.org.

¹² ILO 2010 www.ilo.org.

¹³ ILO 2010 www.ilo.org.

¹⁴ See ILO 2010 www.ilo.org. Africa has faced challenges of poverty and is said to be the home of half the world's poor. Persistent conflict has also negatively affected the region. The HIV/AIDS pandemic has also pushed children into work. See also UN 2012 www.un.org.

¹⁵ UN 2012 www.un.org.

¹⁶ Davidson 2001 *Transnat'l L & Contemp Probs*. See also ILO 2010 www.ilo.org.

¹⁷ ILO 2012 www.ilo.org.

To regulate child labour, the ILO has adopted the *Minimum Age Convention 138* of 1973 (hereinafter referred to as *Convention 138*) and the *Worst Forms of Child Labour Convention 182* of 1999 (hereinafter referred to as *Convention 182*). The United Nations has adopted the *Convention on the Rights of the Child* (hereinafter referred to as the CRC).¹⁸ In an African context, the African Union has adopted the *African Charter on the Rights and Welfare of the Child* (hereinafter referred to as the *African Children's Charter*).¹⁹ Such conventions aim at the reduction and eventual elimination of child labour. After the ratification of such conventions, many countries have adopted domestic laws prohibiting child labour.²⁰ Despite such regulation, statistics prove that children still participate in harmful labour practices. The main purpose of this article is to assess ILO child labour conventions critically, in order to bring further understanding of the provisions of the text of such instruments. The ILO has been specifically chosen because it is the organisation that has since 1919 been the most pivotal in the campaign against child labour.²¹ Between 1919 and 1965 the ILO adopted ten conventions concerning the minimum age for admission to employment and work, and it subsequently decided to consolidate all of these in *Convention 138*. *Conventions 138* and *Convention 182* are also solely committed to child labour matters, while the CRC and the *African Children's Charter* are devoted to children's rights in general.

¹⁸ *UN Convention on the Rights of the Child* (1989).

¹⁹ *African Charter on the Rights and Welfare of the Child* (1999). This Charter was adopted against the backdrop of the deep concern of African states about the future of African children as inheritors and keepers of the African cultural heritage. Communitarianism is a distinct feature of the African concept of human rights with the belief that an individual is embedded within a community.

²⁰ Davidson 2001 *Transnat'l L & Contemp Probs*.

²¹ The ILO established the *ILO Convention Fixing the Minimum Age for Admission of Children to Industrial Employment 5* (1919) (*Minimum Age (Industry) Convention*); *ILO Convention Fixing the Minimum Age for Admission of Children to Employment at Sea 29* (1920) (*Minimum Age (Sea) Convention*); *Minimum Age (Agriculture) Convention* (1921); *Minimum Age (Trimmers and Stokers) Convention* (1921); *Minimum Age (Non-Industrial Employment) Convention* (1932); *Minimum Age (Sea) Convention (Revised)* (1936); *Minimum Age (Industry) Convention (Revised)* (1937); *Minimum Age (Non-Industrial Employment) Convention (Revised)* (1937); *Minimum Age (Fisherman) Convention* (1959); *Minimum Age (Underground Work) Convention* (1965). In 1992 the International Programme on the Elimination of Child Labour (IPEC) was created, and it has been considered to be the most significant turning point of the ILO in its involvement in the fight against child labour. IPEC is considered to be the most effective international programme targeting the elimination of child labour. With the formation of the IPEC, the ILO had significant operational capability but had to navigate largely uncharted waters with very little experience. In 1998 the International Labour Conference adopted the Declaration on Fundamental Principles and Rights at Work. In this Declaration, the abolition of child labour was included amongst the four fundamental principles of the organisation; see ILO Date Unknown www.ilo.org. See also Celek 2004 *Geo J on Poverty L & Pol'y* 101.

2 The *Minimum Age Convention 138* of 1973

Convention 138 was established by the ILO in 1973. This Convention revised industry-specific conventions²² that had been adopted after 1919.²³ Previous minimum-age conventions had applied to certain occupational groups only or to certain sectors of the economy, such as agriculture, industry, and underground work, but this particular Convention was intended to have application in all spheres of economic activity.²⁴ Myers²⁵ alleges that *Convention 138* was adopted not only to cater for the needs of children but also as a response to the fear that the participation of children in work undermines adult jobs and incomes.

2.1 Article 1

Article 1 of this Convention outlines the purposes of the Convention. These are to encourage member states to:²⁶

Undertake to pursue national policy designed to ensure the effective abolition of child labour and to raise progressively the minimum age for admission to work to a level consistent with the fullest physical and mental development of young persons.

This article encourages member states to draft legislation that abolishes child labour but it does not define what child labour is, in this particular article or anywhere else in the Convention. It is difficult for member states to abolish child labour if they are

²² The *Minimum Age (Industry) Convention* (1919) *Minimum Age (Sea) Convention* (1920); *Minimum Age (Agriculture) Convention* (1921); *Minimum Age (Trimmers and Stokers) Convention* (1921); *Minimum Age (Non-Industrial Employment) Convention* (1932); *Minimum Age (Sea) Convention (Revised)* (1936); *Minimum Age (Industry) Convention (Revised)* (1937); *Minimum Age (Non-Industrial Employment) Convention (Revised)* (1937); *Minimum Age (Fisherman) Convention* (1959); *Minimum Age (Underground Work) Convention* (1965).

²³ Article 10(1) of *Convention 138*.

²⁴ Creighton 1997 *Comp Lab L J* 371. According to Creighton, the global survey conducted by the ILO in preparation for *Convention 138* provided ample evidence of the failure of previous minimum age conventions regulating child labour. It reflected that most child labour was performed in contexts of small-scale informal sectors difficult to control by laws and labour inspection. The approach of *Convention 138*, however, remained unaffected and "the minimum age campaign suffered from a permanent hangover." For a detailed discussion about the minimum age campaign, also consult generally Bourdillon, White and Myers 2009 *Int J Sociol Soc Pol*.

²⁵ Myers 2001 *Ann Am Acad Polit Soc* 46.

²⁶ Article 1 of *Convention 138*.

not aware of what kind of work or practices they are supposed to abolish. This Convention consequently leaves member states to define what they consider to be child labour.²⁷ The definition of child labour will therefore differ from country to country, thus having a negative impact on the universal implementation of the Convention. Some cultures encourage children to work to support their families while developing a skill or trade that will support them in the future.²⁸ In a survey conducted in Pakistan, it was documented that parents pushed their children to work at an early age so that they could avoid the dangers of vagrancy.²⁹ It is believed that child employment teaches children of the poor the ability to acquire moral and ethical attitudes and work habits at an early age.³⁰ Member states, therefore, may define child labour in a less formal way than other countries, thus causing differences in the general implementation of the Convention.

Article 1 does not impose an obligation to take any specific measures beyond the drafting of legislation to ensure the effective abolition of child labour.³¹ The article gives the impression that, in order to comply with the obligations established by the Convention, it would be sufficient to establish the required minimum age without engaging in other activities aimed at abolishing child labour. This Convention, unfortunately, does not provide much guidance as to what ought to be the form or

²⁷ Smolin argues that the Convention has an abolitionist approach to child labour, but unfortunately does not define the evil that needs to be abolished. Smolin 2000 *Hum Rts* Q 946.

²⁸ Cobbah 1987 *Hum Rts* Q 320. According to Cobbah, in the African context each family member has a social role that permits the family to operate as a reproductive, economic, and socialisation unit. Such roles are defined differently in Western families. See also, generally, Lloyd 2002 *Int'l J Child Rts* 184, see generally Nhenga-Chakarisa 2010 *AHRLJ*.

²⁹ Department of Labour 1994 www.dol.gov.

³⁰ Celek 2004 *Geo J on Poverty L & Pol'y* 99. In addition, Celek claims that in some states governments argue that the enforcement of child labour laws will harm children rather than protect them. They argue that stricter enforcement of child labour regulations will either reduce the income of already poor families by erasing their children's contributions or even further endanger children's safety and well-being. For these reasons, Celek claims that in countries where child labour is particularly prevalent governments rarely make the effort to enforce domestic provisions regulating the employment of children. They rarely provide the funds for labour inspectors. See also Joshi *Child Labour Issues* 1. Joshi claims that child labour steals the childhood of its participants, for instance in agriculture, where children could be exposed to toxic chemicals, dangerous tools, and violent animals. Children cannot read instructions on labels and use chemicals and tools inappropriately, causing harm to their fragile bodies. Constant bending can cause serious physical injuries with long-term effects. In most cases physical harm is indeed inflicted on the child, but when employment is the only source of food it becomes inappropriate to refer to it as an evil. Those who participate in child labour are the poor and disadvantaged in society and they would rather work to make a living. Poverty is, therefore, the evil that needs to be eliminated.

³¹ Boockmann 2009 *World Development* 681.

content of any policy which is directed towards the attainment of its objectives. Child labour is, however, a complex problem that requires more than a simple legislative provision to abolish it. Boockmann³² argues that one reason why legislation can fail to achieve the objective of reducing child labour is that it often applies only to certain activities. Even if legislation were to cover the entire economy it might not be enforced equally in all sectors, such as in home production, agriculture, and illegal employment activities and would, thus, prevent the effective implementation of the Convention.

Mendelivich³³ correctly argues that determined practical measures should be used to supplement and enforce legislation.³⁴ He states³⁵ that social policies should be directed at attacking poverty and some of its effects, such as absenteeism from school. Social protection instruments can serve to prevent vulnerable households from having to resort to child labour. He alleges³⁶ that the most important thing should be working towards profound economic, social, and cultural changes in the less developed countries. Although Mendelivich's recommendations are useful, they are dependent on the positive action of governments who have the duty to adopt other measures to supplement child labour legislation. If a country experiences socio-economic challenges, eliminating child labour might not be its priority, as children then work to prevent starvation. Other factors, such as a lack of human resources, may also make it impossible for labour inspectors to visit all places of work in order to enforce such legislation. In contrast, Hobbes *et al*³⁷ contend that, when looking at child employment in the developed countries, it becomes apparent that economic development, the reduction of poverty, and the compulsory education system have not removed children from employment. If child work is still rampant in

³² Boockmann 2009 *World Development* 681.

³³ Mendelievich 1979 *Int'l Lab Rev* 566. See also Alston 1989 *Nord J Int'l L* 40. Alston states that, given the multifaceted nature of most major child labour problems, the solutions to them will almost invariably require action by a variety of actors both nationally and internationally. The problems require government to partner with non-governmental groups, trade unions, peasant groups, legal service groups, the press, educators, and other local community groups.

³⁴ Alston 1989 *Nord J Int'l L* 41 states that legislation will be effective only where determined efforts are made to secure its implementation by the bureaucracy charged with responsibility for such implementation, which it is both technically and financially equipped to do.

³⁵ Mendelievich 1979 *Int'l Lab Rev* 567

³⁶ Mendelievich 1979 *Int'l Lab Rev* 566.

³⁷ McKechnie and Hobbs 1999 *Childhood* 98.

developed countries despite economic development, this raises doubts as to whether it is possible to eliminate child labour completely.

Alston³⁸ is more concerned with the drafting and the wording of the legislation that member states are obliged to enact. He claims that defective legislation may be designed to leave open loopholes required to permit the continuation of exploitative practices. Alston³⁹ is of the opinion that inappropriately tough legislative provisions might have the unexpected consequence of eliminating any limited degree of protection by forcing children to go underground. Celek⁴⁰ claims that in some states governments argue that the enforcement of child labour laws will harm children rather than protect them. They argue that stricter enforcement of child labour regulations will either reduce the income of already poor families by erasing their children's contributions or even further endanger children's safety and well-being. Children thus become inaccessible to any form of labour inspection or to less formal pressures to mitigate the harshness of their conditions. Legislation is desirable, however, and the need for careful consideration of such legislation is necessary.⁴¹ The needs of the child, the socio- economic conditions, and also the views and opinions of all concerned groups need to be determined before the drafting and then the adoption of such legislation.

Estacio and Marks,⁴² however, criticise the Convention for relying heavily on written policies. They argue that the majority of children involved in child labour are out of school and are most likely not able to read and write. Written policies, therefore, protect the hierarchies of power by relying on the laws formulated by the elite and by making it difficult for others to penetrate the system.⁴³ The problem Estacio and Marks identify is a genuine concern for many people, especially those in rural areas where illiteracy is high.⁴⁴ Such a problem can, however, be alleviated by

³⁸ Alston 1989 *Nord J Int'l L* 41.

³⁹ Alston 1989 *Nord J Int'l L* 41.

⁴⁰ Celek 2004 *Geo J on Poverty L & Pol'y* 99.

⁴¹ Celek 2004 *Geo J on Poverty L & Pol'y* 99.

⁴² Estacio and Marks 2005 *Journal of Health Psychology* 483.

⁴³ Estacio and Marks 2005 *Journal of Health Psychology* 483.

⁴⁴ Shanthakumari and Kannan 2010 *Journal of Contemporary Research in Management* 110. See also Neves and Du Toit, who claim that in rural South Africa there is high poverty, limited

governments having the political will to engage with all relevant stakeholders.⁴⁵ Awareness campaigns can be conducted through the use of television, radio, and posters. Such campaigns can attempt to define what child labour is, to highlight the harmfulness of child labour, and also to argue why it should be abolished. Campaigns could also make clear what the relevant legislation regulating child labour is, and point out the possible penalties for breaches of such legislation. Other platforms, such as community meetings and open dialogue forums, could also be utilised to bring awareness and engage parents and other role players. Governments could also go beyond written policies by including child labour within national school curriculums. Child labour is a complicated concept, and it can be defined and understood in many different ways. Teachers will, therefore, need some kind of training to equip them to be able to disseminate information about child labour effectively to their students. Such practical solutions will remain nothing more than ideas if governments are unwilling to provide the relevant financial resources to undertake such awareness.

2.2 Article 2

Article 2(1) of this Convention states:⁴⁶

Each member which ratifies this Convention shall specify in a declaration appended to its ratification a minimum age for admission to employment or work within its territory..... no one under that age shall be admitted to employment or work in any occupation.

This Convention places a positive duty on member states to specify a minimum age for employment in any occupation. This minimum age is not limited to children within a specific industry or sector, such as in agriculture, but to all children in any form of work or employment. The use of the words "employment" or "work" means

opportunities for employment and survivalist improvisation. Education and access to basic services in rural areas differs significantly from the situation in urban areas, negatively affecting literacy in rural areas. See generally Neves and Du Toit 2013 *Journal of Agrarian Change* 93-115. See also, generally, Khan and Khan 2013 *Journal of Studies in Social Sciences* 164-183.

⁴⁵ Stakeholders can be the parents who send their children to work, employer organisations, and trade unions. Banks and financial institutions can provide development to poor communities, and non-governmental organisations can be involved in awareness and also in poverty eradication.

⁴⁶ Article 2 of *Convention 138*.

that all labour performed by children, whether or not it is performed under a contract of employment or while a child is self-employed, is subject to the terms of the Convention.⁴⁷ The contents of this provision mean that legislation should extend to those working in family undertakings and in the home, irrespective of whether they receive remuneration or whether they work under any kind of formal agreement.⁴⁸ Such legislation is important, but it is not always easy to monitor its implementation. It is not easy to monitor children when they work within informal sectors such in domestic households.

Age is also used as the determining factor of when a child should participate in any work or employment. This provision is problematic in that in many African cultures children of all ages are required to participate in some form of work.⁴⁹ In terms of article 2(3) of this Convention, the minimum age for work or employment should not, however, be less than the age of completion of compulsory schooling, and, in any case, not less than fifteen years. Sweptson⁵⁰ claims that linking the two concepts of minimum age and compulsory education implies that the educational infrastructure necessary to provide schooling up to a specified age actually exists. This may not always be the case in developing countries. Hanson and Vandaele⁵¹ highlight the fact that the fifteen years minimum age limit is not absolute. The Convention is not a static instrument but a "dynamic one aimed at encouraging the progressive improvement of standards promoting sustained action to attain the objectives."⁵²

The Convention, thus, stresses the importance of compulsory education, rather than the need for children to work. It does not make a link with primary education but refers to compulsory schooling in general. The employment of children below the age of fifteen years is thereby considered to be unlawful. Bourdillon *et al*⁵³ argue that any universalised policy of excluding children below a certain age from

⁴⁷ Creighton 1997 *Comp Lab L J* 372.

⁴⁸ Creighton 1997 *Comp Lab L J* 372.

⁴⁹ Nhenga-Chakarisa 2010 *AHRLJ* 180.

⁵⁰ Swepston 1982 *Int'l Lab Rev* 582.

⁵¹ Hanson and Vandaele 2003 *Int'l J Child Rts* 99.

⁵² Hanson and Vandaele 2003 *Int'l J Child Rts* 99.

⁵³ Bourdillon, White and Myers 2009 *Int J Sociol Soc Pol* 107.

employment or work in any occupation is unjustified as there have been insufficient attempts to determine the real impact of work on children. They argue that the blanket prohibitions affecting all work, even safe work, divert attention away from the urgent need to intervene in forms and conditions of work that are genuinely harmful to children. Bourdillon's notions are valid; excluding children from all work on the basis of age alone is open to challenge. Some children develop more quickly than others, and the blanket ban on all work seems to be unjustified. The actual effect on children needs to be assessed. Minimum age policies reflect a paradigm that assumes that children benefit from being withdrawn or excluded from work, yet there is little empirical evidence to support this assumption.⁵⁴ Child development studies demonstrate that children thrive in a great diversity of activities, including many that carry important responsibilities.⁵⁵ Many children value the practical and experimental nature of what they learn through work. There is also a growing body of literature based on the views of children, which contains testimonies about how work contributes to the quality of life and builds self-esteem.⁵⁶ Hobbs *et al*⁵⁷ claim that there is a significant shift emerging in the developed world. Governmental bodies in London and Edinburgh are now treating work by school-aged children, whether paid or unpaid, as a reality.⁵⁸ Such views presuppose the correctness of the notion that many children's jobs provide opportunities for useful learning. White⁵⁹ puts it well that it is contradictory and unjust for society, on the one hand, to bombard its children with messages of global and national consumer culture, underlining the importance of having money and of spending it in certain ways, and on the other hand to deny the same children the right to earn money. As the body responsible for social justice within the workplace, the ILO needs to embark on standards that promote the work of children in conditions that are not harmful in greater detail than what is currently available. More studies need to be conducted and more attention given to determine acceptable forms of work in which many children participate.

⁵⁴ Bourdillon, White and Myers 2009 *Int J Sociol Soc Pol* 106.

⁵⁵ Bourdillon, White and Myers 2009 *Int J Sociol Soc Pol* 110.

⁵⁶ Bourdillon, White and Myers 2009 *Int J Sociol Soc Pol* 110.

⁵⁷ Hobbes 2007 *Children and Society* 124.

⁵⁸ Hobbes 2007 *Children and Society* 124.

⁵⁹ White 1994 *Development and Change* 874

Article 2(4) provides an exception for countries whose economy and educational facilities are insufficiently developed. Such countries may initially specify a minimum age of fourteen years after consultation with the organisations of the employers and workers concerned. This provision has been praised for its so-called flexibility in attempting to consider the economic and educational insufficiencies of developing countries.⁶⁰ The provision, however, includes the word "initially", which reveals that the ILO expects member states eventually to increase the minimum age of employment. It does not, however, indicate what factors ought to be considered in eventually increasing the minimum age. Member states can, therefore, accept that when educational and economic conditions improve, the minimum age of employment should increase. Despite its lack of detail this provision ought to be praised for its consideration of the needs of children in developing countries. The ILO thus embraces and acknowledges that differences do exist between developing and developed countries.

2.3 Article 3

Article 3(1) states:⁶¹

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

Creighton⁶² suggests that the underlying purpose of the provision is to protect young persons against exposure to hazardous work before they have formed the judgement necessary to undertake such work in safety. Employment before they have acquired this mental facility presents a danger not only to themselves but also to fellow workers. The provision disappointingly seems somewhat vague as it does not adequately describe or give examples of what kind of work may fall within this category. In order to supplement *Convention 138* the ILO has established the

⁶⁰ See Creighton 1997 *Comp Lab L J* 362.

⁶¹ Article 3 of *Convention 138*.

⁶² Creighton 1997 *Comp Lab L J* 363.

*Minimum Age Recommendation*⁶³ which is, however, a non-binding instrument. In terms of article 10 of the Recommendation, member states should take into account work concerning dangerous substances, agents, or processes (including ionising radiations), the lifting of heavy weights and underground work. The Recommendation gives some kind of guidance of some of the types of work to consider when determining if work is hazardous. The Recommendation is, however, not a legally binding instrument, and member states are thus not obliged to comply with its provisions. Member states are again left in a position of determining this type of work without much help from the Convention.

Article 3(2) stipulates that the types of work referred to in article 3(1) are to be determined by national laws and regulations after consultation with organisations of employers and workers. This Article, therefore, allows member states to determine the issues that may affect them directly. The Convention does not, however, give the member states guidelines relative to what factors they should consider in determining whether such work is likely to cause harm.

Article 3(3) stipulates that:⁶⁴

Notwithstanding the provisions of Article 3(1) national laws or regulations or the competent authority may after consultation with the organisations or employers and workers concerned, authorise employment or work as from the age of 16 years on condition that the health, safety and morals of the young persons concerned are fully protected and that the young persons have received adequate specific instruction or vocational training in the relevant branch of activity.

In simpler terms, the Article allows member states to permit children above the age of sixteen years to participate in work or employment provided that such young persons are fully protected and have been given adequate instruction and vocational training to undertake such work. The Article is commended for its flexibility in permitting children above the age of sixteen years to be able to participate in such employment. The conditions that the Convention also puts in place, *viz* those of

⁶³ *ILO Minimum Age Recommendation 146 (1973).*

⁶⁴ *Article 3(3) of Convention 138.*

adequate instruction and vocational training, also seem reasonable to protect young persons from potential harm.

2.4 Article 4

Article 4(1) encourages a competent national authority to exclude limited forms of employment or work from the material scope of the application of the Convention. It states that exceptions may be permissible only if they are 1) necessary, 2) in limited categories of work, or 3) relate to special and substantial problems of application.⁶⁵ This provision is, however, very broad and not useful, as it does not contain a list or guidelines relative to which categories of work can be excluded. The Committee of Experts on the Application of Conventions and Recommendations (CEACR) asserts that article 4 aims to leave the competent authorities in each country a wide discretion to adapt the application of the Convention to the national situation.⁶⁶ Among the possible exclusions mentioned during the preparatory work for the Convention were employment in family undertakings, domestic service in private households, homework, and other work outside the supervision or control of the employer.⁶⁷ These forms of work are indeed difficult to monitor owing to their invisibility but they can be forms of work in which children are exploited. According to Swepston,⁶⁸ no country has actually made use of the possibility of excluding categories of employment or work from the application of this Convention. This provision makes the Convention difficult to implement as there is insufficient detail on which member states can rely if they wish to conform to such provisions. Confusion is therefore created, and member states are justified in abstaining from making such a list.

⁶⁵ Borzaga "Limiting the Minimum Age" 49. See also Swepston 1982 *Int'l Lab Rev* 582.

⁶⁶ Committee of Experts on the Application of Conventions and Recommendations (CEACR) 1981.

⁶⁷ Borzaga "Limiting the Minimum Age" 49.

⁶⁸ Swepston 1982 *Int'l Lab Rev* 582.

Article 4(2) stipulates:⁶⁹

Each member which ratifies this Convention shall list in its first report on the application of the Convention submitted under article 22 of the Constitution of the ILO any categories which may have been excluded in pursuance of Article 4(1) giving the reasons for such exclusion, and shall state in subsequent reports the position of its law and practice in respect of the categories excluded and the extent to which effect has been given or is proposed to be given to the Convention in respect of such categories.

Barzago states that the fact that member states have to list the exclusions in a report is a sign that this article is too rigid.⁷⁰ Member states are required to list exclusions in the first national report which is delivered in the first year of ratification of the Convention. Member states must, therefore, determine and decide upon the possible exceptions in a very short period of time.⁷¹ After the submission of the first national report, it seems as though member states can no longer modify the list of exceptions or provide one if no exceptions were included in the first report.⁷² This means that member states, having ratified the Convention, cannot adapt their regulations to suit social and economic changes that might occur over the years. According to some scholars, such provisions have discouraged the use of article 4 in many countries.⁷³ It is advisable that the ILO provide member states with at least more time, more than a year where necessary, to provide possible exceptions, and also the chance to change such exceptions after a period of time to take into account changing social and economic conditions.

2.5 Article 5

Article 5(1) stipulates that member states whose economy and administrative facilities are insufficiently developed may initially limit the scope of application of this Convention. The provision seems to accommodate less developed countries by permitting the limitation of the scope of the Convention. Member states that adhere

⁶⁹ Article 4(1) of *Convention 138*.

⁷⁰ Borzaga "Limiting the Minimum Age" 49.

⁷¹ Borzaga "Limiting the Minimum Age" 49.

⁷² Borzaga "Limiting the Minimum Age" 49. See also Cullen, who criticises aa 4 and 5: Cullen "Child Labour Standards" 91.

⁷³ Borzaga "Limiting the Minimum Age" 49. Cullen "Child Labour Standards" 91.

to the provisions of article 5(1) are, however, expected to declare the branches of economic activity or types of undertakings to which they will apply the provisions of the Convention. Borzago⁷⁴ alleges that this clause is problematic as it does not adequately describe the sectors that can be excluded from the scope of the Convention.

Article 5(3) expressly states that the Convention will apply to the following sectors: Economic activity in mining, quarrying, manufacturing, construction, electricity, gas, water and sanitary service, transport, storage, and communications, and plantations and other agricultural undertakings mainly producing for commercial purposes but excluding family and small scale holdings producing for local consumption and not regularly employing hired workers.⁷⁵

The Convention does not adequately describe the complexities of the agricultural sector. Agriculture is considered to be the most important economic activity in many developing countries, and child labour is highly prevalent in that industry.⁷⁶ The provision states that the Convention is applicable to plantations and agricultural undertakings functioning primarily for commercial purposes, but children working on family holdings and small-scale holdings producing crops for local consumption and not regularly employing hired workers seem to be excluded from the application of the Convention.⁷⁷ This provision has the potential to create confusion. From a literal interpretation of this Convention, a child below the age of fifteen years involved in agricultural work for his/her own household, even though the child is subjected to poor working conditions and for long hours, is not protected by the Convention. Misunderstandings have arisen as a result of the poor drafting of the Convention.⁷⁸ Large-scale agriculture depends on hired workers who receive wages for their work,

⁷⁴ Borzaga "Limiting the Minimum Age" 55. See also Cullen, who agrees with Borzaga's contention. Cullen "Child Labour Standards" 91.

⁷⁵ Article 5(3) of *Convention 138*.

⁷⁶ Borzaga "Limiting the Minimum Age" 56.

⁷⁷ Article 5(3) of *Convention 138*.

⁷⁸ Borzaga "Limiting the Minimum Age" 57. Member states who have excluded one or more sectors of the economy from the material scope of the Convention are obliged to indicate their general position with regard to the employment of children in those sectors, also pointing out the progress made towards a broader application of the Convention. See Article 5(4)(a) of *Convention 138*.

thereby making it part of the formal sector. Family-based work, however, is regulated by the internal family management and this makes it difficult for the government to regulate.⁷⁹ One cannot blame the drafters of the Convention for excluding it from the application of the Convention. Its exclusion, however, does not work in the best interests of the child, as it does not protect the child from exploitative labour in such sectors. Smolin⁸⁰ declares that the fact that small scale labour is not regulated means that children are pushed out of wage-earning plantations into small-scale plantations even though this still prevents school attendance.

Sweptson⁸¹ rightfully claims that a clear distinction should be made between articles 4 and 5. Sweptson alleges that, while Article 4 allows the exclusion of an occupation, article 5 allows for the exclusion of an entire economic sector.⁸² From a further analysis of the provisions, article 4 seems to apply to all ILO member states, both those in the developed and undeveloped countries. Article 5, however, seems to lean towards developing countries as they are insufficiently developed. Excluding an entire economic sector would not adequately protect children from exploitative labour practices. Employers could take advantage of such non-regulation and abuse children in those excluded or unregulated sectors. Despite the problems of implementation, all economic sectors should be fully addressed in legislation to avoid the possible exploitation of children in all economic sectors.

2.6 Article 6

Article 6 provides for an exception to the application of minimum ages, stipulating that they do not apply to work done by children in schools for general vocational or technical education or in other training institutions. This provision is commended for its flexibility in providing children with the chance of learning through work.

⁷⁹ Smolin 2000 *Hum Rts* Q 967.

⁸⁰ Smolin 2000 *Hum Rts* Q 967.

⁸¹ Sweptson 1982 *Int'l Lab Rev* 582.

⁸² Sweptson 1982 *Int'l Lab Rev* 584.

Sweptson⁸³ claims that many countries unfortunately do not have any regulation covering work done in institutions, and it is advisable that such regulations be promulgated to protect the large number of children participating in schools and institutions of learning. Sweptson's contentions are pertinent as children in some cases may be subjected to exploitative labour practices at school or institutions of learning. An example of that would be a child who undertakes a practical subject such as agriculture, who may be forced to grow crops in the blazing heat, using pesticides without the necessary instruction and protective clothing. As a form of punishment children may also be used in ways that are harmful to them, while the school bases its claim on the exception found in Article 6. The Convention is, unfortunately, not helpful in giving guidelines relative to what kind of activities children can or cannot undertake in schools. Setting out guidelines for the work of children in schools and institutions of learning is, however, critical if children are to be protected in schools and training institutions.

2.7 Article 7

Article 7 of this Convention states:⁸⁴

Member states through their national laws can permit children between the ages of 13 and 15 years of age to undertake light work. Such work should not be likely to be harmful to their health or development and should not prejudice their attendance at school, their participation in vocational orientation or training programmes.

There is a lack of definition or clarity relative to what work actually qualifies as light work. Light work is simply referred to as work that is not likely be harmful to the health or development of children and also not likely to prejudice their attendance at school. The lack of a definition could afford member states some form of flexibility in dealing with circumstances that are unique to themselves. Such definition may, thus, be influenced by environmental, cultural, social, political, and economic

⁸³ Sweptson 1982 *Int'l Lab Rev* 582-583.

⁸⁴ Article 7 of *Convention 138*.

circumstances.⁸⁵ The absence of a definition may, however, also cause confusion and a general misunderstanding of the concept. This article does not provide any operational guidance for assessing what work qualifies as light work.⁸⁶ Despite the confusion and lack of detail of this term, the ILO has on many occasions requested member states to adopt legislation and measures to establish and regulate the light work of children.⁸⁷ It can also be implied that this Convention does not permit the light work of children below the age of thirteen years, even if such employment is not hazardous to their health, morals, or development and does not prejudice attendance at school. The fact that children below the age of thirteen years cannot work, even if such work is not detrimental, seems somewhat unfair and restrictive. In many traditional African societies, children at a young age are taught skills through work.⁸⁸ In some African cultures children are considered to be adults upon reaching puberty, which triggers initiation, circumcision, and marriage.⁸⁹ This provision is thus incompatible with many cultures, and it places an unnecessarily strict prohibition of work by children below the age of thirteen. The ILO should reconsider the possibility of light work for children of all ages. Smolin⁹⁰ argues that the provision of light work assumes that children between the ages of twelve and fifteen years will be subject to compulsory education laws and enrolled in school. In India, however, approximately twenty percent of children between the ages of five and fourteen years are actually not in school.⁹¹ Smolin⁹² rightfully argues that for the large majority of children not in school it is difficult to see how their best interests

⁸⁵ Hilson in his analysis of child labour in small-scale mining communities in Africa comes to the conclusion that the light work of children differs according to individual circumstances, for instance, on whether a child is based in the rural or urban areas. In rural Sub-Saharan African environments the lack of transportation and machinery makes life extremely labour intensive. The simple domestic task of collecting water becomes a major problem when a child has to walk extremely long distances to collect the water. In an urban setting the availability of municipal water makes getting a glass of water very easy and does not take up much time. The light work of children will thus be affected by many differing factors such as accessibility, the local geography, the multiplicity of ethnic groups, languages and systems of socialisation and education. See Hilson 2010 *Wiley Journal of Community Practice* 447.

⁸⁶ Swepston 1982 *Int'l Lab Rev* 582. Some countries have been said to disagree with the concept of allowing a restricted kind of light work for younger children. Other countries have adopted provisions on light work and have set ages of between 10 and 15 years for such work.

⁸⁷ ILO 2012 www.ilo.org.

⁸⁸ See generally Bennet 1993 *Transformation* 32; Cobbah 1987 *Hum Rts Q* 322; Nhenga-Chakarisa 2010 *AHRLJ* 180.

⁸⁹ Nhenga-Chakarisa *Application of the International Prohibition on Child Labour* 92.

⁹⁰ Smolin 2000 *Hum Rts Q* 960.

⁹¹ Smolin 2000 *Hum Rts Q* 960.

⁹² Smolin 2000 *Hum Rts Q* 960.

are served by ruling out full-time employment.⁹³ Smolin⁹⁴ rightfully argues that the "desire of a child labour movement to support compulsory education cannot excuse a failure to provide labour standards which meet the actual needs of the current circumstances of many children." He further claims that the exceptions of light work will channel underaged children into unregulated sectors.

2.8 Article 8

Article 8 provides for an exception to the prohibition of employment or work for the purposes of artistic performances.⁹⁵ The article once again places a duty on the authorities to grant permits, and such permits must limit the number of hours during which employment or work is allowed, and prescribe the conditions under which it is permitted. No minimum age is laid down in the Convention for this type of work.⁹⁶

Abernethie⁹⁷ claims that the notion of childhood reflected in *Convention 138* focused mainly on European, American, and British ideas, history, and circumstances. National and international labour law at the end of the 19th and the beginning of the 20th centuries was focused on solving important questions regarding the work of women and children.⁹⁸ The shared belief that children should not have a natural right to work formed the basis for the establishment of the concept of a minimum age for admission to employment or work.⁹⁹ In the drafting of the Convention the Western countries dominated the ILO membership, and it has been difficult for many developing countries to ratify the Convention for economic and cultural reasons.¹⁰⁰

⁹³ While it would be likely to serve the best interest of the child to supply meaningful formal education, in the absence of such opportunities it makes little sense to reduce this age group to a significant degree of enforced idleness.

⁹⁴ Smolin 2000 *Hum Rts Q* 960.

⁹⁵ Article 8 reads as follows: "After consultations with the organisations of employers and workers concerned, where such exist, the competent authority may by permits granted in individual cases allow exceptions to the prohibition of employment of work provided in Article 2 of this Convention for such purposes as participation in artistic performances."

⁹⁶ Swepston 1982 *Int'l Lab Rev* 582.

⁹⁷ Abernethie 1998 *Int'l J Child Rts* 91. See also generally White 1994 *Development and Change* 852; Dessy and Pallage 2005 *Economic Journal* 68.

⁹⁸ Borzaga "Limiting the Minimum Age" 53.

⁹⁹ Borzaga "Limiting the Minimum Age" 53.

¹⁰⁰ Borzaga "Limiting the Minimum Age" 40.

To have a child withdrawn from work is simply not practical in many African cultures and *Convention 138* is biased in its idea of what children should do. The concept of childhood within African communities is that it is a time to grow, learn, build character, and acquire the social and technical skills necessary for participation in adulthood.¹⁰¹ African societies deem childhood as a period of training, as evidenced by the demands made by adults for children to perform tasks.¹⁰² Individual rights are balanced against the requirements of the group.¹⁰³ The responsibility of the child is a much broader concept for African families than it is for Western families.¹⁰⁴ As a child grows, duties involving looking after siblings, cleaning, and laundry are apportioned to a child. Some African cultures mark the end of childhood when new economic responsibilities are acquired and entrance into the institution of marriage takes place.¹⁰⁵ In African culture children can be considered to be adults upon entering puberty, which triggers initiation, circumcision and marriage.¹⁰⁶ A Xhosa male child becomes an adult when he has gone through circumcision rituals, during which he has to spend several days in the bush fending for himself through gathering and hunting.¹⁰⁷ Any man who does not go through this process is derogatively referred to as a child.¹⁰⁸ In one of his statements Bourdillion¹⁰⁹ cautions South Africa against a "simplistic adoption of romantic notions of childhood dominant in developed countries." He claims that there are evident cultural factors that indicate different ideas of childhood and what is appropriate for children.¹¹⁰ He reflects a negative attitude towards international standards to the extent that they are general and cannot be applied within the particular situation of children

¹⁰¹ Kaime *African Charter* 72. According to Kaime, amongst the Lomwe people children are taught from an early age to acquire skills that will be essential during their adult and married years. During play, young boys mimic the roles of adult men while they acquire wives and build homesteads. As they get older they are taught some economically useful skills in addition to the chores around the house. Thus at very young ages children are expected to contribute in terms of labour and the upkeep of the homestead. Children acquire gendered roles as girls imitate their mothers. See also Bhukuth 2008 *Development in Practice* 390.

¹⁰² Lloyd 2002 *Int'l J Child Rts* 184.

¹⁰³ Bennet 1993 *Transformation* 32.

¹⁰⁴ Cobbah 1987 *Hum Rts* Q 322.

¹⁰⁵ Nhenga-Chakarisa 2010 *AHRLJ* 180.

¹⁰⁶ See generally Kaime *African Charter*.

¹⁰⁷ Kaime *African Charter*.

¹⁰⁸ Kaime *African Charter*.

¹⁰⁹ Bourdillion 2009 *Werkwinkel* 116-118.

¹¹⁰ Bourdillion 2009 *Werkwinkel* 116-118.

everywhere.¹¹¹ *Convention 138* merely provides a minimum age that should be applied universally without considering cultural or traditional beliefs and practices.

White¹¹² criticises *Convention 138* for not adequately drafting provisions in the best interests of the child.¹¹³ He claims that the Convention implies that children are helpless victims or potential victims needing adults to intervene on their behalf. With an increase in worldwide poverty, widespread disease and the increase of child-headed households, it could be in the best interests of children to participate in some form of work to prevent starvation.¹¹⁴ White's contentions are valid in that in some instances children are forced into work due to socio-economic problems. Member states, however, need to take drastic measures to alleviate poverty. Such poverty alleviation is dependent on the availability of funds which member states may not always have. The real issue is not whether young people should be permitted to enter the workforce at the age of fourteen, fifteen or sixteen years, but rather how best to create an environment where it is considered neither necessary nor appropriate for children of any age to work excessive hours for inadequate pay in abusive and/or insanitary and unsafe conditions.

By the mid-1990s the ILO had taken note of the various problems with *Convention 138*, which was considered to be too complicated.¹¹⁵ It responded to this challenge by proposing a new convention to focus world attention and resources with the priority being placed on the most intolerable forms of child labour. In 1999 the

¹¹¹ Bourdillion 2009 *Werkwinkel* 116-118.

¹¹² White 1996 *repub.eur.nl*.

¹¹³ Hanson and Vandaele in the same vein criticise the Convention for not containing any reference to the principle of the right to freedom to work. They argue that the aim of the Convention in line with the *ILO Minimum Age Recommendation 146* (1973) is the total abolition of child labour. This is presented as a goal in itself, reflecting a protectionist approach towards child labour. Hanson and Vandaele 2003 *Int'l J Child Rts* 116.

¹¹⁴ See also Nhenga-Chakarisa 2010 *AHRLJ* 184.

¹¹⁵ Myers 2001 *Ann Am Acad Polit Soc* 52. According to Davidson, *Convention 138* was met with resistance owing to the "vested commercial interests and market pressures as well as the moral indifference and cultural attitudes". Davidson 2001 *Transnat'l L & Contemp Probs* 214. See also Hanson and Vandaele 2003 *Int'l J Child Rts* 116. Hanson and Vandaele claim that *Convention 138* aimed at a progressive eradication of child labour, and *Convention 182* emphasised that this long-term aim could not be maintained for one particular form child labour, ie the worst forms of child labour; hence the more precise and concrete obligations to implement the prohibition.

International Labour Conference unanimously adopted the *Worst Forms of Child Labour Convention 182* of 1999.

3 Worst Forms of Child Labour Convention 182 of 1999 (hereinafter referred to as Convention 182)

*Convention 182*¹¹⁶ came into force on 19 November 2000. This Convention represented the recognition for the first time in an international legal instrument of the need to protect children from being used to commit crime and to make it clear that this is a form of exploitation and abuse.¹¹⁷ The Convention is unusual, as it focuses more on criminal than on labour matters.¹¹⁸ The ultimate purpose of this Convention is the effective elimination of the worst forms of child labour.¹¹⁹ It takes into account the importance of free basic education and the need to remove the children concerned from all such work by providing rehabilitation and social integration structures.¹²⁰

3.1 Article 1

Article 1 states:¹²¹

Each member which ratifies this Convention shall take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency.

This provision indicates that there is a sense of urgency with regard to eliminating the worst forms of child labour.¹²² The terms "immediate" and "effective measures" and "as a matter of urgency" are indicative of the need to make the worst forms of

¹¹⁶ *ILO Worst Forms of Child Labour Convention 182* (1999).

¹¹⁷ Gallinetti *Assessment of the Significance of the International Labour Organisation's Convention 182* 106.

¹¹⁸ White claims that in the 1980s the official thinking about child labour experienced a shift from a purely abolitionist perspective towards one which could include the support or protection of children who work, even if such employment might contravene the law. White 1994 *Development and Change* 852. See also Dessy and Pallage 2005 *Economic Journal* 68.

¹¹⁹ Article 1 of *Convention 182*.

¹²⁰ Article 8. of *Convention 182*.

¹²¹ Article 1 of *Convention 182*.

¹²² Estacio and Marks 2005 *Journal of Health Psychology*; see also Myers 1999 *Childhood* 17.

child labour a priority for elimination.¹²³ The provision makes it possible to categorise child labour into the worst forms of child labour and those other forms which are tolerable.¹²⁴ Current international campaigns and trends also focus their attention on the worst forms of child labour while there appears to be a neglect of other forms of child work, such as the light work of children. Child work is a reality, especially in many African countries, where culture plays a major role. The worst forms of child labour need to be addressed urgently, but other forms of work such as the light work of children need to be revisited. The Convention is, however, commended for encouraging member states to go beyond the enactment of legislation to address the use of children in these forms of labour.

3.2 Article 2

In terms of article 2, the Convention applies to all persons under the age of eighteen years.

3.3 Article 3

The worst forms of child labour comprise:

- a) all forms of slavery, or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict;
- b) the use, procuring, or offering of a child for prostitution for the production of pornography or for pornographic performances;
- c) the use, procuring, or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties; and

¹²³ Noguchi 2010 *Int'l J Child Rts* 522.

¹²⁴ White 1999 *Childhood* 133-134.

- d) work done which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.¹²⁵

The first three categories (a-c) are termed "unconditional worst forms of child labour."¹²⁶ They are termed "unconditional" because improving the working conditions would never make them legal.¹²⁷ The exploitation of children in prostitution or the use of children in illicit activities or pornography would never be acceptable. On the other hand, the work described in article 3(d) is often referred to as hazardous work, or a conditional worst form of child labour.¹²⁸ The conditions of this type of work can be improved by altering the conditions under which such work is performed. An example of this would be a child working in a factory using machinery without safety guards. Such work has the potential to harm the health or safety of such child. The fitting of a protective device to the machine would make such work non-hazardous, and this activity would cease to fall under the 'worst forms of child labour' as defined by this article.¹²⁹

The wording of article 3(d) of *Convention 182* and the wording of article 3(1)¹³⁰ of *Convention 138* are similar. Gallinetti¹³¹ argues that non-permissible work or child labour referred to in *Convention 138* has been upgraded to a worst form of child labour under *Convention 182*. *Convention 182*, therefore, complements *Convention 138* on the minimum age required to participate in work that is hazardous.¹³²

One of the most striking differences between *Convention 182* and *Convention 138* is that *Convention 138* mentions specific industries, such as mining, quarrying,

¹²⁵ Article 3 of *Convention 182*.

¹²⁶ ILO *Child Labour* 46.

¹²⁷ ILO *Child Labour* 46; see also Kane 2009 *Global Social Policy* 180

¹²⁸ ILO *Child Labour* 47. See also Kane 2009 *Global Social Policy* 180; Nhenga-Chakarisa 2010 *AHRLJ* 161-196.

¹²⁹ ILO *Child Labour* 47.

¹³⁰ Article 3(1) of *Convention 138* describes employment or work which by its nature or the circumstances in which it is carried out is likely to jeopardise the health, safety, and morals of young persons.

¹³¹ Gallinetti *Assessment of the Significance of the International Labour Organisation's Convention 182* 172.

¹³² See Davidson 2001 *Transnat'l L & Contemp Probs* 216.

manufacturing, construction, electricity, gas and water.¹³³ *Convention 182* refers, in more general terms, to slavery, trafficking, forced/compulsory military recruitment, child prostitution, and drug trafficking.¹³⁴ *Convention 138* categorises industries that are not illegal *per se*. *Convention 182* categorises activities that are illegal and constitute criminal activity in nearly every country.¹³⁵ Davidson¹³⁶ applauds this Convention for not merely identifying relatively easy industries in the formal economy but for its stance in trying to root out the worst forms of child labour wherever they exist, in both the formal and informal economy.¹³⁷ It is unfortunately not always easy to root out such work as it may not always be visible.

With regards to the categories of worst forms of child labour, Smolin¹³⁸ has much to criticise. Firstly, he states that child pornography or prostitution is traditionally a criminal rather than a labour matter. The fact that child pornography and prostitution are crimes of vice makes them notoriously difficult to eliminate effectively and especially difficult for the labour movement.¹³⁹ Vice crimes are difficult crimes for law enforcement, because they are so pervasive and appear as victimless consensual transactions.¹⁴⁰ Smolin¹⁴¹ claims that the child labour movement is attempting to undertake a virtually impossible task, at least by traditional law enforcement standards. Even though the drug trade is illegal, it has still proven to be extremely resistant to criminal enforcement efforts.¹⁴² Given the illegal nature of the trade, it can hardly be expected that normal labour practices could have any effect in this area. Smolin¹⁴³ claims that it is comical even to consider a labour inspector citing a drug ring for the illegal use of children. The drug trade is unlikely to be eliminated in the foreseeable future. The ability of the world

¹³³ *Convention 138* art 5(3).

¹³⁴ *Convention 182* art 3.

¹³⁵ Davidson 2001 *Transnat'l L & Contemp Probs* 217.

¹³⁶ Davidson 2001 *Transnat'l L & Contemp Probs* 219.

¹³⁷ According to Dessy and Pallage, it is not without moral pain that parents send their children into such forms of labour. They would never do so in the absence of poverty. Dessy and Pillage 2005 *Economic Journal* 69.

¹³⁸ Smolin 2000 *Hum Rts* Q 961.

¹³⁹ Smolin 2000 *Hum Rts* Q 961.

¹⁴⁰ Smolin 2000 *Hum Rts* Q 961.

¹⁴¹ Smolin 2000 *Hum Rts* Q 961.

¹⁴² Smolin 2000 *Hum Rts* Q 961.

¹⁴³ Smolin 2000 *Hum Rts* Q 962.

community, or any nation, to have an influence on internal employment decisions in such a context are, in Smolin's¹⁴⁴ opinion, virtually non-existent. Estacio and Marks¹⁴⁵ are also enraged by the fact that those who subject children to hazardous conditions, the so-called employers, are the very same persons who are consulted to bring about appropriate mechanisms to monitor the implementation of the Convention. Such persons may go to great pains to hide children.¹⁴⁶ Governments really need, instead, to take a stand with regard to identifying offenders and punishing them.¹⁴⁷ Another obstacle could also lie in identifying children working in home-based and other informal sector work. In Guatemala, for example, the labour inspection system is unable to monitor large factories.¹⁴⁸ If they are unable to monitor formal industries, it is likely to be even more difficult to monitor the informal economy, which is often not as visible as the formal sector. The costs associated with inspecting workplaces may also be prohibitive for countries with minimal resources.¹⁴⁹

The complete absence from the document of a ban on the involvement of children in armed conflict is also rather conspicuous.¹⁵⁰ The Convention merely refers to forced or compulsory recruitment, but this limited provision fails to protect thousands of children who are lured into or coerced into warfare.¹⁵¹ Critics argue that military regimes may exploit the voluntary enlistment loophole in order to gain international legitimacy.¹⁵² Smolin¹⁵³ is not necessarily concerned about the issue of voluntary, forced, or compulsory recruitment, but he does state that the age of voluntary and compulsory conscription by children occurs in the context of rebel movements that lack any accountability to either their nation or the world community. This problem will end only when the conditions which produce internal rebellions cease. Smolin

¹⁴⁴ Smolin 2000 *Hum Rts* Q 973.

¹⁴⁵ Estacio and Marks 2005 *Journal of Health Psychology* 483.

¹⁴⁶ Estacio and Marks 2005 *Journal of Health Psychology* 483.

¹⁴⁷ Estacio and Marks 2005 *Journal of Health Psychology* 483.

¹⁴⁸ Estacio and Marks 2005 *Journal of Health Psychology* 483.

¹⁴⁹ Davidson claims that even in relatively affluent states, the underfunding of labour inspections is reported. It all boils down to the political will of the government. Davidson 2001 *Transnat'l L & Contemp Probs* 219.

¹⁵⁰ Davidson 2001 *Transnat'l L & Contemp Probs* 217-218.

¹⁵¹ Davidson 2001 *Transnat'l L & Contemp Probs* 217-218.

¹⁵² Davidson 2001 *Transnat'l L & Contemp Probs* 217-218.

¹⁵³ Smolin 2000 *Hum Rts* Q 961.

argues that *Convention 182* has entered an area where there is a lack of experience and those who enforce such instruments, such as labour inspectors, lack jurisdiction in military matters let alone control over the acts of armed rebels or combatants in a civil war.¹⁵⁴ Although *Convention 182* seems to have gone beyond *Convention 138* and has been widely accepted, its practical implementation is extremely complicated. The labour law sector is not adequately equipped to deal with such criminal matters.

3.4 Article 4

Article 4 states that:¹⁵⁵

- 1) The types of work referred to under Article 3(d) shall be determined by national laws or regulations by the competent authority after consultation with the organisations of employers and workers concerned taking into consideration relevant labour standards in particular paragraphs 3 and 4 of the Worst forms of Child Labour Recommendation 1999,
- 2) The competent authority after consultation with the organisations of employers and workers concerned shall identify where the types of work so determined,
- 3) The list of the types of work determined under paragraph 1 of this Article shall be periodically examined and revised as necessary in consultation with the organisations of employers and workers concerned.

The Convention encourages the determination of hazardous work at the national level. Member states will take into consideration problems that are unique to them, and the definition of hazardous work will therefore differ from country to country. Noguchi¹⁵⁶ claims that the determination of the nature of hazardous work is extremely important as a first step in clarifying what is to be eliminated and accordingly what concrete actions to take. The competent authority, which is usually an organ of government, has a positive duty to consult with employer and worker organisations. This provision creates the impression that governments are always willing to consult with employer and worker organisations. Sometimes governments or even the employer/worker organisations may refuse to consult with one another, thereby negatively affecting the implementation of the Convention. This article

¹⁵⁴ Smolin 2000 *Hum Rts* Q 961.

¹⁵⁵ Article 4 of *Convention 182*.

¹⁵⁶ Noguchi 2002 *Int'l J Child Rts* 358. See also Celek who generally describes the Convention but does not, however, critically analyse it. Celek 2004 *Geo J on Poverty L & Pol'y* 102.

makes reference only to worker and employer organisations, but does not take into account the possibility of the involvement of other role players and non-governmental organisations which could positively influence such consultations. Since the majority of the worst forms of child labour are crimes, consultation with law enforcement organs including the police could be vital. The periodic revision of such work is also necessary to make sure that such policies remain relevant and up-to-date.

3.5 Article 5

According to the terms of article 5, each member state should establish or designate appropriate mechanisms to monitor the implementation of the provisions giving effect to the Convention. According to Davidson,¹⁵⁷ Article 5 is critical for the success of this Convention as implementation is crucial for the elimination of child labour. Such mechanisms could have financial implications for governments that do not always have such resources.

3.6 Article 6

Article 6 stipulates that:¹⁵⁸

- 1) Each member shall design and implement programmes of action to eliminate as a priority the worst forms of child labour,
- 2) Such programmes of action shall be designed and implemented in consultation with relevant government institutions and employers' and workers' organisations taking into consideration the views of other concerned groups as appropriate.

The Convention is, thus, action oriented; it requires the design of programmes. Noguchi¹⁵⁹ praises *Convention 182* for its ability to protect children beyond the legislative provisions. She praises it for its ability to mobilise society and to engage the top leadership of each country. *Convention 182* goes far beyond a simple

¹⁵⁷ Davidson 2001 *Transnat'l L & Contemp Probs* 219.

¹⁵⁸ Article 6 of *Convention 182*.

¹⁵⁹ Noguchi 2010 *Int'l J Child Rts* 522-523.

prohibition of child labour. It demands a comprehensive and integrated approach so that it can break the vicious cycle of poverty, social inequality, and child labour.¹⁶⁰ Unlike the situation arising from the provisions of *Convention 138*, legislation is not, here, the only measure used to eliminate child labour. Governments are also required to collaborate not only with worker or employer organisations but also with other concerned groups.¹⁶¹ *Convention 138* does not consider other groups such as NGOs, but the wording of *Convention 182* and particularly the wording of this provision suggests that other appropriate groups can be included. Estacio and Marks¹⁶² claim that children are unfortunately usually given a passive role in such consultations. These scholars claim that children could be included as other concerned groups, but such provision is not sufficient to force the governments to consult with children themselves. Positioning children as passive recipients could make them feel incapable of promoting positive change in their lives and could result in their experiencing feelings of helplessness and incompetence.¹⁶³ I agree to a certain extent with Estacio and Marks: the government needs to have the political will to consult effectively with children. Practical lessons can, however, be learnt from the approach used in Burkina Faso. The child rights NGO, COBUFADE, initiated a Pilot Project for Child Labour in Burkina Faso.¹⁶⁴ The main objective of the research was to enhance knowledge of child labour in gold mining, and to use this knowledge for advocacy to ensure that child gold miners are recognised in national-level policy making. In this case the relevant ministries, regional and local

¹⁶⁰ Noguchi 2002 *Int'l J Child Rts* 361. See also Dessy and Pallage *Why Banning the Worst Forms of Child Labour Would Hurt Poor Countries*. Dessy and Pallage argue that, without appropriate accompanying policies, *Convention 182* on the worst forms of child labour should be rejected by poor countries. Through their studies they show that this *Convention* seems to worsen the situation of poor families who need the wages of their children to survive. They do acknowledge that, combined with a food-for-education programme, the *Convention* may boost the support for a ban on harmful forms of child labour because more time is spent in school rather than at work.

¹⁶¹ These groups can be parents' organisation, children's associations, or organisations for the defence of children. Hanson and Vandaele 2003 *Int'l J Child Rts* 115.

¹⁶² Estacio and Marks 2005 *Journal of Health Psychology* 483.

¹⁶³ Positioning children in a rather passive role further reinforces the construction of child labour as an object without a human face. Since they are on the receiving end, they merely accept the decisions made by the legislators even though such decisions may not necessarily be the best. See Estacio and Marks 2005 *Journal of Health Psychology* 483. Hanson and Vandaele argue that for the first time an international convention dealing with child labour explicitly recognises the inputs of children's wishes. They argue that the input, however, counts only in the implementation phase and not in the determination of the definition of what constitutes work which, by its nature or the circumstances in which it is carried out, is likely to be harmful to the health, safety, and morals of the child. Hanson and Vandaele 2003 *Int'l J Child Rts* 117.

¹⁶⁴ Groves 2005 *Child Development in Practice* 55.

government, parents, and children were consulted. A child-centered approach was used and children were trained to do the research and conduct interviews with a wide range of stake holders.¹⁶⁵ The children in this case were therefore not considered as passive role players and a wide interpretation of article six was used.¹⁶⁶ The training of the children gave them an opportunity to empower and also to build confidence in themselves. The children were able to reflect on their situation and they became more proactive in promoting their rights.¹⁶⁷ Groves¹⁶⁸ claims that the engagement of children in the project was a direct and powerful tool for sensitisation. The children remained in the community and were, therefore, able to continue giving information to others.¹⁶⁹

3.7 Article 7

Article 7 states that:¹⁷⁰

- 1) Each member shall take all necessary measures to ensure the effective implementation and enforcement of the provisions giving effect to this Convention including the provision and application of penal sanctions or, as appropriate, sanctions,
- 2) Each member shall, taking into account the importance of education in eliminating child labour, take effective and time bound measures to:
 - a) Prevent the engagement of children in the worst forms of child labour,
 - b) Provide the necessary and appropriate direct assistance for the removal of children from the worst forms of child labour and their rehabilitation and social integration,
 - c) Ensure access to free and basic education and wherever possible and appropriate vocational training for all children removed from the worst forms of child labour,
 - d) Identify and reach out to children at special risk,
 - e) Take into account the special situation of girls.

¹⁶⁵ Child labourers, and employers, parents, local and national officials, civil society, and organisations also took part in this study.

¹⁶⁶ The child rights NGO COBUFADE initiated a Pilot Project for Enquiries and elaboration of "An Action Programme for the Elimination of the Worst Forms of Child Labour"; see Groves 2005 *Child Development in Practice* 55.

¹⁶⁷ Groves 2005 *Child Development in Practice* 55.

¹⁶⁸ Groves 2005 *Child Development in Practice* 55.

¹⁶⁹ Groves 2005 *Child Development in Practice* 55.

¹⁷⁰ Article 7 of *Convention* 182.

Penal sanctions could serve as a deterrent to potential offenders of child labour laws. The Convention does not, however, provide a guideline as to what could be an appropriate sanction for a child labour offence, and discretion is given to member states. It is not clear, for instance, how harsh a penalty should be for engaging a child in work that is hazardous in terms of article 3(d), a conditional worst form of child labour, as compared with for example child prostitution, which is an unconditional worst form of child labour.

Education is also seen as an important tool in eliminating child labour. Compulsory education reduces child labour as it is easier to monitor school attendance than it is to monitor children in the workplace.¹⁷¹ As long as children do not need to attend school they will enter the labour force.¹⁷² Children compulsorily attending school would be less available for full time work. Parents would be encouraged to keep their children in school, and employers would be dissuaded from hiring them.¹⁷³ Providing free basic education also encourages parents to send their children to school, as they do not have to incur any other expenses. The provision states that free education should be provided where possible, which highlights the fact that in some situations it may not be possible to provide such free basic education.

In many rural areas there have been reports of unqualified teaching staff, lack of relevant textbooks, poor sanitation, and generally low learning standards.¹⁷⁴ In most instances, parents would prefer their children to be working on farms in order to acquire a skill that is practical and useful.¹⁷⁵ Some scholars argue that if policies

¹⁷¹ See Admassie 2002 *African Development Review* 262.

¹⁷² Edmonds and Shrestha 2012 *Journal of Labour Policy* 9. Edmonds and Shrestha argue that compulsory schooling laws indeed increase education yet have an ambiguous effect on work. They reduce income that can be used to increase living standards by adding school expenditure to the family budget and decreasing the time available for work. The reduced income actually increases the pressure on children to work.

¹⁷³ ILO *Child Labour* 113.

¹⁷⁴ ILO *Child Labour* 113. A study conducted in Egypt revealed that parents were requested to pay for textbooks, fees and uniforms that they could not afford, and even if they could afford them they were reluctant to make an investment because they saw little return from education in terms of preparing their children for future employment. Modisaotsile evaluates the situation of rural schools in South Africa. See Modisaotsile 2012 www.ai.org.za. See also the National Planning Commission 2010 www.info.gov.za. See also, generally, Khan and Khan 2013 *Journal of Studies in Social Sciences* 164-183; Anker 2000 *Int'l Lab Rev* 261.

¹⁷⁵ Admassie 2002 *African Development Review* 262.

were put in place to improve the educational structures of rural areas, many more parents would not be sceptical about sending their children to school.¹⁷⁶ Indeed, with the improvement of resources in schools, child labour could be reduced, but compulsory schooling alone cannot overcome the social and economic obstacles that combine to keep children out of school and in the labour force. Forcing children to stay in school may not necessarily be the best way to help children. Children come from impoverished backgrounds where extra income is needed for survival. Some children may actually seek work in order to pay for their school fees, and the complete ban on child labour could affect such children negatively. It is important, therefore, not only to focus on education as a tool for the eradication of child labour, but also to focus on the socio-economic and development problems that affect child labourers.

Indeed poor educational facilities are a deterrent to school attendance but improvement does not necessarily guarantee better attendance or even better participation in school. In addition, member states need be careful about assuming that all forms of child labour necessarily interfere with school attendance and performance. Full-time work is incompatible with school attendance and performance, but part-time child labour does not necessarily interfere when it occurs during the school holidays, or for a few hours a week during the school year. The number of hours children may work during the school year before their school performance suffers is uncertain but, according to Anker,¹⁷⁷ it is likely to be about two to three hours a day or up to fifteen hours per week.¹⁷⁸ Heady¹⁷⁹ deals with the effect that child labour has on the attendance of school children in Ghana. He claims that it is not too difficult to combine school and work. Part-time work has little effect on school attendance owing to the fairly small amount of work that most working children do. He does, however, come to the conclusion that working children in Ghana do not do as well in reading and mathematics tests as non-working children

¹⁷⁶ Anker 2000 *Int'l Lab Rev* 261. Anker alleges that, to assist policy formulation on child labour, information should be routinely collected on the strengths and weaknesses of education and schooling. He advocates that there be short tests that determine basic reading and writing skills to establish how much children actually learn at school.

¹⁷⁷ Anker 2000 *Int'l Lab Rev* 261.

¹⁷⁸ Anker 2000 *Int'l Lab Rev* 261

¹⁷⁹ Heady *What is the Effect of Child Labour on Learning Achievement?*

of the same ages.¹⁸⁰ Bourdillon *et al*¹⁸¹ assert that the available literature provides different answers on whether work outside school affects the time available for school work. Some studies indicate that work does not always detract from time spent on schoolwork. Some studies showed that work actually took time from leisure activities. On the other hand, work in marginalised communities in particular can be heavy and can interfere with schoolwork. Sometimes children do struggle to balance school and work.¹⁸² When drafting legislation, member states therefore need to determine adequately when work actually becomes harmful to education. Legislation should also address the situation during school holidays, when children are actually not attending school. Such legislation should also adequately determine the hours of work children may perform.

The Convention encourages the removal, rehabilitation, and social integration of child labour victims. The wording of the provision seems to place a burden on member states to remove children from areas in which they participate in the worst forms of child labour. Crimes such as child prostitution and drug trading are often crimes that would in most cases be hidden from daily life. It would therefore not be easy to remove such children from those contexts if they are not easily visible in them. One could interpret this clause to mean that children ought to be removed and taken to a place where they can be rehabilitated and socially integrated. The provision assumes that member states can afford to provide facilities where child labourers can be rehabilitated and later integrated into society. In addition, the Convention does not provide any kind of guideline that member states can use when initiating such rehabilitation and reintegration of child labourers. While it is commendable that victims for example of trafficking be removed, rehabilitated, and integrated, the practicality and effectiveness of this clause depends on many other factors that do not necessarily fall within the labour law arena. Such measures can also be costly, and member states that are financially unstable may not always be in a position to provide suitable facilities for the implementation of the measures.

¹⁸⁰ Heady *What is the Effect of Child Labour on Learning Achievement?* Children risk not having enough time for homework and being tired on school days.

¹⁸¹ Bourdillon Date Unknown plancanada.ca.

¹⁸² Bourdillon Date Unknown plancanada.ca.

The Convention states that children who are at special risk should be considered. It does not, however, define or give guidelines as to which children qualify as children at special risk. One can therefore accept that children from child-headed households and street children are possibly covered by this provision, as they are available and more prone to being coerced into some of the worst forms of child labour to make a living.¹⁸³ Besides this, it is also not easy to identify children at risk because in some cases children may participate in the worst forms of child labour even with the approval of their parents and guardians. All children are, therefore, at risk of being exploited, but the families of poorer communities are at higher risk than others. It is consequently critical that poverty be reduced in member states in order to prevent children from becoming involved in child labour to avoid starvation.

The Convention also takes into consideration the special situation of girls. The provision does not adequately describe why it considers girls as special. The Convention also does not provide information as to what the situation of girls actually is. A child, whether a boy or a girl, can be abused and subjected to the worst forms of child labour, merely by virtue of the fact that such a person is a child. Boys are as prone to exploitation as are girls, and the situation of girls should not necessarily be given preference. In terms of the ILO Global Report of 2010 the number of boys involved in child labour far exceeded the number of girls.¹⁸⁴ In the ILO global estimates of 2013, child labour was reported as being higher among boys than girls.¹⁸⁵ The report further states that the magnitude of decline in child labour among girls was greater than that of boys.¹⁸⁶ By placing an emphasis on the situation of girls there is the potential of neglecting the boy child, who is equally prone to such exploitation. The provision on the special situation of girls is specifically addressed in *Convention 182* and was not included in *Convention 138*.

¹⁸³ Although the *ILO Minimum Age Recommendation 146* (1973) is not a binding instrument, according to art 3 particular account should be taken of the needs of children and young persons who do not have families, or do not live with their own families, or of migrant children who live and travel with their families. Such children could, therefore, also qualify as children at special risk.

¹⁸⁴ ILO 2010 www.ilo.org.

¹⁸⁵ ILO 2013 www.ilo.org.

¹⁸⁶ ILO 2013 www.ilo.org.

3.8 Article 8

Article 8 stipulates that:¹⁸⁷

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

This provision makes this Convention unique. Traditionally international labour conventions were drafted with the intention of their being applicable within a ratifying state's national boundaries. In contrast, *Convention 182* encourages member states to assist one another in the fight against child labour. Statistics show that many industrialised countries, such as the Netherlands, the United States of America, and Germany have donated large sums of money that have been allocated to developing countries in order to improve development.¹⁸⁸ Noguchi¹⁸⁹ claims that article 8 does not create any obligation as regards the specific form or level of assistance. She claims the main emphasis is on partnership. Such partnership, if in the form of financial assistance, could be used for poverty eradication and the development of communities, reducing the need for families to rely on the labour of children.

Articles 9 to 16 of this Convention elaborate on the extensive registration, ratification, and denunciation process involved in this Convention. Estacio and Marks¹⁹⁰ allege that the process is too lengthy and time consuming, as it actually takes twelve months after the date of the ratification before the Convention comes into force. This contradicts the appeal to make the issue a matter of urgency. Member states can, however, take measures to implement the provisions of the Convention despite the lengthy process of its ratification.

¹⁸⁷ Article 8 of *Convention 182*.

¹⁸⁸ ILO 2010 www.ilo.org.

¹⁸⁹ Noguchi 2002 *Int'l J Child Rts* 365.

¹⁹⁰ Estacio and Marks 2005 *Journal of Health Psychology* 481.

Convention 182 is applauded for its efforts in catering for the needs of both industrialised and developing countries. Myers¹⁹¹ alleges that this Convention was so skilfully negotiated to garner support from both the industrialised and developing countries that it became the first ILO Convention ever adopted by unanimous vote. He claims it got there by intentionally targeting the worst forms of child labour, in a way that all essential actors could agree to. Myers¹⁹² also commends this Convention because it articulates its objectives and the responsibilities of the ratifying states in terms that are general but are amenable to monitoring, and that leave ample room for different societies to work towards implementation within their own concepts of childhood and child care.

Smolin¹⁹³ disapproves of *Convention 182* as it concentrates on core criminal actions, yet the ILO has very little competence in criminal justice systems. The fact that the ILO deals with the tripartite relationship between the employer, the government and the employee shows that its concerns are predominantly in the labour arena. After an analysis of *Convention 138*, the CRC and the *Optional Protocols to the CRC*, Gallenti¹⁹⁴ comes to the conclusion that *Convention 182* was unnecessary. She suggests that in adopting *Convention 182* and as the body entrusted with issues relating to labour and economic exploitation, the ILO might have been motivated by the need to be seen to address child economic exploitation. She thus argues that *Convention 182* could be said to be an attempt by the ILO to re-exert its authority in an area that had been quite easily and appropriately assimilated into the CRC. Hence, as a treaty, "*Convention 182* does not add measurably to the monopoly of normative standards already evident in international law."¹⁹⁵ The arguments of Smolin and Gallenti are true; the ILO seems to have encroached on an area in which it has little experience. Instead of addressing the possibility of tolerable child work, the ILO has focused on matters that are criminal. The ILO should rather address the work of children that can be deemed to be tolerable.

¹⁹¹ Myers 2001 *Ann Am Acad Polit Soc* 52.

¹⁹² Myers 2001 *Ann Am Acad Polit Soc* 52.

¹⁹³ Smolin 2000 *Hum Rts Q* 973.

¹⁹⁴ Gallinetti *Assessment of the Significance of the International Labour Organisation's Convention 182* 383.

¹⁹⁵ Gallinetti *Assessment of the Significance of the International Labour Organisation's Convention 182*.

4 Conclusion

Myers¹⁹⁶ claims that the content and style of *Convention 182* reflects lessons learnt from *Convention 138*. The content refers to the most intolerable forms of labour that no group or country would credibly defend and that virtually all societies would condemn.¹⁹⁷ He contends that "one could argue that this Convention has come closer to expressing a genuinely global consensus on child labour than *Convention 138*." This is evident in the fact that this Convention has received worldwide ratification. Hanson and Vandaele¹⁹⁸ base their argument on nearly similar ideas, and they claim that *Convention 182* in itself did not change the existing material law obligations concerning child labour. While the aim of *Convention 138* was the progressive eradication of child labour, *Convention 182* recognises the existence of tolerable forms of child labour and seeks to eliminate the worst forms of child labour. The worst forms of child labour should never be tolerated, but there seems to be a general neglect in international law relating to the tolerable forms of work from which children can benefit. *Convention 138* makes reference to light work but does not adequately determine what it is, and the ILO should rather focus on the definition of tolerable forms of labour such as the light work of children.

¹⁹⁶ Myers 2001 *Ann Am Acad Polit Soc* 52.

¹⁹⁷ Myers 2001 *Ann Am Acad Polit Soc* 52.

¹⁹⁸ Hanson and Vandaele 2003 *Int'l J Child Rts* 116.

Bibliography

Abernethie 1998 *Int'l J Child Rts*

Abernethie L "Child Labour in Contemporary Society: Why Do We Care?" 1998
Int'l J Child Rts 81-114

Admassie 2002 *African Development Review*

Admassie A "Explaining the High Incidence of Child Labour in Sub-Saharan Africa" 2002 *African Development Review* 251-275

Alston 1989 *Nord J Int'l L*

Alston P "Implementing Children's Rights: The Case of Child Labour" 1989
Nord J Int'l L 35-53

Anker 2000 *Int'l Lab Rev*

Anker R "The Economics of Child Labour: A Framework for Measurement" 2000
Int'l Lab Rev 257-280

Bennet 1993 *Transformation*

Bennet T "Human Rights and the African Cultural Tradition" 1993
Transformation 30-40

Boockmann 2009 *World Development*

Boockmann B "The Effect of ILO Minimum Age Conventions on Child Labour and School Attendance: Evidence from Aggregate and Individual-Level Data" 2009
World Development 679-692

Borzaga "Limiting the Minimum Age"

Borzaga M "Limiting the Minimum Age: Convention 138 and the Origin of the ILO's Action in the Field of Child Labour" in Pertile M, Nesi G and Nogler L (eds) *Child Labour in a Globalized World: A Legal Analysis of ILO Action* (Ashgate Aldershot 2008) 39-64

Bourdillon, White and Myers 2009 *Int J Sociol Soc Pol*

Bourdillon M, White B and Myers W "Re-Assessing Minimum-age Standards for Children's Work" 2009 *Int J Sociol Soc Pol* 106-117

Bhukuth 2008 *Development in Practise*

Bhukuth A "Defining Child Labour a Controversial Debate" 2008 *Development in Practise* 385-394

Celek 2004 *Geo J on Poverty L & Pol'y*

Celek B "The International Response to Child Labour in the Developing World International Response to Child Labour in the Developing World: Why Are We Ineffective?" 2004 *Geo J on Poverty L & Pol'y* 87-114

Cobbah 1987 *Hum Rts Q*

Cobbah J "African Values and the Human Rights Debate: An African Perspective" 1987 *Hum Rts Q* 309-331

Creighton 1997 *Comp Lab L J*

Creighton B "Combatting Child Labour: The Role of International Labour Standards" 1997 *Comp Lab L J* 362-388

Cullen "Child Labour Standards"

Cullen H "Child Labour Standards: From Treaties to Labels" in Weston BH (ed) *Child Labour and Human Rights: Making Children Matter* (Lynne Rienner London 2005) 87-115

Davidson 2001 *Transnat'l L & Contemp Probs*

Davidson M "The International Labour Organisation's Latest Campaign to End Child Labour: Will it Succeed Where Others Have Failed?" 2001 *Transnat'l L & Contemp Probs* 203- 224

Dessy and Pallage *Why Banning the Worst Forms of Child Labour Would Hurt Poor Countries*

Dessy E and Pallage S *Why Banning the Worst Forms of Child Labour Would Hurt Poor Countries* (Centre for Research on Economic Fluctuations and Employment Montreal 2001)

Dessy and Pallage 2005 *Economic Journal*

Dessy E and Pallage S "A Theory of the Worst Forms of Child Labor" 2005 *The Economic Journal* 68-87

Edmonds and Shrestha 2012 *Journal of Labour Policy*

Edmonds E and Shrestha M "The Impact of Minimum Age of Employment Regulation on Child Labour and Schooling" 2012 *Journal of Labour Policy* 1-28

Estacio and Marks 2005 *Journal of Health Psychology*

Estacio E and Marks D "Child Labour and the International Labour Organisation's Convention 182: A Critical Perspective" 2005 *Journal of Health Psychology* 475-484

Gallinetti *Assessment of the Significance of the International Labour Organisation's Convention 182*

Gallinetti J *An Assessment of the Significance of the International Labour Organisation's Convention 182 in South Africa with Specific Reference to the Instrumental Use of Children in the Commission of Offences as a Worst form of Child Labour* (LLD-thesis UWC 2007)

Groves 2005 *Child Development in Practice*

Groves L "Implementing ILO Child Labour Convention 182: Lessons From the Gold mining Sector in Burkina Faso" 2005 *Child Development in Practice* 49-59

Hanson and Vandaele 2003 *Int'l J Child Rts*

Hanson K and Vandaele A "Working Children and International Labour Law: A Critical Analysis" 2003 *Int'l J Child Rts* 73-146

Heady *What is the Effect of Child Labour on Learning Achievement?*

Heady CJ *What is the Effect of Child Labour on Learning Achievement? Evidence from Ghana* (UNICEF Innocenti Research Centre Florence 2000)

Hilson 2010 *Wiley Journal of Community Practice*

Hilson G "Child Labour in the Artisanal Mining Communities: Experiences from Northern Ghana" 2010 *Wiley Journal of Community Practice: Organizing, Planning, Development and Change* 445-473

Hobbs 2007 *Children and Society*

Hobbs S *et al* "Talking About Work: School Students' Views on their Paid Employment" 2007 *Children and Society* 123-135

ILO *Child Labour*

International Labour Organisation *Child Labour: A Textbook for University Students* (ILO Geneva 2004)

Joschi *Child Labour Issues*

Joschi S *Child Labour Issues, Challenges and Laws* (Akansa New Delhi 2006)

Kaime *African Charter*

Kaime T *The African Charter on the Rights and Welfare of the Child: A Socio-Legal Perspective* (PULP Pretoria 2009)

Kane 2009 *Global Social Policy*

Kane J "What the Economic Crisis Means for Child Labour" 2009 *Global Social Policy* 175-196

Khan and Khan 2013 *Journal of Studies in Social Sciences*

Khan M and Khan N "An Outlook of Educational Attainment and Literacy in Rural India: A Case Study" 2013 *Journal of Studies in Social Sciences* 164-183

Lloyd 2002 *Int'l J Child Rts*

Lloyd A "Evolution of the African Charter on the Rights and Welfare of the Child and the Gauntlet" 2002 *Int'l J Child Rts* 179-198

Mendelievich 1979 *Int'l Lab Rev*

Mendelievich E "Child Labour" 1979 *Int'l Lab Rev* 557-568

McKechnie and Hobbs 1999 *Childhood*

McKechnie J and Hobbs S "Child Labour: View From the North" 1999 *Childhood* 89-100

Myers 2001 *Ann Am Acad Polit Soc*

Myers W "The Right Rights? Child Labour in a Globalising World" 2001 *Ann Am Acad Polit Soc* 38-55

Neves and Du Toit 2013 *Journal of Agrarian Change*

Neves D and Du Toit A "Rural Livelihoods in South Africa: Complexity, Vulnerability and Differentiation" 2013 *Journal of Agrarian Change* 93-115

Nhenga-Chakarisa *Application of the International Prohibition on Child Labour*

Nhenga-Chakarisa T *Application of the International Prohibition on Child Labour in an African Context: Lesotho, Zimbabwe, and South Africa* (PhD-thesis UCT 2008)

Nhenga-Chakarisa 2010 *AHRLJ*

Nhenga-Chakarisa T "Who does the Law Seek to Protect and From What? The Application of International Law on Child labour in an African Context" 2010 *AHRLJ* 161-196

Noguchi 2002 *Int'l J Child Rts*

Noguchi Y "ILO Convention No 182 on the Worst Forms of Child Labour and the Convention on the Rights of the Child" 2002 *Int'l J Child Rts* 355-369

Noguchi 2010 *Int'l J Child Rts*

Noguchi Y "20 years of the Convention on the Rights of the Child and International Action against Child Labour" 2010 *Int'l J Child Rts* 515-534

Shanthakumari and Kannan 2010 *Journal of Contemporary Research in Management*

Shanthakumari S and Kannan P "Dissimilar of Customer Perception and Expectation Among Rural and Urban Markets" 2010 *Journal of Contemporary Research in Management* 105-113

Smolin 2000 *Hum Rts Q*

Smolin D "Strategic Choices in the International Campaign Against Child Labour" 2000 *Hum Rts Q* 942-987

Sweepston 1982 *Int'l Lab Rev*

Sweepston L "Child Labour: Its Regulation by ILO Standards and National Legislation" 1982 *Int'l Lab Rev* 577-594

White 1994 *Development and Change*

White B "Children, Work and 'Child Labour:' Changing Responses to the Employment of Children" 1994 *Development and Change* 849-878

White 1999 *Childhood*

White B "Defining the Intolerable; Child Work, Global Standards and Cultural Relativism" 1999 *Childhood* 133-144

Register of international instruments

African Charter on the Rights and Welfare of the Child (1999)

ILO Convention Fixing the Minimum Age for Admission of Children to Employment at Sea 29 (1920)

ILO Convention Fixing the Minimum Age for Admission of Children to Industrial Employment 5 (1919)

ILO Minimum Age Convention 183 (1973)

ILO Minimum Age Recommendation 146 (1973)

ILO Worst Forms of Child Labour Convention 182 (1999)

Minimum Age (Agriculture) Convention (1921)

Minimum Age (Fisherman) Convention (1959)

Minimum Age (Industry) Convention (Revised) (1937)

Minimum Age (Non-Industrial Employment) Convention (1932)

Minimum Age (Non-Industrial Employment) Convention (Revised) (1937)

Minimum Age (Sea) Convention (Revised) (1936)

Minimum Age (Trimmers and Stokers) Convention (1921)

Minimum Age (Underground Work) Convention (1965)

UN Convention on the Rights of the Child (1989)

Register of internet sources

Bourdillon Date Unknown plancanada.ca

Bourdillon M *et al*/ Date Unknown A Place For work in Children's Lives Paper Prepared on Behalf of PLAN plancanada.ca/downloads/A%20place%20for%20work%20in%20children's%20lives.pdf [date of use 3 May 2013]

Department of Labour 1994 www.dol.gov

Department of Labour 1994 By the Sweat and Toil of Children; The Use of Child Labour In American Imports www.dol.gov/ilab/media/reports/iclp/sweat/sweat.pdf [date of use 22 May 2013]

National Planning Commission 2010 www.info.gov.za

National Planning Commission 2010 Diagnostic Overview
www.info.gov.za/view/DownloadFileAction?id=147192 [date of use 25 Jun 2013]

ILO Date Unknown www.ilo.org

International Labour Organisation Date Unknown Introduction to the ILO
www.ilo.org/global/About_the_ILO/lang--en/index.htm [date of use 22 May 2013]

ILO 2010 www.ilo.org

International Labour Office 2010 Accelerating Action Against Child Labour:
Global Report under the Follow-up to the ILO Declaration on the Fundamental
Principles and Right at Work
www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/documents/publication/wcms_126752.pdf [date of use 03 Sep 2013]

ILO 2012 www.ilo.org

International Labour Office 2012 General Survey on the Fundamental
Conventions Concerning Rights at Work in Light of the ILO - Declaration on
Social Justice for a Fair Globalization, 2008: Report of the Committee of
Experts on the Application of Conventions and Recommendations Report III
(Part 1B) www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_174846.pdf [date of use 9 May 2013]

ILO 2013 www.ilo.org

International Labour Organisation 2013 Making Progress Against Child Labour
Global Estimates and Trends 2000-2012
www.ilo.org/ipecc/Informationresources/WCMS_221513/lang--en/index.htm
[date of use 11 Oct 2013]

Modisaotsile 2012 www.ai.org.za

Modisaotsile B 2012 The Failing Standard of Basic Education in South Africa
www.ai.org.za/wp-content/uploads/downloads/2012/03/No.-72.The-Failing-Standard-of-Basic-Education-in-South-Africa1.pdf [date of use 11 Oct 2013]

UN 2012 www.un.org

United Nations 2012 The Millennium Development Goals Report of 2012
www.un.org/millenniumgoals/pdf/MDG%20Report%202012.pdf [date of use on 9 May 2013]

UNICEF 2006 www.unicef.org

United Nations Children's Fund 2006 Millennium Development Goals: Goal Eradicate Poverty and Hunger
www.unicef.org/mdg/poverty.html [date of use 03 Sep 2013]

White 1996 repub.eur.nl

White B 1996 Globalisation and the Child Labour Problem
repub.eur.nl/res/pub/18923/wp221.pdf [date of use 3 Sep 2013]

List of abbreviations

AHRLJ	African Human Rights Law Journal
Ann Am Acad Polit Soc	Annals of the American Academy of Political and Social Science
CEACR	Committee of Experts on the Application of Conventions and Recommendations
Comp Lab L J	Comparative Labour Law Journal
CRC	Convention on the Rights of the Child
Geo J on Poverty L & Pol'y	Georgetown Journal on Poverty Law and Policy
Hum Rts Q	Human Rights Quarterly
ILO	International Labour Organisation / Office

Int'l J Child Rts	International Journal of Children's Rights
Int J Sociol Soc Pol	International Journal of Sociology and Social Policies
Int'l Lab Rev	International Labour Review
IPEC	International Programme on the Elimination of Child Labour
Nord J Int'l L	Nordic Journal of International Law
Transnat'l L & Contemp Probs	Transnational Law and Contemporary Problems
UN	United Nations
UNICEF	United Nations Children's Fund

**A CRITICAL ASSESSMENT OF THE *MINIMUM AGE CONVENTION* 138 OF
1973 AND THE *WORST FORMS OF CHILD LABOUR CONVENTION* 182 OF
1999**

RA Mavunga*

SUMMARY

The International Labour Organisation (the ILO) has regulated child labour through the *Minimum Age Convention* and the *Worst Forms of Child Labour Convention*. Such conventions aim at the reduction and eventual elimination of harmful labour practices. After the ratification of such conventions, many countries have adopted domestic laws prohibiting harmful labour. Despite such regulations, statistics prove that children still participate in harmful work. The main purpose of this article is to assess the ILO child labour conventions critically, so as to provide further understanding of the provisions of the text of such instruments. While the aim of the *Minimum Age Convention* was the progressive eradication of child labour, the *Worst Forms of Child Labour Convention* recognises the existence of tolerable forms of child labour, and it seeks to eliminate the worst forms of child labour.

KEYWORDS: Child labour, Worst forms of child labour, Child work, Hazardous work; Minimum age, International Labour Organisation, ILO

* Rufaro Audrey Mavunga. LLD Candidate, University of Pretoria; Assistant: Institute for International and Comparative Law in Africa (ICLA). Email: mavungarufaro@gmail.com.