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The Inevitability of Nimble Fingers? Law, Development, and Child Labor

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The Inevitability of Nimble Fingers? Law, Development, and Child Labor

Katherine Cox*

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I. INTRODUCTION

There are four hundred million children working throughout the world today.¹ Efforts to reduce the incidence of child labor have not worked; the figures are rising, not diminishing.² In response, countries and international bodies have become more resolute in their efforts to eradicate child labor's most intolerable forms. Various possible responses to the problem have been canvassed, including³ (1) the implementation of unilateral trading measures that condition trade upon eradicating child labor,⁴ (2)

1. The most recent International Labour Organization (ILO) data shows that seventy-three million children between ages ten and fourteen work. However, this survey did not include China and the industrialized nations, nor were all categories of child workers included in the survey. If all children under fourteen were included, the figure would rise to around 250 million children working worldwide, and if those who carried water for the family were counted the total would be around 400 million. The numbers would go even higher than this if children engaged in domestic work otherwise hidden from the statistician's view were included. See UNICEF, *Shadowy Figures, in THE STATE OF THE WORLD'S CHILDREN* (1997) [hereinafter *THE STATE OF THE WORLD'S CHILDREN*].

2. See *id.* at 28; *Combating the Most Intolerable Forms of Child Labour: A Global Challenge* 5, ILO (Amsterdam Child Labour Conference) (1997); *Governing Body Document on Child Labour 2*, ILO Doc. GB.264/ESP/1 (1995).

3. For an article which articulates some of the issues currently of concern in the area of child labor, see Owen Bowcott, *When Work is the Lesser of Two Evils*, *MANCHESTER GUARDIAN WKLY.*, Oct. 25, 1997, at 8.

4. See *infra* note 22 and accompanying text regarding the Harkin Bill; see also Timothy P. McElduff & Jon Veiga, *The Child Labor Deterrence Act of 1995: A Choice between Hegemony and Hypocrisy*, 11 *ST. JOHN'S J. LEGAL COMMENT.* 581 (1996).

the enforcement of labor standards through international trading agreements,⁵ (3) the increased use of corporate codes of conduct,⁶ and (4) the adoption of new international labor standards.⁷ These options have generated much debate. They have been discussed, and will continue to be discussed, at high levels. Perhaps, however, before taking any new measures, it is worth reflecting on and reconsidering the law already in place. Such an examination may help to determine why the present international framework has not been effective. Through an examination of current law it may be possible to promote more appropriate and direct steps towards combating child labor, while avoiding potentially harmful measures. Action that is based on incorrect assumptions about the causes of child labor and how it can be solved may lead to a worsening of the situation, and not an improvement.

This Article examines development issues that are raised in a legal analysis of international human rights law relating to child labor. In so doing it highlights some of the weaknesses of the present legal approach to the problem. In order to demonstrate better the weaknesses of the system, India is used as an example of a developing country where some of the development issues raised in the legal analysis arise. The second Part of this Article defines the concept of child labor. It undertakes a comprehensive analysis of international legal instruments that deal with the topic of child labor and touches on the relationship between child labor and the right to education. The third Part examines some of the development issues that arise out of that legal analysis and critiques the current legal approach. In particular it focuses on the causes of child labor that cannot be directly attributed to poor economic development and thus warrant a different approach. The final Part of the paper uses India as an example of a country, which, despite progressive legislation and policy, and improved

5. This possibility of a "social clause" in the World Trade Organization (WTO) to enforce core ILO labor standards was discussed at the WTO's Singapore Ministerial Conference in December 1996. Many States rejected the suggestion. For a general discussion on this topic, see Daniel S. Ehrenberg, *The Labor Link: Applying the International Trading System to Enforce Violations of Forced and Child Labor*, 20 YALE J. INT'L L. 361 (1995).

6. See generally Lance Compa & Tashia Hinchliffe-Darricarrere, *Enforcing International Labor Rights through Corporate Codes of Conduct*, 33 COLUM. J. TRANSNAT'L L. 663 (1995).

7. The ILO is presently working towards getting its members to adopt new labor standards, such as a total prohibition of work by very young children and special protection for girls, prohibiting the most intolerable forms of child labor (considered to be bonded child labor, child slavery, child prostitution and sexual exploitation, use of children in the production or trafficking of drugs or the production of pornography, and use of children in work that is manifestly dangerous to a child's safety, health, or morals). See *IPEC Fact Sheets: Action Against Most Intolerable Forms of Child Labor (AMIC)*, ILO (1997).

economic development, has not been able to make significant inroads into eradicating the practice of child labor.

II. CHILD LABOR

In the past decade, the issue of child labor has attracted increasing attention. In times past, the topic has been the focus of action at both the national and international levels, but it has never been an issue of major concern. However, since the mid-1980s, the world has paid greater attention to its most voiceless inhabitants.⁸ The adoption of the United Nations *Convention on the Rights of the Child* (CRC) by the General Assembly in 1989 illustrates this general trend.⁹ In addition to enumerating new rights, the Convention transformed the rights articulated in the earlier *Declaration of the Rights of the Child* into binding legal obligations.¹⁰

Within the United Nations' structure, both the United Nations International Children's Emergency Fund (UNICEF) and the United Nations Commission on Human Rights have done work in the area of child labor.¹¹ However, it is the International Labour Organization (ILO) in particular which has embarked on a mission to draw attention to this issue.¹² In 1991 the ILO introduced an International Programme on the Elimination of Child Labour (IPEC), which, by 1998, was operational in fifty countries.¹³ In March 1996 the ILO governing body put child labor on the agenda

8. See *infra* note 9. See generally INTERNATIONAL LABOUR ORGANIZATION, CHILD LABOUR: TARGETING THE INTOLERABLE 4 (1996) (explaining the effects of hazardous work on children).

9. See *Convention on the Rights of the Child*, U.N. GAOR, U.N. Doc. A/RES/44/25 (1989) [hereinafter CRC].

10. As of December 1997, all but two States had ratified the CRC (the US has signed but not ratified, Somalia has not signed or ratified). The earlier *Declaration of the Rights of the Child* was adopted by the General Assembly in 1959 and asserted the right of children to "special protection, opportunities and facilities for a healthy, normal development." See UNITED NATIONS, BASIC FACTS ABOUT THE UNITED NATIONS 205 (1995).

11. See generally, UNICEF, STATE OF THE WORLD'S CHILDREN (1997), which is a major report published by UNICEF concerned with the worldwide incidence of child labor. In 1993, the Commission on Human Rights adopted the Programme of Action for the Elimination of the Exploitation of Child Labour. See Report of the Special Rapporteur on the State of Children, Child Prostitution and Child Pornography, ¶ 55, UN Doc. Gen. A/49/478.

12. Indeed, the ILO was one of the few international organizations that was committed to the abolition of child labor before the mid-1980s.

13. See Governing Body Document, Operational Aspects of the International Programme on the Elimination of Child Labour (IPEC), ¶ 6, ILO DOC. GB.271/TC/2; see also Governing Body Document on Child Labor, ILO Doc. GB.264/ESP.11.

for the 1998 session of the International Labor Conference, with the objective of getting the international community to adopt a new convention aimed at prohibiting intolerable forms of child labor.¹⁴ Child labor has also been the focus of other international conferences.¹⁵

In addition to UN agencies, both non-governmental organizations (NGOs) and the media have increasingly focused on the plight of child workers. In recent times, the role of large multinational corporations in the exploitation of children has been particularly scrutinized. Reports from human rights organizations have highlighted the continuing use of child labor by sporting goods companies such as Nike and Reebok.¹⁶ As a result, Reebok created the corporate position of human rights officer, and it now grants human rights awards in an attempt to counteract criticism of its past record.¹⁷ Numerous international bodies are also beginning to take action. The Universal Federation of Travel Agents' Association (UFTAA), the World Tourism Organization, and the International Federation of Football Association (FIFA) are three international organizations

14. The Convention would supplement existing international instruments, would apply to all children under eighteen and would oblige member States to put an end to all forms of intolerable child labor. See *Combating the Most Intolerable Forms of Child Labour: A Global Challenge*, *supra* note 2. Such a Convention is thought to be needed as a supplement to Convention 138 (the *Minimum Age Convention*), which has been viewed by some member States as too complex and difficult to apply in its entirety; consequently, it has not had greater ratification. See ILO, *CHILD LABOUR: TARGETING THE INTOLERABLE*, *supra* note 8, at 23.

15. These conferences include: the World Summit for Children at the United Nations (1990), the World Congress against Commercial Sexual Exploitation of Children in Stockholm (August 1996), the Amsterdam Child Labour Conference (January 1997) and the International Conference on Child Labor in Oslo (October 1997). The Oslo International Action Plan, which came out of the conference, involves: [1] encouraging countries to ratify and implement international Conventions; [2] giving money to projects that assist children to go to school rather than work; [3] subsidizing families for loss of earnings; [4] combating poverty via aid programs; [5] examining existing development programs to improve their impact; and [6] improving the systems of gathering and monitoring information within developing countries so as to understand and tackle the causes of child labor more effectively. See Jonathan Steele, *Child Labour, Child Danger*, *MANCHESTER GUARDIAN WKLY.*, Nov. 23, 1997, at 24.

16. For example, two Hong Kong human rights organizations, the Asia Monitor Resources Centre and the Hong Kong Christian Industrial Committee, recently produced a report on the operations of four factories in southern China that make shoes for Nike, Reebok and Adidas, and employ children to do the work. See Margaret Harris, *Sweated Child Labour Still Fair Game*, *SYDNEY MORNING HERALD*, Sept. 23, 1997.

17. See Compa & Hinchliffe-Darricarrere, *supra* note 6, at 679-80.

which have agreed to take steps to combat child labor problems that come within the ambit of their operations.¹⁸

Regional trading groups and individual countries have similarly made moves to implement restrictive trading measures in an attempt to crack down on child labor. The European Union reached agreement on a new Generalized System of Preferences (GSP) in 1995. The new GSP bans the import of goods produced by child labor.¹⁹ Only countries that comply with the agreement receive access to European Union markets and, if they are developing countries, reduced tariffs.²⁰ In the United States, legislation has recently been passed banning imported goods made by forced child labor,²¹ and Senator Harkin has introduced a bill banning the import of products produced by child labor.²² Other countries, in particular those which have large numbers of children in the work force, have started to review their national child labor legislation and develop new child labor policies.²³ The effectiveness of these programs has varied from country to country, but there is no doubt that there is a new international awareness of the problem, and that a country's treatment of its children is now subject to greater international scrutiny.

To ascertain why the international community has now so comprehensively rejected child labor it is necessary to determine what is so abhorrent about it. Why do people react in horror when the topic of child labor is raised? What is so intrinsically bad about it? The appalling consequences of child labor are usually cited as providing clear and unequivocal evidence of why

18. FIFA has agreed to establish a code of labor practice for the production of goods licensed by FIFA with the International Confederation of Free Trade Unions, the International Textile, Garment and Leather Workers' Federation, and the International Federation of Commercial, Clerical, Professional and Technical Employees, that prohibits using child labor to produce such goods. UFTAA and the WTO have pledged to fight child sex tourism and child prostitution.

19. See ILO, *supra* note 8, at 5.

20. See *id.*

21. See Ed Vulliamy, *US to Ban Child Labour Imports*, MANCHESTER GUARDIAN WKLY., Oct. 12, 1997, at 4.

22. Senator Harkin first introduced the bill, known as the Child Labor Deterrence Act, in 1993 S. 613, 103d Cong. (1993). To date, he has introduced it four times and says that he will continue to do so until it becomes law. See 143 CONG. REC. S1575-78 (daily ed. Feb. 25, 1997) (statement of Sen. Harkin). In 1996, he introduced a bill known as the Child Labor Free Consumer Information Act, that informs and empowers consumers in the U.S., through a voluntary labeling system, to buy goods made without abusive and exploitative child labor. See S. 2094, 104th Cong. (1995); see also McElduff & Veiga, *supra* note 4, at 601-12.

23. These countries are Brazil, India, Indonesia, Kenya, Nepal, Pakistan, Philippines, United Republic of Tanzania, Thailand, and Zimbabwe. See ILO, *supra* note 8, at 5.

it is such an objectionable practice.²⁴ Certainly, the list of harms is significant: children who work suffer serious detriment to their health and development; they are exposed to hazardous working conditions; and they are easy targets for abuse and exploitation.²⁵ They also miss out on educational opportunities.²⁶ But if these causes for concern are removed (and admittedly it is unrealistic to suppose they ever would be) one is left to wonder whether there isn't something more fundamental at stake? If all that is bad about child labor is exposure to these harms, can there be anything wrong with a child working if she is not so exposed? Indeed, hasn't a child, like the rest of us, a right to work? If a child is working reasonable hours, in good conditions, is being well paid and treated, and being provided with training and educational opportunities "on the job," is it still possible to object to the practice of child labor?

Interestingly, UNICEF maintains that some work that promotes or enhances a child's development without interfering with schooling, recreation, or rest may be beneficial to a child.²⁷ The organization goes on to say that "to treat all work by children as equally unacceptable is to confuse and trivialize the issue and to make it more difficult to end the abuses. This is why it is important to distinguish between beneficial and intolerable work."²⁸ Nevertheless, while it may be true that some work done by children is beneficial, this author maintains that the very practice of child labor, as defined in this Article,²⁹ is wrong for a reason independent of its effects: a child is not an adult. A child is still growing and developing. Until a child has had the opportunity to mature, acquire independent thought and gain self-awareness, any work that she does must be regarded, in some sense, as "forced" labor. The further a child is from becoming an adult the more likely it is that this will be the case. This might explain why, to most minds, the idea of a six-year-old working is more objectionable than the idea of a twelve-year-old doing so.³⁰ If it is agreed that child labor is abhorrent, not only

24. See *id.* at 3 (noting that working children suffer significant and permanent growth deficits compared with children in school).

25. See *id.*

26. See *id.* at 6-7.

27. It is interesting to postulate as to how often all of these conditions would be met. See UNICEF, *THE STATE OF THE WORLD'S CHILDREN*, *supra* note 1, at 24.

28. *Id.* The author discusses the issue of 'good' and 'bad' work in Part II.B., under the heading of "Labor."

29. Child labor is defined at Part II.A.

30. As Siddiqi & Patrinos state, "Most would agree that a six year old is too young to work, but whether the same can be said about a twelve year old is debatable." See Faraaz Siddiqi & Harry Anthony Patrinos, *Child Labor: Issues*,

because its consequences are intolerable, but because children are unable to make free, informed decisions about the work that they do, it then becomes necessary to define child labor and to determine whether its practice can be regarded as a human rights violation.

A. *What is Child Labor?*

There is no international legal instrument that defines the concept of child labor. This is surprising given that the practice is so universally condemned. In fact, it has been observed that until child labor is conclusively defined it is hard to envisage how the practice will be abolished.³¹ Furthermore, because countries independently regulate child employment there is no uniform custom to draw on in this area at all. Accordingly, the scope of what is and isn't child labor is unclear.³² This will become evident in the discussion below.

The starting point for defining child labor is to ask who, in this context, is a child? The difficulty encountered in answering this question highlights one of the most fundamental problems of regulating child labor and goes to the heart of the dilemma of determining when it is acceptable for a child to work. As discussed above, child labor is considered abhorrent because a child of a certain age does not have the maturity to make decisions or exercise her free will, and is especially physically and psychologically vulnerable. In so far as this is true, all child labor must be regarded as "forced" labor. However, at some point, the very thing that makes the idea of child labor so abhorrent ceases to exist. In other words, there comes a time when a child is old enough and experienced enough to act independently and to choose to work. Indeed, at that time, not only might a child choose to work, but a child might also be considered to have a right to work.³³ The right to work is a fundamental one, tied up with core ideas about human dignity, upon which the international law of human rights is based.³⁴ It is not surprising then to

Causes and Interventions, 2 Doc. HCOWP 56; see also UNICEF, *THE STATE OF THE WORLD'S CHILDREN*, *supra* note 1, at 25 (discussion of "How old is a child?").

31. See *id.* at 2.

32. See *id.*

33. The right to work is provided for in Article 23(1) of the *Universal Declaration of Human Rights* and Article 6 of the *International Covenant on Economic, Social and Cultural Rights*. See *Universal Declaration of Human Rights*, G.A. Res. 217A(III) (1948); *International Convention on Economic, Social and Cultural Rights*, [hereinafter ICESCR], G.A. Res. 2200A (XXI) (1966).

34. See *id.*

find that the ILO considers that the eradication of child labor cannot occur without a "a campaign to create full, freely chosen and productive employment"35

One obvious starting point for determining what this age might be, is the *Convention on the Rights of the Child*.36 The Convention defines a child to be a human being under the age of eighteen years.37 In fact, many nations view age eighteen as the age when a person officially moves from childhood to adulthood, with its attendant legal and political responsibilities.38 Yet it is evident from a quick perusal of international documents and articles on child labor, that for the purposes of defining this term, the Convention and common practice of many countries are not useful guidelines. Indeed, if a working person of seventeen years were considered to be engaged in child labor there would be an extremely high incidence of this practice in the vast majority of industrialized nations. In fact, in Australia fifteen to seventeen year old children who do not work and are not in school are included in the unemployment statistics.39

An alternative starting point for determining when a person can be employed is the internationally recommended age for work, which has been set at age fifteen by the ILO.40 This is not a fixed age: the ILO *Minimum Age Convention*41 contains "flexibility clauses" which authorize the employment of children in "light work" from the age of thirteen and which have lower age limits for developing countries (fourteen years generally, twelve years for light work).42 It is worth noting that only forty-nine countries have ratified this convention, and thus it cannot be regarded as

35. ILO, CHILD LABOUR: TARGETING THE INTOLERABLE, *supra* note 8, at 25.

36. See CRC, *supra* note 9.

37. Article 1 of the Convention states "[f]or the purposes of the present Convention a child means every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier." See CRC, *supra* note 9, at art. 1.

38. These nations include Australia, United States of America, France, Germany, and the United Kingdom.

39. See Australian Bureau of Statistics, Labour Force Status - Annual Average <<http://www.statistics.gov.au.website>>.

40. Article 2 of the ILO Convention No. 138 (also known as the *Minimum Age Convention*) sets the general minimum age in normal circumstances at fifteen years. Where economic and educational facilities are insufficiently developed, the general minimum age is fourteen years. However, Article 3 sets the minimum age for hazardous work at eighteen years (sixteen years where certain work conditions are met). See MAC, *infra* note 41, at art. 2.

41. International Labour Organization, *ILO Convention 138 Concurring the Minimum Age for Admission to Employment* (visited Nov. 7, 1998) <http://childhouse.uio.no/childrens_rights/dci_ilo> [hereinafter MAC].

42. See *id.* at art. 17.

legally binding on the majority of member states.⁴³ However, it supplies a helpful guide for defining child labor, especially given that the other international documents dealing with the issue—the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) and the *Convention on the Rights of the Child*—leave the task of fixing a minimum employment age to State Parties.⁴⁴ In this sense then, the national laws of a country become extremely important in determining whether certain practices occurring in that country constitute child labor.

An interesting scenario arises if a country that is party to the ICESCR and CRC, but has not ratified the *Minimum Age Convention* or any other applicable ILO age-setting conventions, chooses to set its minimum employment age below that mandated by the ILO.⁴⁵ In this event, the international community does not appear to have any legal basis to object to that State's practice, except perhaps to argue that setting a very young employment age would be a breach of the obligation to interpret a treaty in "good faith."⁴⁶ In any event, it is clear that a "child," in the context of child labor, is not a fixed concept. In any particular instance it is necessary to consider not only the age of the individual, but also the work she is doing, and the country in

43. Forty-nine countries had ratified ILO Convention 138 as of August 15, 1996. See *id.*

44. Article 10 of the *International Covenant on Economic, Social and Cultural Rights* states that "[s]tates should also set age limits below which the paid employment of child labour should be prohibited and punishable by law." See ICESCR, *supra* note 33, at art. 10. Article 32 of the CRC states that member states shall "[p]rovide for a minimum age or minimum ages for admissions to employment" See CRC, *supra* note 9, at art. 32(a).

45. For example, in India, the country the author discusses later in this paper, the minimum age of employment has been fixed at fourteen years for hazardous forms of employment. This is set out in the *Child Labour (Prohibition and Regulation) Act*, which bans the employment of children in certain hazardous occupations. A child is defined as "a person who has not completed their fourteenth year of age." *Child Labour (Prohibition and Regulation) Act*, pt. I, § 2(ii) (India). There is no general prohibition of child labor in the Act, nor is there a minimum age limit for non-hazardous forms of employment. This Act accords with Article 24 of the Indian Constitution, which states that "[n]o child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment[.]" yet it is clearly not in line with the ILO minimum of eighteen years for hazardous employment set out in the *Minimum Age Convention*, which India has not ratified. See INDIA CONST. § 24. See *Child Labour (Prohibition and Regulation) Act*, *supra*, at art. 3.

46. Section 3 (Interpretation of Treaties), Article 31 of the *Vienna Convention on the Law of Treaties* states that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Clearly, such a country would have a lot of explaining to do when reporting to the relevant IESCR and CRC supervisory Committees. See THE VIENNA CONVENTION ON THE LAW OF THE TREATIES 49 (Dietrich Rauschnig ed., 1978).

which she lives, in order to determine whether she is a child. In this paper, however, for the sake of simplicity and clarity, the general ILO yardstick of 15 years is used to define a child.

B. *Defining Labor*

Defining "labor," in the context of child labor, is almost as difficult as defining a "child." Some practices can be easily identified as labor; mine and factory work are obvious examples. Other practices, however, are harder to define, and the process of drawing a line between work that is acceptable and work that is not is a tricky one.⁴⁷ By extrapolating from Article 32(1) of the *Convention on the Rights of the Child*, it is possible to define "labor" to be any work that is "likely to be hazardous, or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development."⁴⁸ This is a useful definition, as it focuses not only on the child's work, but also on the effect of that work on the child. It is important to make this connection because even seemingly innocuous work can thus be considered to be labor. This is especially true with respect to one of the main issues that arises in the context of defining labor, namely, how to categorize work done within the home. For example, should a child doing household chores or helping out on a family farm or business be considered to be engaged in child labor?

While this may not be a pressing issue in an industrialized country where children may simply take out the garbage and set the dinner table, in developing countries many children spend a large part of their lives working on the family farm or in the family business, and contributing to the management of the household.⁴⁹ In fact, most working children are unpaid family workers.⁵⁰ While much of this work may not be particularly dangerous or difficult,⁵¹ it does pose other risks, such as depriving these children of their right to education. Certainly, on its face, Article 32(1) of the CRC would appear to cover a child working in the home where that work interfered with the child's

47. UNICEF recognizes that some work that children do may be beneficial, especially if it promotes their development without hindering their schooling. See UNICEF, *THE STATE OF THE WORLD'S CHILDREN*, *supra* note 1, at 24.

48. CRC, *supra* note 9, at art. 32(1).

49. Indeed, girls, as a group, tend to work longer hours than boys due to the fact that they have higher demands placed on them in the homes. See ILO 1996 Press Kits: *Child Labour Today: Facts and Figures*, June 10, 1996 <<http://www.ilo.org/public/english/235press/plcits/child1.htm>>.

50. See *Governing Body Document on Child Labour*, *supra* note 2, at 3.

51. Many, however, would debate this. See *Governing Body Document on Child Labor*, *supra* note 2, at 8.

education or was harmful to her development.⁵² It is interesting to note, however, that Article 32(2)(a) only requires State Parties to fix a minimum age for admission to *employment*.⁵³ The 1986 Working Group made it clear that the word "employment" was specifically chosen here—and the word "work" removed—so as to make it clear that States did not have to regulate "work in or for the family."⁵⁴ This seems somewhat incongruous with the scope of the rights enumerated in Article 32(1).⁵⁵ The conclusion that can be drawn from this anomaly is that the CRC was not trying to eradicate child labor, but rather to protect children from its worst abuses and effects.⁵⁶ Article 32(2)(a) reflects the opinion of many countries that families should be able to rely on their children's assistance in the home or family business. Conventionally, employment outside the home is considered to pose a greater risk of harm than work in the home.⁵⁷ The ILO states, however, that the "evidence does not support so sweeping a generalization."⁵⁸

A further issue, closely linked to the issue of work in the home, is whether a child must be remunerated for her work in order for it to be considered "labor"?⁵⁹ Obviously, most children that work in the home or in the family business are not wage earners. As the majority of working children are in family enterprises, it follows that the majority of children are not in paid employment.⁶⁰ There does not appear to be any reason why an unpaid child worker would not be covered by Article 32(1). Indeed, there is no good reason to deprive a child who is not being paid of the same protection as one who is.

In this regard, there does not appear to be any reason to limit the use of the word *employment* in Article 32(2)(a) to paid employment.⁶¹ This is in contrast to Article 10(3) of the ICESCR, which directs States to set age limits below which *paid employment* should be prohibited.⁶² The fact that the drafters of

52. See CRC, *supra* note 9, at art. 32(1).

53. See *id.* at art. 32(2)(a).

54. THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD: A GUIDE TO THE "TRAVAUX PREPARATOIRES" 422 (Detrick ed., 1992) [hereinafter A GUIDE TO THE "TRAVAUX PREPARATOIRES"].

55. See *id.* at art. 32(1).

56. See discussion below at paragraph 1.2.2(III) on the *Convention on the Rights of the Child*.

57. See Governing Body Document on Child Labor, *supra* note 2, at 8.

58. In fact, the opposite may be true. See *Governing Body Document on Child Labor*, *supra* note 2, at 8.

59. It is interesting to note that the ICESCR only requires States to set age limits below which the *paid employment* of child labor should be prohibited.

60. Child workers in Latin America, however, are an exception to this rule. See *supra* note 39.

61. *Id.* at art. 32(2)(a).

62. See ICESCR, *supra* note 33, at art. 10(3).

the CRC must have had knowledge of Article 10(3) of the ICESCR tends to indicate they intended Article 32(2)(a) to have a broader application than Article 10(3). However, this discussion is largely academic. Given the Working Group's position on "work done in or for the family" and the fact that most unpaid child workers are working in the family, in practice it is clear that State Parties do not need to regulate the majority of children who are not being paid.

In conclusion, whether or not a child is engaged in "labor" must depend on the type of work the child is doing, the effect it has on her, and the amount of time she is expected to spend doing the work (i.e., does it interfere with her education). Whether a child is being paid, or is working in or for the family, does not alter the fact that she may be engaged in labor.⁶³ All that changes in the different scenarios are the obligations of states. Indeed, although states are only specifically required to regulate employment, they are obligated to protect children from all work that interferes with the child's education or is otherwise harmful to the child. In this Article all such harmful "work," paid or unpaid, that is carried out by a person under 15 years of age, is considered to be child labor.

It is important to note that this Article does not deal with the topic of child slavery or bonded child labor, which is commonly considered to be a form of slavery. Clearly these practices are so abhorrent that they cannot be justified under any circumstances. The international community universally condemns slavery, and its practice violates numerous international human rights conventions.⁶⁴ The intention of this Article is to focus on children who are working in situations that are not so blatantly abusive.

63. In other words, whether a child's "labor" is described as "work," "employment," or "paid employment" does not change the fact that it is labor. See discussion *supra* Part 1.B.2 on the use of these different terms in the relevant international legal instruments.

64. See Convention on the Suppression of Slave Trade and Slavery, Sept. 26, 1929, 46 Stat. 2183; Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 18 U.S.T. 3201; ILO Convention No. 29 (Forced Labor Convention); ILO Convention No. 105 (Abolition of Forced Labor Convention); the International Covenant on Civil and Political Rights (1966) Articles 8 and 24; International Covenant on Civil and Political Rights, Dec. 16, 1966, 6 I.L.M. 360 (1967), at art. 8, 24; the International Covenant on Economic, Social and Cultural Rights (1966), *supra* note 28, at arts. 7 & 10; the Convention on the Rights of the Child (1989), *supra* note 9, at arts. 32, 35, 36.

C. *Is Child Labor a Violation of a Human Right?*

There is no international legal document that prohibits child labor in and of itself.⁶⁵ Rather, there are international documents in which states recognize a child's right not to do certain kinds of work, and agree to take measures to ensure this right. As is discussed below, however, there are gaps in this legal framework. It cannot be comprehensively stated that a child has a right not to work. In fact the difficulty encountered in trying to define child labor can be linked to gaps in the law prohibiting its practice. Currently, the prohibition on child labor is more easily drawn from the recognition that the practice of child labor infringes on children's other rights. Thus, child labor "is a denial of the [child's] right to education and of the opportunity to reach full physical and psychological development."⁶⁶ The link between labor and education will be discussed in more detail below.

It is arguable that the international community has tackled the problem of child labor in a realistic manner. It has recognized that the practice cannot be eradicated overnight and has designed its laws accordingly. The documents are best read with this in mind. Prohibition and regulation are directed towards paid employment outside the home or family enterprise, as it is paid employment that is usually thought to encompass the most intolerable forms of child labor. It comes as no surprise, then, to learn that there are forms of child labor that are not covered by the international legal framework and that children may, in many instances, do such work legally.

1. Overview of the International Community's Position on Child Labor

It is only in the last fifteen years that the international community has become increasingly active in the area of child labor. Nevertheless, for years before that it had been a topic of concern. The ILO adopted one of the first conventions prohibiting child labor in 1919, the year of the ILO's creation, and it has adopted numerous conventions dealing with the problem since

65. This legal analysis assumes that there is no customary international law prohibiting child labor. Although it might be possible to argue that such a norm exists (through an examination of states' practices and the sense of legal obligation accompanying that practice) it is unlikely that a prohibitive norm could be found in the light of so much inconsistent state practice. See Timothy A. Glut, Note, *Changing the Approach to Ending Child Labor: An International Solution to an International Problem*, 28 VAND. J. TRANSNAT'L L. 1203, 1212-17 (1995).

66. ILO, CHILD LABOUR: TARGETING THE INTOLERABLE, *supra* note 8, at 7.

then.⁶⁷ There is no unanimous agreement among countries on how to tackle the issue. Not surprisingly, some commentators and countries argue that developing countries need the chance to compete on the global market with lower labor costs until they are developed enough to have "outgrown" the practice of child labor.⁶⁸ They point to the fact that many of today's industrialized countries have a history of active child labor and that their successful industrialization may arguably be attributed to the use of children in the work force.⁶⁹ In support of this argument, some commentators assert that child labor is even a "fundamental evolutionary stage in the development of a country."⁷⁰ During the Industrial Revolution in England, for example, the contributions of children to their families' income was comparable to present day levels in Peru and Paraguay.⁷¹ Thus, it is arguable that as a country develops, the role of children within the country changes from being an economic asset (bringing in income), to being an economic burden (through increased consumption). As the role of children changes, the problem of child labor naturally diminishes. This view, however, fails to acknowledge the role of national child labor laws in the decrease of child labor in industrialized countries and the movements within those countries to outlaw the practice.⁷² If this is the case, international instruments and national laws dealing with the issue of child labor may have a vital role to play in its elimination.

67. ILO Convention No. 5 (*Minimum Age (Industry) Convention*) prohibits the work of children under the age of fourteen in industrial establishments. The International Labour Office was established in 1919 under the Treaty of Versailles. The International Labour Organization (as it then became known) became the first specialized agency associated with the U.N. in 1946. See UNITED NATIONS, BASIC FACTS ABOUT THE UNITED NATIONS, *supra* note 10, at 274.

68. See generally Claudia R. Brewster, *Restoring Childhood: Saving the World's Children from Toiling in Textile Workshops*, 16 J.L. & COM. 191, 199-200 (1997); Timothy A. Glut *supra* note 65, at 1207-08, 1230 & n. 194.

69. Some commentators argue that, at certain levels of poverty in developing countries, child labor augments national economic development. See Siddiqi & Patrinos, *supra* note 30, at 9.

70. See *id.*

71. See *id.*

72. For example, during the 1800s the U.K. Parliament passed a series of Acts abolishing various forms of child labor. See WOODWARD, *THE AGE OF REFORM, 1815-70*, 11-12, 143-50 & 587-90 (1938). In the United States, the National Child Labor Committee was formed to combat child labor and was an active campaigner in the field. See generally TRATHER, *CRUSADE FOR THE CHILDREN: A HISTORY OF THE CHILD LABOR COMMITTEE & CHILD LABOR REFORM IN AMERICA* (1970).

2. Applicable and Relevant International Human Rights Law

The trend towards international legal condemnation and regulation of the practice of child labor can be traced to 1919 with the adoption of ILO Convention No. 5, which prohibits the work of children under the age of fourteen in industrial establishments.⁷³ In the decades that followed, nine sectoral ILO Conventions on the minimum age of admission to various areas of employment were adopted along similar lines.⁷⁴ The first United Nations document which touches on the issue is the *Universal Declaration of Human Rights* [hereinafter UDHR], adopted by the General Assembly in 1948.⁷⁵ While child labor is not dealt with in this document, the right to education is for the first time formally recognized.⁷⁶ The link between the right to education and child labor will be disclosed below.

The most pertinent legal instruments specifically dealing with child labor have all come into effect since 1967 with the adoption of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), the *Minimum Age Convention* (MAC) and the *Convention on the Rights of the Child* (CRC).⁷⁷ These documents are considered to be legally binding on all states that have ratified them, and they generally map out the international community's position on child labor.⁷⁸ As with most of the international law on human rights, the international provisions are to be implemented by national law.⁷⁹ There is a dichotomy, particularly within the

73. ILO Convention No. 5, *Minimum Age (Industry) Convention* (1919).

74. These were established upon similar lines to Convention No. 5 and can be cited as follows: Convention No. 7 (*Minimum Age (Sea) Convention* 1920); Convention No. 10 (*Minimum Age (Agriculture) Convention* 1921); Convention No. 15 (*Minimum Age (Trimmers and Stokers) Convention* 1921); Convention No. 33 (*Minimum Age (Non-Industrial Employment) Convention* 1932); Convention No. 58 (*Minimum Age (Sea) Convention (Revised)*, 1936); Convention No. 59 (*Minimum Age (Industry) Convention (Revised)* 1937); Convention No. 60 (*Minimum Age (Non-Industrial Employment) Convention (Revised)* 1937); Convention No. 112 (*Minimum Age (Fishermen) Convention*, 1959); Convention No. 123 (*Minimum Age (Underground Work) Convention*, 1965).

75. See G.A. Res 217A (III), 3d Sess., Supp. No. 16, U.N. Doc. A/810 (1948).

76. UDHR Article 26(1) reads: "Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory." See *id.* at art. 26(1).

77. ICESCR, *supra* note 34; International Labour Organization, *Minimum Age Convention* (visited Jan. 20, 1999) <http://www.ilo.org/public/english/90travai/cis/ilo_standards/c138.htm>; CRC, *supra* note 9.

78. See generally GERALDINE VAN BUEREN, *THE INTERNATIONAL LAW ON THE RIGHTS OF THE CHILD*, 6-21 & 262-75 (1995).

79. LOUIS HENKIN, *THE AGE OF RIGHTS* 17 (1990).

CRC and the ICESCR, between the rights recognized in the documents and the obligations imposed on State Parties.⁸⁰ This is not a feature unique to the international law of child labor; a disparity between rights recognized and obligations imposed can be found to exist in many of the subject areas of the ICESCR.⁸¹

The analysis presented in this Article deals in some detail with the relevant provisions of: (1) *The International Covenant on Economic, Social and Cultural Rights* (1966); (2) *The ILO Minimum Age Convention* (1973); and (3) *The Convention of the Rights of the Child* (1989).⁸² This author particularly focuses on the extent to which children can and cannot work, and whether a right to education is recognized under each of the legal instruments. The Article examines the corresponding obligations that are imposed on State Parties, and discusses the legal force of each of the documents. The Article also undertakes a comparative analysis of the respective strengths and weaknesses of these three instruments, in light of the rights recognized and obligations imposed.

As a preface to examining these legal instruments it is important to draw attention to one feature they share. It quickly becomes evident when interpreting the relevant Articles that there is a need to clarify what is meant by the various uses of the words "work," "employment," and "paid employment." All of these terms are used in the documents and it is clear that in each instance the particular choice of word is important. Clearly, in the minds of the drafters these words have different meanings and it is not intended that they be applied interchangeably. A dictionary definition of "employment" defines the word to mean "the act of employing someone"; "employ" is in turn defined to mean "to use or engage the services of" someone.⁸³ Work, however, is defined as labor or toil, although it can be used to mean employment.⁸⁴ Thus, not all work is employment, and not all employment is paid employment. It is worth keeping the relative scope of these terms in mind when considering the law in this area, particularly

80. This is because under both the CRC and the ICESCR, states only have a duty to progressively achieve, to the maximum of their available resources, the full realization of the economic, social, and cultural rights recognized. See ICESCR art. 2(1); CRC art. 4.

81. ICESCR art. 2(1) applies to *all the rights* enunciated in the ICESCR, except those rights whose realization is not hindered through a lack of resources. See CRAVEN, *infra* note 86, at 101-02.

82. See ICESCR, *supra* note 34; International Labour Organization, *Minimum Age Convention* (visited Jan. 20, 1999) <http://www.ilo.org/public/english/90travail/cis/ilo_standards/c138.htm>; CRC, *supra* note 9.

83. WEBSTER'S THIRD INTERNATIONAL DICTIONARY: UNABRIDGED 743 (1993).

84. See *id.*

because child labor, in this paper, is defined to encompass all three terms.⁸⁵

a. International Covenant on Economic Social and Cultural Rights (1966)

The ICESCR was adopted by the General Assembly of the United Nations on December 16, 1966, and entered into force on January 3, 1976.⁸⁶ The ICESCR recognizes the right to education that is compulsory at the primary level.⁸⁷ It states that children should be protected from economic and social exploitation and from employment in work that is harmful to their morals or health, or is dangerous to life, or is likely to hamper their normal development.⁸⁸ Such employment should be punishable by law. The ICESCR also declares that states should set age limits "below which the paid employment of child labour should be prohibited and punishable by law."⁸⁹ Article 10(3) of the ICESCR covers children's "employment in work," indicating that this Article is directed towards children that are "employed" and not those working in other contexts.⁹⁰ Furthermore, states only have a duty to set age limits for "paid employment," which is even narrower than the right recognized (i.e., the right to be protected from all employment - paid or unpaid - in work that is harmful).⁹¹ Clearly, the ICESCR does not comprehensively prohibit child

85. See *infra* Part II.A.

86. See MATTHEW C. R. CRAVEN, *THE INTERNATIONAL COVENANT ON ECONOMIC SOCIAL AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT* 22 (1995).

87. See ICESCR *supra* note 33, at art. 13. Article 13(1) reads: "The States Parties to the present Covenant recognize the right of everyone to education." Article 13(2)(a) reads: "The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right . . . primary education shall be compulsory and available free to all."

88. See ICESCR, *supra* note 33, at art. 10(3).

89. Article 10(3) reads:

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

See *id.*

It is interesting that States only have to set age limits on the paid employment and not employment per se. This means that one of the largest areas of child labor, the unpaid child working in the family home or business, is not covered.

90. ICESCR, *supra* note 33, at art. 10(3).

91. *Id.*

labor nor does it require states to implement legislation comprehensively prohibiting it.

The prevailing feature of the ICESCR is the "softness" of its implementation obligations. In Article 2(1) of the Covenant a State Party agrees to take steps toward implementing the ICESCR "to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized."⁹² Thus, states need not immediately secure the rights enumerated but rather can work towards them as they gain the means to do so. This can be contrasted with the *International Covenant on Civil and Political Rights* (ICCPR), which has stricter and more immediate implementation obligations.⁹³ Due to the "softness" of its provisions, the extent to which the ICESCR can be regarded as creating binding legal obligations on State Parties is questionable.

In a General Comment, dealing with the nature of State Parties' obligations under section 2(1) of the ICESCR, the Committee on Economic, Social, and Cultural Rights stated that:

[T]he fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in light of the overall objective, indeed the *raison d'être*, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal.⁹⁴

It follows, then, that where the realization of rights is not hindered through lack of resources, states are required to fulfill their duties under the Covenant immediately.⁹⁵ The Committee is also of the opinion that all states are subject to a minimum core obligation to ensure "minimum essential levels of each of the rights" but does not elaborate on what this minimum level is.⁹⁶

92. *Id.* at art. 2(1).

93. For example, Article 2 of the ICCPR requires States to "undertake to respect and to ensure" all rights in the present covenant, to "take the necessary steps" to give effect to rights and ensure "effective" remedies. See *The International Covenant on Civil and Political Rights*, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), reprinted in 6 I.L.M. 368 (1967).

94. ICESCR, *General Comment No. 3 (1990): The Nature of States Parties' Obligations* [hereinafter *General Comment No. 3*], reprinted in CRAVEN, *THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT* 375 (1995).

95. CRAVEN, *supra* note 86, at 101-02.

96. *General Comment No. 3*, *supra* note 94, at 375.

Interestingly, in the same General Comment, the Committee identifies Articles 10(3) and 13(2)(a) as being "capable of immediate application by judicial and other organs in many national legal systems."⁹⁷ This suggests that states with the legislative and judicial framework to implement these Articles should do so immediately, even if they do not have the economic means to effectively implement such laws and cope with the expense of education and the eradication of child labor. In effect the right is still being progressively implemented, even though some immediate legislative and judicial steps have been taken in that direction.⁹⁸

Interestingly, Article 10(3) does not refer to "rights." Instead it states that children *should* be protected from economic and social exploitation and that certain employment *should* be punishable by law.⁹⁹ It is possible to query if, in the absence of any mention of specific rights, state obligations are therefore diminished. However, given that the entire ICESCR is couched in legal terms, there does not seem to be any reason for assuming that Article 10(3) was intended to be any less of a legal obligation.

As Craven states:

The mere fact that article 10 makes no specific reference to 'rights' does not prevent those provisions being treated in the same way as the other provisions in the Covenant It should be assumed that as article 2(I) was intended to outline State obligations with respect to all the substantive articles, it must also apply to article 10 notwithstanding the lack of specific reference to 'rights.'¹⁰⁰

Ultimately, however, given that there is no immediate implementation requirement, it is doubtful that there would be legal ramifications for a state that had not yet succeeded in carrying out the measures outlined in Article 10(3). The lack of legal ramifications, coupled with the fact that the Covenant does not cover all forms of child labor and thus is not geared towards eradicating child labor altogether, means that the legal force of

97. *Id.* at 374.

98. Schachter has written that the importance of domestic legislation that gives effect to international duties in the ICCPR should not be underestimated, even if in practice such legislation does not immediately ensure effective remedies, as it "affords a ground not only for international criticism but also for internal demands." See Oscar Schachter, *The Obligation to Implement the Covenant in Domestic Law*, in *THE INTERNATIONAL BILL OF RIGHTS* 331 (Louis Henkin ed., 1981). The same can be said of domestic legislation enacted pursuant to the ICESCR that is not immediately effective in producing results.

99. See ICESCR, *supra* note 33, at art. 10(3).

100. CRAVEN, *supra* note 86, at 135-36.

the ICESCR, with respect to child labor, cannot be regarded as significant.¹⁰¹

b. The Minimum Age Convention (1973)

In 1973, the ILO adopted the *Minimum Age Convention*.¹⁰² The ILO considered that the time had come to establish a general instrument dealing with the subject of the minimum age of admission to employment.¹⁰³ The Convention (formally known as ILO Convention No. 138) was designed to “gradually replace the existing [instruments] applicable to limited economic sectors, with a view to achieving the total abolition of child labour.”¹⁰⁴ It requires Member States to set various minimum ages for employment and work, dependent on both the type of work that the child is engaged in, and the country in which she lives.¹⁰⁵ Article 2(3) sets the general minimum age at fifteen years, although Article 2(4) states that countries with insufficiently developed economies may set a minimum age of fourteen years.¹⁰⁶ There is a blanket prohibition on “employment or work” of persons less than eighteen years in work likely to jeopardize the health, safety, or morals of young persons, although, if certain conditions are met, the age is lowered to sixteen years.¹⁰⁷ Article 7(1) allows children above the age of thirteen years to perform light work, although Article 7(4) lowers the age to twelve years for developing countries.¹⁰⁸

Unlike the ICESCR and the CRC, the *Minimum Age Convention* explicitly promotes the goal of eradicating child labor.¹⁰⁹ Minimum ages are fixed in relation to both “employment” and “work,” and both terms are used throughout the document.¹¹⁰ In this respect the convention has the widest scope.¹¹¹ However, although the document appears to be

101. Its moral and political weight may be significant, however. *See id.*; ICESCR, *supra* note 33.

102. MAC, *supra* note 41.

103. *See id.*

104. MAC, *supra* note 41, at pmb1.

105. *Id.* at art. 2(1), 3(2).

106. *Id.* at art. 2(3), 2(4).

107. Article 3.1 establishes the prohibition. *See id.* at art. 3(1). Article 3(2) states that the type of employment to which Article 3(1) applies shall be determined by national laws or regulations. *See id.* at art. 3(2). Article 33 allows the minimum age to be lowered to sixteen years. *See id.* at art. 3(3).

108. MAC, *supra* note 41, at art. 7(1), 7(4).

109. *See id.* at pmb1.

110. *See* MAC, *supra* note 41.

111. The *Minimum Age Convention* and the *Minimum Age Recommendation* are considered to be the most comprehensive international instruments and

comprehensive, its application can be severely limited. For example, member parties can exclude application of the Convention to categories of employment as long as the work in question is not likely to jeopardize the health, safety, or morals of young persons.¹¹² The scope of the Convention can be further limited by developing countries, particularly in the areas of "family and small scale holdings producing for local consumption and not regularly employing hired workers."¹¹³ Clearly, this provision is designed to allow children in developing countries to work in and for the family.

In summary, even a country that has ratified the Convention can extensively limit its operation. Its legal force, therefore, cannot be viewed as comprehensive. It is also worth drawing attention to the ILO *Minimum Age Recommendation*, which calls on states to raise the minimum age of employment to sixteen years.¹¹⁴ Recommendations are not legally binding and are only regarded by the ILO as a guide for states in formulating national policy.¹¹⁵ Thus, while some might regard the age recommendation as a "strong call to action on the part of member states," it cannot be treated as any more than that.¹¹⁶

c. The Convention of the Rights of the Child (1989)

The CRC was adopted by the General Assembly of November 20, 1989 and entered into force on September 2, 1990.¹¹⁷ The CRC recognizes the child's right to an education, which is compulsory at the primary level.¹¹⁸ It recognizes the child's right

statements on child labor. See UNICEF, *THE STATE OF THE WORLD'S CHILDREN*, *supra* note 1, at 19.

112. See MAC, *supra* note 41, at art. 4(1)-(2).

113. See *id.* at art. 5.3. Article 5(3) also states that the Convention shall be applicable in the areas of mining and quarrying, manufacturing, construction, electricity, gas and water, sanitary services, transport, storage and communication, and plantations and other agricultural undertakings mainly producing for commercial purposes. *Id.*

114. ILO Recommendation 146 (1973).

115. This is especially true because ILO Conventions are sometimes regarded as having a mainly persuasive character, even among ILO officials. See Transcript, *International Trade and Social Welfare: The New Agenda*, 17 COMP. LAB. L.J. 338, 343 (1996). Note that with respect to Recommendations the ILO Constitution only requires that member States bring the Recommendation before that State's legislative authority. National legislation need not be enacted. ILO CONST.

116. UNICEF, *THE STATE OF THE WORLD'S CHILDREN*, *supra* note 1, at 19.

117. CRC, *supra* note 9.

118. Article 28(1)(a) reads: "States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular . . . make primary education compulsory and available free to all."

to be protected from economic exploitation.¹¹⁹ It also recognizes a child's right to be protected from work that is hazardous, likely to interfere with a child's education, or harmful to her development.¹²⁰ States are required take legislative, administrative, social, and educational measures to ensure the implementation of those rights and to set a minimum age for admission to employment.¹²¹

Interestingly, Article 32(1) of the CRC recognizes the right of the child to be protected from performing certain types of "work" which have a negative impact on the child.¹²² This is clearly a broader recognition of rights than that evidenced in the ICESCR, which was limited to harmful "employment."¹²³ This expansion reflects, I suggest, the increased willingness of states in 1989—as opposed to 1966 when the ICESCR was adopted—to recognize children's rights.

There are three other "expansions" worth noting. First, whereas employment in harmful work was "punishable by law" under the ICESCR, the CRC requires State Parties to take legislative, administrative, social and educational measures to ensure that children do not engage in harmful work.¹²⁴ Thus, not only does the CRC protect children from a wider range of harmful work situations, but it also requires State Parties to take a greater variety of measures to protect children. Second, the CRC requires State Parties to set a minimum age for all employment, not just *paid* employment, as stipulated in the ICESCR.¹²⁵ This distinction

119. See CRC, *supra* note 9, at art. 32.

120. See *id.*

121. Article 32(1) reads: "States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development."

Article 32(2) reads:

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

(a) provide for a minimum age or minimum ages for admissions to employment;

(b) provide for appropriate regulation of the hours and conditions of employment; and

(c) provide for appropriate penalties or other sanctions to ensure the effective enforcement of this article.

Id.

122. See ILO Recommendation 146 (1973).

123. See *id.*

124. See *id.*

125. This would appear to make it clear that there was no requirement of States to regulate unpaid employment under the ICESCR, such as that which

may not be as meaningful as it first appears, given that it is clear that the drafters considered the term "employment" not to include "work in or for the family."¹²⁶ Because the majority of children engaged in unpaid employment are working in or for the family, the practical distinction between regulating "paid employment" and "employment" may, in many instances, be meaningless.¹²⁷ Finally, the conflict between the right to education and child labor is formally recognized in the CRC.¹²⁸ Children are not to work where it will interfere with their education.¹²⁹

Thus, in many ways Article 32 can be viewed as expanding children's rights. However, due to several weaknesses in the document, it cannot be regarded as comprehensively prohibiting child labor. First, like the ICESCR, although arguably to a lesser extent, the CRC may be considered a "soft" law. Article 4 states that "[i]n regard to economic, social and cultural rights, States Parties shall undertake such measures to the *maximum extent of their available resources*" (emphasis added). Clearly, this provision gives a state leeway in implementing child labor laws in light of that state's economic development. The CRC must therefore be regarded in some sense as a document with progressive goals.

Second, although the right of children not to be exposed to harmful work is recognized, and states have a duty to take various measures to implement this right, states are only specifically directed to regulate *employment* practices.¹³⁰ This undermines the requirement that other provisions be taken to protect children in all kinds of work.¹³¹ Third, the major weakness with the CRC,¹³² in so far as it purports to regulate child labor, is that it fails to set an international minimum age of employment.¹³³ Thus, the task of setting a minimum age is left to the individual states, without any guidelines or basic limits.¹³⁴

typically occurs in the home or in a family business. See *supra* notes 80-81 and accompanying text. Compare CRC, *supra* note 9, with ICESCR, *supra* note 33, at art. 10.

126. A GUIDE TO THE "TRAVAUX PREPARATOIRES," *supra* note 54, at 422.

127. See ILO Recommendation 146, *supra* note 114.

128. See CRC, *supra* note 9, at art. 32.

129. See *id.*

130. See ILO Recommendation 146, *supra* note 114.

131. See *id.*

132. See also ICESCR, *supra* note 33, at art. 10.

133. Although this may be considered a weakness of the legislation, the drafters considered this flexibility to be a strength. See LAWRENCE J. LEBLANC, *THE CONVENTION ON THE RIGHTS OF THE CHILD: UNITED NATIONS LAWMAKING ON HUMAN RIGHTS* 134 (1995).

134. In light of this fact, it might be thought that the most significant international child labor document to date, although not the most influential due to its low ratification rate, is the ILO *Minimum Age Convention*. As of August 15, 1996, ILO Convention 138 had been ratified by forty-nine countries. India, which

Why did the CRC, adopted well after the *Minimum Age Convention*, decline to fix a minimum age for employment? The basic working text of the CRC, adopted by the 1980 Working Group, put forward a minimum age of fifteen years and in so doing made an oblique reference to the ILO *Minimum Age Convention*.¹³⁵ However, all subsequent proposals submitted to the Working Group failed to specify a fixed age and ultimately none was set.¹³⁶ The drafters recognized that, in developing countries, children often must work even at the expense of receiving an education.¹³⁷ The consensus was that in order to take into account the different economic development of various countries, the State Parties should adopt their own legislative measures to regulate child labor, and in so doing devise statutory schemes appropriate to their specific situations.¹³⁸

Indeed, it was the ILO that put forward the position that fixing a minimum age would be too rigid. The ILO thought that its *Minimum Age Convention*, though geared toward raising the minimum age of employment, "distinguished between different kinds of work and recognised the need for establishing different age limits for different kinds of employment."¹³⁹ It argued that a fixed age, in the context of the CRC, would not make "special

has been a member of the ILO since 1919, has not ratified this Convention, although it has ratified 35 other ILO Conventions. Of the "minimum age" Conventions, *supra* note 55, India has ratified Convention No. 5 (*Minimum Age (Industry) Convention, 1919*) - ratified by India on September 9, 1955; Convention No. 15 (*Minimum Age (Trimmers and Stokers) Convention, 1921*)—ratified by India on November 20, 1922; Convention No. 123 (*Minimum Age (Underground Work) Convention, 1965*) - ratified by India on March 20, 1975. However, as discussed above, the MAC too can have a very limited application. See also *Governing Body Document on Child Labor, supra* note 2, at 17.

135. The relevant Article of the basic working text, as adopted by the 1980 Working Group reads as follows:

1. The child shall be protected against all forms of discrimination, social exploitation and degradation of his dignity. He shall not be the subject of traffic and exploitation in any form.
2. The States Parties to the present Convention recognize that the child shall not be employed in any form of work harmful to his health or his moral development, or in work dangerous to his life or which would interfere with his normal growth, and undertake to subject to legal punishment persons violating this law.
3. The States Parties to the present Convention shall comply with the law prohibiting the employment of children before the age of fifteen years.

1980 Working Group E/CN.4/1349* at 6, *extracted in* A GUIDE TO THE "TRAVAUX PREPARATOIRES," *supra* note 54, at 418 (emphasis added).

136. See *id.* at 418-25.

137. See LEBLANC, *supra* note 133, at 134.

138. See *id.*

139. LEBLANC, *supra* note 133, at 134.

allowance for the problems of less developed countries nor for work in connection with education or training, and would not contemplate a progressive raising of the minimum age."¹⁴⁰

3. Summary of the International Legal Human Rights Framework

From the foregoing discussion, it is clear that child labor is not expressly prohibited in any international human rights convention.¹⁴¹ Rather, international law focuses on trying to protect children from its worst effects. Furthermore, while a wide range of children's work is prohibited in international documents, a lesser range is regulated by directing State Parties to fix minimum ages. Thus, there is a clear divide between prohibition and regulation.

The failure of the international legal system to prohibit and regulate child labor uniformly and comprehensively may be regarded as a weakness. However, it may also be viewed as a strength. Certainly, the drafters of the CRC considered this approach to be the only practical one. Thus, while the ultimate objective of the international community is to eradicate child labor, "initially the main consideration, in more pragmatic terms, [is] to regulate and humanize it [because] in many countries it [is] impossible to eliminate child labour without first of all giving special attention to the improvement of overall economic conditions."¹⁴²

Still it is possible, given the current framework of international law, to make a strong case for the limitation and regulation of child labor by interpreting the documents in existence. From reading these documents together, three main propositions emerge: (1) children are considered to have a right to education, which is compulsory at the primary or elementary level;¹⁴³ (2) children are to be protected from economic exploitation and should not be exposed to work which is hazardous or harmful to their development and well being;¹⁴⁴ and (3) children are entitled, generally, to protection from exploitation and harm.¹⁴⁵ From these three propositions, and with ages set in

140. UN ECOSOC, 1980:2, *quoted in* LEBLANC, *supra* note 133, at 134.

141. Indeed, reflecting this international approach, many national labor laws do not cover areas of economic activity in which child labor is widespread, such as in the domestic and agricultural areas or family businesses. *See* ILO, *Combating the Most Intolerable forms of Child Labor: A Global Challenge* 15 (1997).

142. LEBLANC, *supra* note 133, at 135-36.

143. *See* UDHR, *supra* note 75, at art. 26(1); ICESCR, *supra* note 33, at art. 13; *see* CRC, *supra* note 9, at art. 28(1)(a).

144. *See* CRC, *supra* note 9, at art. 32; ICESCR, *supra* note 33, at art. 10.

145. *See* CRC, *supra* note 9, at art. 36 ("States Parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child's

the *Minimum Age Convention* in mind, the international position regarding child labor may be summed up as follows:

1. children should not work where it interferes with their right to education;
2. children should not do certain types of work (i.e., that which is dangerous, harmful, or exploitative) below the age of sixteen;¹⁴⁶ and
3. children should not work below the age of twelve in any circumstances.

D. *The Link Between Child Labor and the Right to Education*

The focus of this Article is on child labor, not education, and thus it will not include a detailed examination of the complex relationship between education and child labor. However, it is important to bear in mind the correlation between the two when dealing with this topic. The right to education has been recognized in both the ICESCR and the CRC and can be tied to the issue of child labor on many levels. In a legal sense it is closely related; by definition, child labor denies a child of her right to education. Indeed, it is made clear in the CRC that a child should not work if it interferes with her education.¹⁴⁷

The consequences of having no education, or trying to juggle education and work, are not hard to appreciate. It has been documented that "above a certain threshold in respect of hours of work, which varies according to age and type of activity, a child's learning capacity can be impaired."¹⁴⁸ According to American researchers, the academic performance of young persons between twelve and seventeen years old is adversely affected if they work fifteen hours a week.¹⁴⁹ Clearly, children need not even be working full time to suffer educationally.

However, the relationship between child labor and education goes beyond this. Education has a role to play in both the incidence of and the solution to child labor.¹⁵⁰ Thus, the link

welfare"); ICESCR, *supra* note 33, at art. 24 ("Every child shall have . . . the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State").

146. See *infra* Part I.C. for a more detailed discussion of this issue.

147. See CRC, *supra* note 9, at art. 31.

148. *Combating the Most Intolerable Forms of Child Labor*, *supra* note 2, at para. 28.

149. See *id.*

150. Of course, it must be remembered that at times other rights (such as the rights to food and life) must come before the right to education. Some of the drafters of the CRC acknowledged that some children must work, even at the cost of their education. See UN CHR, 1989b:90, in LEBLANC, *supra* note 133, at 133-34 (quoting *Question of a Convention on the Rights of the Child: Report of the*

between labor and education cannot be limited to the mere impossibility of working and studying at the same time.¹⁵¹ Furthermore, if one of the reasons child labor is abhorrent is that a child is not able to exercise her free will, then education is vital because it is the means by which a child acquires the knowledge to make informed choices about her life. The role of education in causing child labor will be discussed more fully below.

E. *Conclusion: International Pragmatism as a
Response to Child Labor*

The international response to child labor has been problematic, but nevertheless realistic. The international community has chosen to focus on the most harmful and intolerable forms of child labor while, momentarily, turning a blind eye to less harmful work done in or for the family. While this may not be the way the problem would be tackled in an ideal world, this approach recognizes that many countries may not yet be in the position to outlaw child labor. It is an approach that acknowledges that the problem of child labor cannot be solved quickly. Consequently, states have agreed to target its worst aspects first, in ways in which even developing countries can manage.

III. DEVELOPMENT ISSUES ARISING OUT OF A LEGAL ANALYSIS
OF THE INTERNATIONAL HUMAN RIGHTS LAW
RELATING TO CHILD LABOR

It is evident in the above legal analysis of the international law relating to child labor that a certain approach has been taken in the design of these laws. In particular, there is a focus on a progressive implementation of child labor law in accordance with a state's means. Furthermore, the enactment and enforcement of such laws is left in the exclusive domain of each individual state. This legal approach implicitly recognizes the link between child labor and economic development, and in essence it acknowledges

Working Group on a Draft Convention on the Rights of this Child, United Nations Commission on Human Rights, 44th Sess., U.N. Doc. E/C.14/1987/88 (1989)). For a discussion of education as a cause of child labor, see *infra* Part I.C.

151. The author does not include here work done by children in schools for vocational or technical education or in other training institutions for apprenticeships. UNICEF has recognized that "education and child labour interact profoundly." Education can keep children away from work, but poor quality or expensive education can drive them to work. See UNICEF, *THE STATE OF THE WORLD'S CHILDREN*, *supra* note 1, at 48.

that developing countries cannot eradicate child labor overnight. It also implicitly recognizes that it is undesirable to set rigid international standards because child labor poses different problems and issues in different countries. Rather, it is preferable to have general laws that allow each State to design more specific and appropriate laws for itself.

The connection between child labor and economic development is no surprise. Indeed, many reports and papers recognize poverty and inadequate economic growth as the underlying causes of the problem.¹⁵² Furthermore, the link between poverty, economic development, and child labor can be demonstrated through purely statistical data.¹⁵³ A numerical analysis indicates that children in developing and least-developed countries are more likely to work than those in industrialized countries.¹⁵⁴ The correlation between the stage of a country's development and the relative incidences of child labor in that country cannot be ignored. It is possible to surmise that the more economically developed a country is, the less likely that its children will be working.

The drafters of the international instruments discussed in Part II recognized this link and responded to it by molding the international laws accordingly. The present laws allow countries to progressively eradicate child labor as they acquire the means to do so.¹⁵⁵ The minimum ages set may vary according to different standards of economic development.¹⁵⁶ As a result of this approach, the international law relating to child labor is flexible and might be thought to be "soft." This is not to say, as discussed above, that the international community did not take the most realistic, and arguably laudable, approach to the issue of child labor. But there are problems with this approach that are not reflected in the law. The main problem is the fact that the causes

152. See, e.g., *id.* at 27-28; *Combating the Most Intolerable Forms of Child Labour: A Global Challenge*, *supra* note 2, at 9-11; *Glut*, *supra* note 65, at 1207-10. See *Siddiqi & Patrinos*, *supra* note 30. The ILO points out that development issues come within the province of international organizations such as the World Bank, International Monetary Fund (IMF), World Trade Organization, United Nations Educational, Scientific and Cultural Organization (UNESCO), and UNICEF. See *Governing Body Document on Child Labour*, *supra* note 2, at 23.

153. The link between family purchasing power and child labor can be shown by comparing the gap between purchasing power in industrialized and developing countries, and the respective rates of child labor in those countries. UNICEF, *THE STATE OF THE WORLD'S CHILDREN*, *supra* note 1, at 27 figs.5 & 6.

154. See *Governing Body Document on Child Labour*, *supra* note 2, at 3.

155. See ICESCR, *supra* note 33, at art. 2(1); MAC, *supra* note 41 at art. 5; CRC, *supra* note 9, at art. 4.

156. See ICESCR, *supra* note 33, at art. 10(3) (no minimum age is set); MAC, *supra* note 41, at arts. 2(3), 2(4), 7(1) & 7(4); CRC, *supra* note 9, at art. 32(2) (no minimum age is set).

of child labor are complex and not only related to economic development and poverty—there are other economic, educational, and cultural aspects to the problem. As a result, economic development will not necessarily result in a reduction of child labor if other causes of child labor remain. For example, if ingrained cultural beliefs mean that a country does not have the will to change things,¹⁵⁷ if children are still cheaper and more desirable to employ than adults, or if educational opportunities are not available, child labor may remain a problem long after a country has achieved the economic ability to eradicate the practice.

The international community, by allowing a country to develop before (or as) it eradicates child labor, and by legally sanctioning this approach, allows countries to ignore the other causes of child labor, and thus prolongs child labor when it need no longer exist. The approach fails to impose more direct and immediate sanctions on practices that are not justifiable on economic grounds. UNICEF has asserted that the idea that poverty is the sole cause of child labor—and thus only a problem in developing countries—is a myth that is “vital to confront.”¹⁵⁸ It states:

It is true that the poorest, most disadvantaged sectors of society supply the vast majority of child labourers. The conclusion often drawn from this is that child labour and poverty are inseparable and that calls for an immediate end to hazardous child labour are unrealistic. We are told we must tolerate the intolerable until world poverty is ended.¹⁵⁹

This statement need not only be limited to the most hazardous forms of child labor. Even “tolerable” child labor can be treated separately from the issue of poverty if it is acknowledged that poverty and child labor are not exclusively and inextricably linked.

The importance of recognizing that lack of economic development is not the only cause of child labor lies in the fact that the present legal approach is not working; indeed, there is evidence that the rates of child labor are rising.¹⁶⁰ Child labor

157. This may be true with regard to the implementation of many economic, social, and cultural rights. See CRAVEN, *supra* note 86, at 106.

158. UNICEF, *THE STATE OF THE WORLD'S CHILDREN*, *supra* note 1, at 18.

159. *Id.*

160. See *id.* at 28; *Combating the Most Intolerable Forms of Child Labour: A Global Challenge*, *supra* note 2, at 5; *Governing Body Document on Child Labour*, *supra* note 2, at 5; Siddiqi & Patrinos, *supra* note 30, at 3-4. UNICEF and the ILO suggest that rates are rising particularly in Latin America and Africa due to the economic crisis of the 1980s, population growth, deterioration in living standards, lack of public investment in education, armed conflict, and political unrest.

rates may be rising because countries are not developing, or if they are, the benefits of that development are not reaching everyone within that country. This may be a result of economic reforms and structural adjustment programs that are being implemented in developing countries under the auspices of the World Bank and the International Monetary Fund (IMF).¹⁶¹ These reforms are aimed at moving those countries toward participation in the global economy, and they usually involve a reduction in government expenditures in the areas of health, education, and social services.¹⁶² The burden of this adjustment is borne by the poor, which results in an increase in the rate of child labor.¹⁶³

Outside of economic development issues, at least part of the reason that international law is not working may be attributable to the fact that poor economic development is not the sole cause of child labor, and that the international community has been too lax in not recognizing this. In elaborating on this argument it is appropriate to examine the causes of child labor in more detail.

A. *The Causes of Child Labor*

One of the reasons it is important to isolate the causes of child labor is that the causes point the way to the solution of the problem. If poverty is its root cause (as much evidence suggests) then it might be supposed that economic development would lower the rates of child labor. If culture or religious beliefs are the root causes, then the problem of child labor may be much harder to change and economic development, by itself, is unlikely to remedy the situation. Instead, it would be necessary to alter the cultural and religious beliefs and the value system of an entire portion of society. If poverty and culture are both found to be causes of child labor, then economic development and education in tandem might be required to solve the problem.

1. Poverty

Poverty is usually cited as the single most compelling reason for child labor.¹⁶⁴ Thus, children in poor households, or households where income is unpredictable, are much more likely to work than those in households where the parents are employed with a steady income. The link between poverty and child labor is not disputed.¹⁶⁵ There is no doubt that the vast majority of child

161. See UNICEF, *THE STATE OF THE WORLD'S CHILDREN*, *supra* note 1, at 28.

162. See *id.*

163. See *id.*

164. See *supra* text accompanying notes 103-05.

165. See *id.*

labor occurs in the developing world.¹⁶⁶ Poor economic conditions force children to supply their families with income, either directly or indirectly. They may bring money into the family through outside work, provide free labor in a family business or on a family farm, or mind the house and younger siblings to enable their parents to work. Some commentators argue that developing countries need child labor to survive in the global market and point out that many industrialized countries have used child labor in the past.¹⁶⁷ Because poor countries cannot compete with rich countries in areas such as technology, it is argued that by using cheap labor—and child labor is cheap—developing countries can remain competitive.¹⁶⁸ Arguably, then, developing countries need to use child labor until they can compete equally on the world market.¹⁶⁹

However, the significance of the role of poverty in causing child labor has been questioned. There are conflicting opinions on the importance of children's wage earnings and the extent to which their contribution to family income assuages poverty.¹⁷⁰ The unavailability of data on the economic contribution of children and child labor generally makes it difficult to come to a conclusive determination on this point.

There is also evidence that child labor may perpetuate poverty. Certainly this is true insofar as child labor inhibits a child's ability to educate herself, traps her in unskilled and poorly paid work, or permanently impairs her health. Thus, in macroeconomic terms, it can be said that child labor that harms a child's development "perpetuates poverty by degrading the stock of human capital necessary for economic and social development."¹⁷¹ Child labor is also thought to cause unemployment and underemployment among adults, thus increasing poverty.¹⁷² In some instances, however, child labor may facilitate adult employment. A child doing home tasks, for example, may enable her mother to work outside the home. Likewise, a child working in a family business may enable that business to survive and thus provide adult employment. Furthermore, the employment of children outside the home may

166. See UNICEF, *THE STATE OF THE WORLD'S CHILDREN*, *supra* note 1, at 18.

167. See *Glut supra* note 65, at 1208. Note that some industrialized countries did not use child labor, or, like the United States, started to eradicate it well before they were industrialized.

168. See *id.* at 1207-08.

169. See *id.*

170. See UNICEF, *THE STATE OF THE WORLD'S CHILDREN*, *supra* note 1, at 27; *Glut, supra* note 65, at 1208.

171. See *Governing Body Document on Child Labour, supra* note 2, at 8.

172. See *id.*

have little impact on adult employment because children often take on jobs that adults do not want, or are employed by people who cannot afford adult wages.¹⁷³

Whatever the complexity of the issues that poverty raises, one thing is clear: poverty, in itself, does not cause children to work. This can be demonstrated by the fact that equal rates of poverty at either the family, community, or national level do not lead to equal rates of child labor.¹⁷⁴ There are other factors at play that significantly influence the incidence of child labor. Some of these factors may be linked to poverty and economic development; others are distinct issues that bear no direct relation to a country's economic growth. However, even if some of these causes can be connected to development issues, they all have characteristics that independently influence rates of child labor. Accordingly, they should be considered and treated as separate issues.

2. Other Economic Factors

While poverty, a supply factor, is most often cited as a root cause of child labor, there are demand factors at play. For example, children are cheaper to employ than adults. If children are working within the family business, they are free labor. If they are paid to work outside the home, they are usually paid less than adults.¹⁷⁵ While it is true that many family businesses and small industries rely on child labor to be viable—thus bringing issues of poverty into play—it is also true that businesses that have the opportunity to increase their profit margins through the use of cheap labor will do so.¹⁷⁶ This makes economic sense. Even if a country is developed, children will always be desirable employees as long as they are paid lower wages than adults.

Children may be more attractive employees for other reasons as well. Children are usually more submissive than adults.¹⁷⁷ They are more likely to take orders and less likely to be aware of their rights and cause trouble. From an employer's perspective children can be easily manipulated and controlled and thus are

173. See *id.*

174. See ILO, CHILD LABOUR: TARGETING THE INTOLERABLE, *supra* note 8, at 12.

175. See *id.* at 13.

176. ILO studies have shown that, in certain export industries at least, child labor is not vital, and that minor changes in the financial arrangements between producers, importers, and exporters would reduce the incentive of small-time producers to employ children. See ILO, CHILD LABOUR: TARGETING THE INTOLERABLE, *supra* note 8, at 13.

177. See UNICEF, THE STATE OF THE WORLD'S CHILDREN, *supra* note 1, at 27.

more attractive workers.¹⁷⁸ This is true no matter how developed a country is. Finally, in some industries, children's perceived dexterity makes them attractive to employers, who claim that some jobs can only be done by children or that children can do certain work better than adults.¹⁷⁹ This theory has been largely disputed,¹⁸⁰ but as long as employers perceive that this is true they will keep employing children, regardless of how economically unnecessary it is.

3. Educational Factors

The ILO and UNICEF consider shortcomings of a country's educational system to be a cause of child labor, primarily because opportunities for education tend to stem the flow of labor into the work force.¹⁸¹ Even if children do have the opportunity to go to school, they may work to help pay for schooling; even "free" schooling is expensive. Thus, there is clearly a link between child labor and education, and education can be regarded as part of both the cause of and solution to the problem.

Obviously, there is also a link between economic development and education. The ability of a country to provide free elementary education in line with its international obligations largely depends on its ability to fund such programs. It also depends on whether children and their families can survive without a child's income. The link between development and education is arguably recognized in international instruments, as states need only progressively secure the right to education as they acquire the means to do so.¹⁸² However, access to educational opportunities is not entirely dependent on development. It also depends on whether a child's family or society values education. Thus, poor schooling rates cannot always be blamed on poverty alone.

Furthermore, studies show that at the macroeconomic level there is a high rate of social return on investments in primary education and that such investments are essential to generate economic growth and reduce poverty.¹⁸³ This suggests that education is part of the solution, not only to child labor, but also

178. *See id.*

179. *See Governing Body Document on Child Labour, supra note 2, at 7.*

180. ILO studies on the hand-woven carpet and glass bracelet industries found no basis for the "nimble fingers" argument. *See id.*

181. *See UNICEF, THE STATE OF THE WORLD'S CHILDREN, supra note 1, at 29, 48.*

182. *See ICESCR, supra note 33, at art. 2(1); CRC, supra note 9, at art. 4.*

183. *See Governing Body Document on Child Labor, supra note 2, at 6; Psacharopoulos, "Returns to Investment in Education: A Global Update" (World Bank 1993) (cited in Chopra et al., *India: Economic Reform and Growth* 8 (IMF 1995)).*

to poverty. Arguably, the provision of education should be pursued, not as economic development occurs, but as a prerequisite to economic development.

4. Cultural Factors

Whether a child works may depend on the attitude of the family or society to both education and child labor. Thus, it may be no surprise to learn that "children subjected to the most intolerable forms of labour generally come from population groups which are not only economically vulnerable, but also culturally and socially disadvantaged."¹⁸⁴ Traditional ideas and entrenched social patterns have, outside of poverty, perhaps the most significant role to play in the incidence of child labor. In some countries work is thought to be an effective and purposeful way for children to learn about life and the workings of the world.¹⁸⁵ Children are expected to follow family tradition and be trained in the family trade, this being a valuable asset that will serve them well in their adult life.¹⁸⁶ The fact that children from the poorer, disadvantaged, and minority groups work and do not go to school may also be thought to be a "natural and necessary part of the existing social order," and not a cause for great concern.¹⁸⁷

One reason that cultural and religious beliefs continue to play such a significant role in the perpetuation of child labor is that cultural change is not an inevitable consequence of economic development. No matter how developed a country becomes, if it does not have the will to transform its social order, existing ideas about people's preordained "role" in society are not likely to be altered.

B. Conclusion

The above analysis indicates that there are multiple reasons for the existence of child labor. If all these causes are adequately acknowledged they can all be acted upon. It is time (as the ILO and UNICEF promote) to implement more stringent international law dealing with child labor. Not only should this law comprehensively and immediately ban all intolerable forms of child labor, it should also recognize that economic development is not the only cause of child labor and does not provide the only

184. ILO, CHILD LABOUR: TARGETING THE INTOLERABLE, *supra* note 8, at 10.

185. See UNICEF, THE STATE OF THE WORLD'S CHILDREN, *supra* note 1, at 29.

186. See, e.g., India Ministry of External Affairs, *Meet Jalil Ahmed Ansari, Successful owner of a carpet manufacturing unit. And former "child labourer"* (visited Jan. 31, 1999) <<http://india.indiagov.org/social/child/childlabour.htm>>.

187. See UNICEF, THE STATE OF THE WORLD'S CHILDREN, *supra* note 1, at 27.

path towards its eradication. There are many aspects of the child labor problem that can and should be targeted without regard to economic considerations. While poverty reduction is a purposeful and worthwhile goal and has a role to play in the eradication of child labor, parts, if not all of the child labor problem should be tackled separately from the more general issue of economic development.¹⁸⁸ The complexity of the causal elements of child labor justifies such an approach.

IV. CHILD LABOR IN INDIA

The practice of child labor in India goes back long before independence was achieved in 1947.¹⁸⁹ It is still a problem today.¹⁹⁰ Estimates of the numbers of Indian children working vary wildly.¹⁹¹ This is not surprising given that data of child labor worldwide, and in India in particular, is scant.¹⁹² It has been estimated that India has between ten and 115 million working children.¹⁹³ For example, UNICEF gives a figure of

188. Indeed, UNICEF urges that "hazardous child labor must be eliminated independently of wider measures aimed at poverty reduction." See *id.* at 20. This should be true of all child labor (as I define it in Part II.A).

189. See Daniel S. Ehrenberg, *The Labor Link: Applying the International Trading System to Enforce Violations of Forced and Child Labor*, 20 YALE J. INT'L L. 261, 271 (1995).

190. See generally ILO, CHILD LABOUR TODAY: FACTS & FIGURES (Press Kits 1996); UNICEF, THE STATE OF THE WORLD'S CHILDREN, *supra* note 1; HUMAN RIGHTS WATCH, THE SMALL HANDS OF SLAVERY: BONDED CHILD LABOR IN INDIA (1996); Weiner, *Child Labour in Developing Countries: The Indian Case Articles 28a, 32 & 26 of the UN Convention on the Rights of the Child*, 2 INT'L J. OF CHILDREN'S RTS. 121-28 (1994).

191. The World Bank puts the figure at forty-four million. See Siddiqi & Patrinos, *supra* note 30.

192. The ILO did a survey in 1996 that estimated that seventy-three million children between the ages of ten and fourteen worked. However the survey did not cover the industrialized countries or China, did not cover all categories of child workers, and missed "hidden" workers, such as girls doing domestic work. UNICEF states that "[i]f all children under 14 who are economically active were included, the figure would rise to around 250 million." If children who carried water were included, the figure would rise to 400 million. UNICEF, THE STATE OF THE WORLD'S CHILDREN, *supra* note 1.

193. UNICEF gives a figure of ten to forty-four million child workers in India. See UNICEF, *Child Labour: No Life for a Child* (visited Sept. 30, 1997) <<http://www.doe.ernet.in/~unicefd/u28.htm>>. The Human Rights Watch gives a figure of sixty to 115 million. See HUMAN RIGHTS WATCH, THE SMALL HANDS OF SLAVERY, *supra* note 190, at 15. The ILO puts the figure at 14.4 percent of children between the ages of ten and fourteen. See ILO, *Child Labour Today: Facts and Figures* (June 10, 1996) <<http://www.ilo.us.one/news/child1.html>>. The World Bank puts the figure at forty-four million. See Siddiqi & Patrinos, *supra* note 30.

between ten and forty-four million child workers in India, while the Human Rights Watch gives a figure of between sixty and 115 million child workers.¹⁹⁴ Figures vary depending on how child labor is defined. For example, estimates vary based on what age groups are included, and whether children working in the home or doing part-time work are counted.¹⁹⁵

Certainly, India is not unique in having a child labor problem. It is a universal issue and there are many countries throughout the world that have large numbers of children at work. In particular, there are still very high rates of economically active children in various countries in Africa, Asia, Latin America, and Oceania.¹⁹⁶ However, India is unique in some respects, especially in relation to its cultural history.

A. *India's Economic History and Recent Economic Development*

From independence in 1947 until 1991 India's development strategy was largely protectionist and emphasized government intervention and the expansion of the public sector.¹⁹⁷ This policy was coupled with inwardly-focused trade and investment programs that led to poor rates of investment return and extremely elevated capital labor ratios.¹⁹⁸ Although this economic approach did eliminate famines, improve literacy rates, and lower birth rates, ultimately India's long term growth was not satisfactory.¹⁹⁹ This was primarily due to India's isolation from the rest of the world.²⁰⁰ After decades of government interference India's share of the world trade had declined to less than 0.5% in

194. See HUMAN RIGHTS WATCH, *THE SMALL HANDS OF SLAVERY*, *supra* note 190, at 15.

195. For example, on a worldwide basis, the ILO estimates that seventy-three million children between the ages of ten and fourteen work. ILO, *CHILD LABOUR TODAY: FACTS & FIGURES* (Press Kits 1996). *But see supra* note 192. If children between the ages of five and fourteen are included the figures rise sharply: 250 million children work in the developing world—120 million full-time and 130 million part-time. See IPEC Fact Sheets: Statistics (1997) (revealing a hidden tragedy).

196. Asia is estimated to have 44.6 million economically active children between the ages of ten and fourteen (13% of all Asian children ages ten to fourteen), Africa is estimated to have 23.6 million (26.3%), and Latin America is estimated to have 5.1 million children (9.8%). See ILO, *Child Labour Today: Facts and Figures*, *supra* note 193. These figures do not take into account child workers in the home, nor do they include child workers under ten years old or between fourteen and fifteen. See *id.*

197. See The World Bank Group, *Country: India* (visited Sept. 30, 1997) <<http://www.worldbank.org/html/extdr/offrep/sas/in2.htm>>.

198. See Chopra & Collins, *Overview*, in *INDIA: ECONOMIC REFORM AND GROWTH 1* (1995).

199. See The World Bank Group, *supra* note 197.

200. See *id.*

the late 1980s.²⁰¹ The economic system did not encourage export production or foreign investment, and led to frequent shortages of foreign exchange.²⁰² It also meant that India's balance of payments was exposed to unexpected variations in international markets.²⁰³ Accordingly, economic growth was impaired and poverty was not effectively reduced.²⁰⁴ In the early 1990s, India found itself grappling with severe fiscal and trade imbalances and high inflation.²⁰⁵ It was also on the brink of defaulting on its foreign debt obligations.²⁰⁶

In 1991, India introduced a new economic policy that is presently transforming and expanding its economy.²⁰⁷ The original stimulus for change was the balance of payments crisis of 1990-1991.²⁰⁸ The new policy has focused on macroeconomic reform and a structural adjustment program, especially in the industrial sector.²⁰⁹ After initially working on stabilizing the economy, India generated reform in the areas of investment, trade, and the financial sector.²¹⁰ The general trade liberalization of the Indian economy has led to lower import duties and increased foreign investment.²¹¹ India has also privatized previously state-run industries and services, thereby increasing competition.²¹² This has led to the recovery of private investment and rapid export growth.²¹³ Presently, India has the world's sixth largest economy measured in terms of gross domestic product (GDP).²¹⁴ By the year 2000, India's total exports (mostly in consumer goods) are predicted to triple, making India the fourth largest world economy.²¹⁵

201. *See id.*

202. *See id.*

203. *See id.*

204. *See id.*

205. *See id.*

206. *See id.*

207. *See id.*

208. *See* Chopra & Collins, *supra* note 198, at 1.

209. *See id.*

210. *See* The World Bank Group, *supra* note 197.

211. *See* HUMAN RIGHTS WATCH, THE SMALL HANDS OF SLAVERY, *supra* note 190, at 14; WORLD BANK GROUP, COUNTRY BRIEF: INDIA.

212. *See* HUMAN RIGHTS WATCH, THE SMALL HANDS OF SLAVERY, *supra* note 190, at 14.

213. *See* Chopra & Collins, *supra* note 198, at 1.

214. *See* Economy—Overview <<http://India.indiagov.org/economy/eointro.htm>>. Between 1994 and 1996, the GDP grew at seven percent. *See* WORLD BANK GROUP, COUNTRY BRIEF: INDIA.

215. HUMAN RIGHTS WATCH, THE SMALL HANDS OF SLAVERY, *supra* note 190, at 14-15.

1. Who Has Benefited?

One of the criticisms of India's new economic policies is that while they clearly benefit the rich and the middle class, the benefits to the poor and working classes are not so evident.²¹⁶ Indeed, economists have acknowledged that the social costs of development may be high, and it is not certain that rapid development will provide the surest path to the eradication of poverty.²¹⁷ The effect of the structural adjustment program has, according to some sources, made life more difficult for the poor.²¹⁸ The cost of living is reported to be rising, unemployment remains high, and work conditions are worsening in the informal sector.²¹⁹ In 1995, Gautam S. Kaji, the Managing Director of the World Bank, took the view that economic development must take account of human dimensions, and pointed out that "[i]t can be too easily forgotten that the whole point of economic growth is improvement in human welfare and living conditions. And on that fundamental score, India has not done well compared with the East Asian economies."²²⁰

A 1995 report by the Indian government-appointed Commission on Labour Standards and International Trade found that "child labor has been increasing in India at the rate of four percent a year 'while the working conditions of the children have remained unchanged, if not deteriorated'."²²¹ By contrast, in the same year, the IMF found that constant economic growth in India had led to a reduction in the incidence of poverty, an increase in educational attainment, and a decrease in the labor participation rate due to a larger number of children withdrawing from the labor force and going to school.²²² This study indicated that there had been social benefits resulting from India's economic development, although it made a point of stating that poverty still

216. *See id.*

217. *See generally* Goulet & Wilber, *The Human Element of Development*, in *THE POLITICAL ECONOMY OF DEVELOPMENT AND UNDERDEVELOPMENT* 469-76, 530-38 (Jameson & Wilber eds., 1996); Gall, *What Really Matters - Human Development*, in *THE POLITICAL ECONOMY OF DEVELOPMENT AND UNDERDEVELOPMENT* 469-76, 530-38 (Jameson & Wilber eds., 1996).

218. HUMAN RIGHTS WATCH, *THE SMALL HANDS OF SLAVERY*, *supra* note 190, at 14.

219. *See id.* at 14-15.

220. Gautam S. Kaji, *India's Transformation: Speech to the Financial Community in Bombay, April 14, 1995* (visited Oct. 11, 1997) <<http://www.worldbank.org/html/extdr/extme/gk1speech.htm>>.

221. HUMAN RIGHTS WATCH, *THE SMALL HANDS OF SLAVERY*, *supra* note 190, at 14-15.

222. *See* Ajai Chopra, *Long-Term Growth Trends, in INDIA: ECONOMIC REFORM AND GROWTH* 4, 7-8 (Ajai Chopra et al. eds., 1995).

remains a very serious problem in India.²²³ Ultimately, there is a complete lack of statistical data on child labor in India which makes it impossible to do a proper analysis of the degree to which the rewards of economic development have reached all sectors of India's population, and in particular its children.

2. Economic Contribution of Children

Perhaps the hardest thing to determine is what the economic contribution of child labor is to the Indian economy.²²⁴ Certainly, the economic contribution of working children to their families is significant.²²⁵ Children are often said to be critical to their family's survival, whether they are bringing in money by laboring outside the home, doing housework and minding children in the home (and thus enabling their parents to work), or working in family enterprises.²²⁶ It has been estimated that, on average, working children in developing countries bring in twenty to twenty-five percent of the family income.²²⁷ It has also been argued that children are vital to some Indian export industries where their cheap labor enables the industry to remain competitive.²²⁸ However, this idea has been disputed. In an ILO sponsored study of the hand-woven carpet industry in India, it was found that children were not economically necessary for the industry to survive, although the use of children did increase the profit margin of the loom owners.²²⁹ The study found that "[r]elatively minor changes in the financial arrangements between loom owners, exporters, and importers would reduce the incentive to employ child labour."²³⁰

B. *The Causes of Child Labor in India*

The causes of child labor in India are similar to the causes of child labor in other countries. Poverty is an overwhelming factor: children work to provide their families with income. However,

223. See *id.* at 7.

224. Although there is general information available about India's labor participation and education rates, there is a lack of statistical data concerning the contribution of child labor to the Indian economy. Cf. *id.*

225. See *supra* text accompanying notes 111-13 (discussing the debate on the significance of this contribution).

226. ILO, IPEC FACT SHEETS (1997).

227. See International Labour Organization, *IPEC Fact Sheets* (visited Sept. 22, 1997) <<http://www.org/public/english/90:pec/index.htm>>.

228. *Combating the Most Intolerable Forms of Child Labour: A Global Challenge*, *supra* note 2, at 9.

229. See *id.*

230. See *id.*

there are other significant elements at play. There is also a great demand for child labor in India because some industries regard children as the only people who can perform certain work and because child labor costs are cheap.²³¹ Lack of educational opportunities, and the attitude of families towards education, must also be regarded as a causal factor in India. Currently, only sixty-two percent of Indian children complete the fifth grade of their primary education.²³²

While all of these economic and educational issues contribute to the incidence of child labor in India, arguably the most unique causal element of child labor in India is the country's particular belief system. Myron Weiner argues that India's economic problems are less of a cause of the child labor problem than are the belief systems shared by all aspects of Indian society.²³³ These belief systems are founded on religious notions and the premises that underlie India's hierarchical caste system.²³⁴ There is a commonly-held view in India that "some people are born to rule and to work with their minds while others . . . are born to work with their bodies."²³⁵ This is reflected in the country's continuing educational and economic divide in its population.²³⁶

While Weiner's article focuses on education, and the fear that education of the poor would upset the existing social order, he also makes an important observation about child labor which is especially relevant given the link between the right to education and child labor:

[T]here is historical and comparative evidence to suggest that the major obstacles to the achievement of universal primary education and the abolition of child labor are not the level of industrialization, per capita income and the socioeconomic conditions of families, the level of overall government expenditures in education, nor the demographic consequences of a rapid expansion in the number of school age children, four widely suggested explanations. India has made less of an effort . . . than many other countries not for economic or demographic reasons but because of the attitudes of government officials, politicians, trade union leaders, workers in voluntary agencies, religious figures, intellectuals, and the

231. For example, in the hand-woven carpet and glass bracelet industries, children's "nimble fingers" are thought by employers to be vital. *But see supra* text accompanying note 121.

232. UNICEF, *THE STATE OF THE WORLD'S CHILDREN*, *supra* note 1, at 86 (citing UNESCO as its source).

233. Myron Weiner, *The Child and the State in India*, in *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 3* (Steiner & Alston eds., 1996).

234. *See id.* at 289.

235. *See* UNICEF, *THE STATE OF THE WORLD'S CHILDREN*, *supra* note 1, at 31.

236. Kaji describes India as having an educational, and hence economic, dualism. *See* Kaji, *supra* note 220.

influential middle class toward child labor and compulsory primary school education.²³⁷

This is a provocative statement, and one that the government of India would deny. However, there can be no doubt that sociological and cultural elements greatly influence the incidence of child labor in India.²³⁸

C. India's Response to Child Labor

Although the government of India stresses that it does not condone the practice of child labor,²³⁹ it acknowledges that Indian children work.²⁴⁰ India describes the issue as a socioeconomic problem driven by poverty.²⁴¹ It contends that the problem of child labor has to be approached with this understanding. According to Indian officials, the problem of poverty and the resultant problem of child labor will diminish by solving the economic problems of the country.²⁴² Thus, Indian officials argue that child labor is the direct result of poverty and children cannot be "rescued" from child labor unless their economic plight, and that of their families, is improved.²⁴³ India explains that this is the reason why many projects to remove children from employment do not work.²⁴⁴ It is not enough to merely put a child in school and give her a stipend, because a child can earn more if she is working.²⁴⁵ In a poor household extra money is vital.

India also emphasizes that not all working children are exploited, nor is all the work they do harmful to their development.²⁴⁶ India takes the position that most child labor provides professional training for the child's adult life ahead.²⁴⁷ A

237. Weiner, *supra* note 233, at 287-89.

238. See UNICEF, *THE STATE OF THE WORLD'S CHILDREN*, *supra* note 1, at 31; *Combating the Most Intolerable Forms of Child Labor*, *supra* note 2, at 9.

239. India Ministry of External Affairs, *Policies and Programmes for Children* (visited Jan. 31, 1999) <<http://india.indiagov.org/social/child/progs.htm>> (noting that the government of India ratified the Convention on the Rights of the Child on December 2, 1992).

240. India Ministry of External Affairs, *Meet Jalil Ahmed Ansari*, *supra* note 186 (noting that child labour constitutes only 3.6% of the total labor force in India).

241. India says that this is shown by the fact that the incidence of child labor is higher in States where a larger proportion of the population lives below the poverty line. See *id.*

242. See *id.*

243. See *id.*

244. See *id.*

245. See *id.*

246. See *id.*

247. See *id.*

1997 government report states that "[i]nvariably, [children] grow up to take over the business or trade they were brought up on - and that too, successfully."²⁴⁸ India is forceful in stating that a blanket ban on child labor would be harmful to children.²⁴⁹ According to India, a blanket ban would deprive children of their income and lead to destitution and prostitution.²⁵⁰ It stresses that children and their families should not be penalized for working and that taking care of children and family welfare is the only way to help eliminate child labor in the long run.²⁵¹

In terms of figures, India maintains that there are presently between two and twenty million child laborers in India and that the number of child laborers has been reduced by one-third in the past two years.²⁵² India also maintains:

[C]hild labour constitutes only 3.6% of the total labour force in India. Nearly 90% of these children work in their own rural family settings. 84.9% of the working children population is involved in traditional activities such as cultivation, agriculture, livestock handling, fisheries and forestry. Only 8.46% work in manufacturing, servicing and repairs. Of this only 0.8% of child labour work in factories. And only 7.5% of the labour force in the carpet industry is children. It is illegal for people to employ children in hazardous activities.²⁵³

India says that it is working to eradicate *harmful* child labor by passing laws and adopting policies making child labor illegal.²⁵⁴ The government has resolved to eradicate child labor completely by the beginning of the twenty-first century.²⁵⁵ To do this it has launched child labor projects, set up a National Authority for the Elimination of Child Labour (NAECL), and started to enforce its child labor laws more actively.²⁵⁶ It has also set up special schools for children withdrawn from the carpet industry.²⁵⁷ There

248. *Id.*

249. *See id.*

250. *See id.*

251. *See id.*

252. India gets the two million figure from a survey done by the National Authority for the Elimination of Child Labour in 1994. However, a twenty million figure was used by the then Prime Minister Rao when he announced the government's goal of releasing two million child workers from hazardous industries. These figures can be contrasted with the various figures mentioned above, ranging from ten to 115 million. The Human Rights Watch criticizes the twenty million figure because it is based on a 1981 census that is considered to be inaccurate. For a discussion on this issue, see HUMAN RIGHTS WATCH, *THE SMALL HANDS OF SLAVERY*, *supra* note 190, at 121-23.

253. India Ministry of External Affairs, *supra* note 186.

254. *See infra* text accompanying notes 266-88.

255. India Ministry of External Affairs, *Meet Jalil Ahmed Ansari*, *supra* note 186.

256. *See id.*

257. *See id.*

is a National Research Centre on child labor in India that collaborates with the ILO and UNICEF.²⁵⁸ This center has established a network with NGOs and is assisting them in implementing child labor programs.²⁵⁹ In implementing its child labor policies India asks other countries not to introduce blanket bans and trade sanctions, but to provide financial and infrastructure support for the elimination of child labor.²⁶⁰ More than anything else, India asks for time for its efforts to take effect.²⁶¹

There are a number of criticisms that can be made regarding India's response to its working children. India cites its laws as evidence that it does not condone child labor, but these laws have significant loopholes, and are not effectively implemented.²⁶² Furthermore, the major piece of legislation India cites in support of its position, the *Child Labour (Prohibition and Regulation) Act, 1986*, does not prohibit child labor but merely sets a minimum age of fourteen years for hazardous employment.²⁶³ The fact that India's focus is on prohibiting hazardous employment, and that it does not seek to regulate work in and for the family, is reflected in India's statement that it wishes to eliminate *harmful* child labor.²⁶⁴ India appears to suggest that most forms of work are permissible. The most striking example of this is in the area of family enterprises and rural work. India states that nearly ninety percent of children work with the family in rural settings engaged in traditional farming activities, and only eight percent work in manufacturing.²⁶⁵ These figures are clearly cited as a positive good. Children are being trained in the family trade and are learning the skills that will enable them to work in the future. Nevertheless, India's legislative framework may have fulfilled its international obligations, and India's stance is in line with the theory that the eradication of the most intolerable forms of child labor must be targeted first.

258. See India Ministry of External Affairs, *supra* note 186.

259. See *id.*

260. See *id.* The estimated cost is around \$15 billion per year, an amount that a low-income country like India cannot deploy itself. See *id.*

261. India Ministry of External Affairs, *Meet Jalil Ahmed Ansari, supra* note 186.

262. See *infra* text accompanying notes 266-88.

263. *Child Labour (Prohibition and Regulation) Act, supra* note 45.

264. India Ministry of External Affairs, *Meet Jalil Ahmed Ansari, supra* note 186.

265. See *id.*

D. *Applicable International and National Law
and Government Policy*

1. International Law

India has ratified the ICESCR and the CRC and thus is legally bound to comply with their terms.²⁶⁶ It has not ratified the *Minimum Age Convention*.²⁶⁷ As the CRC is the most extensive legal instrument relating to child labor that India has ratified, this will be the initial focus of this section. When India ratified the CRC it made the following statement:

While fully subscribing to the objectives and purposes of the Convention, realising that certain of the rights of the child, namely those pertaining to the economic, social and cultural rights can only be progressively implemented in the developing countries, subject to the extent of available resources and within the framework of international co-operation; recognising that the child has to be protected from exploitation of all forms including economic exploitation; noting that for several reasons children of different ages do work in India; having prescribed minimum ages for employment in hazardous occupations and in certain other areas; having made regulatory provisions regarding hours and conditions of employment; and being aware that it is not practical immediately to prescribe minimum ages for admission to each and every area of employment in India - the Government of India undertakes to take measures to progressively implement the provisions under article 32, particularly paragraph 2(a), in accordance with its national legislation and relevant international instruments to which it is a State Party.²⁶⁸

Clearly, India was sensitive to the issue of child labor and wanted to further safeguard itself against any undue obligations that might be read into the Article. Generally, under Article 32 India is required to take legislative, administrative, social, and educational measures to ensure its implementation.²⁶⁹ Specifically, it must provide a minimum age for admission to employment.²⁷⁰ It must also provide for appropriate penalties or

266. See ICESCR, *supra* note 33. India ratified the ICESCR on April 10, 1979. See CRC, *supra* note 9. India acceded to the CRC with a declaration on December 11, 1992.

267. Note that there is also a *Minimum Age Recommendation* (ILO Recommendation 146) which calls on States to raise the minimum age of employment to sixteen years. Under the ILO Constitution, in the case of a recommendation, States are bound to bring the Recommendation before the legislative authority in their country. They are not bound to enact legislation.

268. UN LS, 1993:191, *quoted in* LEBLANC, *supra* note 133, at 135.

269. See CRC, *supra* note 9, at art. 32.

270. See *id.*

other sanctions to ensure the effective enforcement of Article 32.²⁷¹ An examination of India's national law and policy on child labor will give an insight into the extent to which India has complied with its international obligations.

2. National Law

India has many laws, dating back to the 1930s, that offer protection to working children, especially in the area of bonded labor and industry.²⁷² For example, the *Factories Act, 1948*, prohibits the employment of children less than fourteen years of age in factories.²⁷³ The Indian commitment to regulating child labor is even articulated in the country's Constitution of 1949. The most important legislation in the area of child labor is the *Child Labour (Prohibition and Regulation) Act, 1986*.

a. Indian Constitution (1949)

The Indian Constitution was adopted on November 26, 1949 and came into force on November 26, 1950.²⁷⁴ Article 24 of the Indian Constitution prohibits the employment of children in factories, mines, or any other hazardous employment below the age of fourteen years.²⁷⁵ It is proclaimed as a right against exploitation, which is one of India's fundamental constitutional rights. Article 39(e) and (f) embellishes this right by requiring the Indian States to "direct [their] policy towards securing . . . that . . . citizens are not forced by economic necessity to enter avocations unsuited to their age or strength" and "that . . . childhood and youth are protected against exploitation."²⁷⁶ The

271. See *id.*

272. These include: *Child (Pledging of Labour) Act, 1933*, *Factories Act, 1948*, *Minimum Wages Act, 1948*, *Plantation Labour Act, 1951*, *Apprentices Act, 1961*, *Shops and Establishments Acts, 1961*, *Beedi and Cigar Workers (Conditions of Employment) Act, 1966*, *Contract Labour (Regulation and Abolition) Act, 1970*, *Bonded Labour System (Abolition) Act, 1976*, *Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979*, *Child Labour (Prohibition and Regulation) Act, 1986*.

273. *Factories Act*, § 67. The Act has a significant loophole, however, as it only applies to factories employing ten or more people with the use of electric or generated power, or twenty or more people without the use of power. See *id.*, § 2(m)(i)-(ii). It has been documented that employers find ways to get around this restriction, such as partitioning the workplace or only employing a small number of people "on the books." See HUMAN RIGHTS WATCH, *THE SMALL HANDS OF SLAVERY*, *supra* note 190, at 39-40.

274. See M. RAMA JOIS, 2 *LEGAL AND CONSTITUTIONAL HISTORY OF INDIA* 347 (1984).

275. See INDIA CONST. art. 24.

276. *Id.* at art. 39.

right to education is provided in Article 41 and Article 45 makes provision for free and compulsory education for children under the age of fourteen years.²⁷⁷ However, neither of these Articles is strictly binding. A state is only obliged to make provisions for education "within the limits of its economic capacity and development" and the states must only endeavour to provide free and compulsory education for children "within a period of ten years from the commencement of [the] Constitution."²⁷⁸ For these reasons the Constitution is of very limited value today in the struggle against child labor.

b. Child Labour (Prohibition and Regulation) Act, 1986

The *Child Labour (Prohibition and Regulation) Act, 1986*, is the most important national law in the area of child labor. Although there were, prior to this Act, a number of acts in existence that prohibited the employment of children under the age of fourteen,²⁷⁹ there was no law in existence that determined in which fields of work children should be banned, nor any law regulating the working conditions of children in non-prohibited employment. The Act bans the employment of children under fourteen in specific occupations, regulates the conditions of children working in acceptable employment, introduces a procedure by which the schedule of banned occupations can be modified, and lays down penalties for employment of children in violation of the Act.²⁸⁰ The Act does not prohibit all child labor, but rather the employment of children in twenty-five hazardous industries.²⁸¹

3. Government Policy

Just as India has child labor laws dating back to the 1930s, there has been government policy on child labor since that time.²⁸² Since 1987, the Indian government has paid increasing attention to the plight of child laborers. In 1987, a National Child Labour Policy was implemented.²⁸³ This policy was funded

277. *Id.* at art. 41, 45.

278. *Id.*

279. One such measure is the *Factories Act, 1948*.

280. *Child Labour (Prohibition and Regulation) Act*, *supra* note 45.

281. *See id.*

282. See COMMISSION ON LABOUR STANDARDS AND INTERNATIONAL TRADE, CHILD LABOUR IN INDIA: A PERSPECTIVE 42-45 (1995) for details of eighteen different child labor policies, laws, and committees established by the central government since 1921.

283. See HUMAN RIGHTS WATCH, *THE SMALL HANDS OF SLAVERY*, *supra* note 190, at 120; see also Van Bueren, *supra* note 80, at 289 n.104.

primarily by various international agencies and was administered by local NGOs.²⁸⁴ In 1994, this program was extended through the Elimination of Child Labour Programme, which was announced by former Prime Minister P. V. Narasimha Rao.²⁸⁵ The initiative had the goal of bringing two million child laborers out of hazardous industries by the year 2000.²⁸⁶ Also in 1994, the National Authority for the Elimination of Child Labor (NAECL) was created under the chairmanship of a Union Labour Minister.²⁸⁷ Most recently, the newly-elected United Front government has implemented a "Common Minimum Program" which, among other things, promises to eradicate child labor in all occupations and industries, and states that the right to free compulsory elementary education shall be made a fundamental right and be enforced through suitable statutory measures.²⁸⁸

E. *Has India Complied with its International Obligations?*

As a prelude, it is worth recognizing that India clearly does not comply with the "international child labor standard" articulated earlier in this paper.²⁸⁹ Working children may be deprived of their right to education, they can be legally exposed to hazardous work between the ages of fourteen and sixteen, and they can legally work for significant amounts of time in non-hazardous work although under the age of fourteen. However, as stated above, India has not ratified the *Minimum Age Convention*, thus even the extent to which India must comply with the international standard is debatable. Accordingly, this section focuses on whether India has complied with its international obligations under the CRC, namely to take legislative, administrative, social, and educational measures to protect its children from harmful work and to provide a minimum age for admission to employment. This section also examines the extent to which India has provided for the regulation of employment, along with appropriate penalties or other sanctions.

While India has set a minimum age for hazardous forms of employment, it has failed to legislate a standard minimum age for

284. See HUMAN RIGHTS WATCH, *THE SMALL HANDS OF SLAVERY*, *supra* note 190, at 120.

285. See *id.* at 118-19.

286. See *id.* at 118.

287. The NEACL has three functions: to establish policies and programs for the elimination of child labor, to monitor the progress of implementation of these programs, and to coordinate the implementation of child labor elimination in related projects. See *id.*

288. See *Common Minimum Programme of the United Front Government* (visited Oct. 11, 1997) <<http://www.nic.in/India-Image/CMP/#Labour>>.

289. See *supra* notes 141-46 and accompanying text.

all types of work. As discussed above, the CRC can be regarded as "soft" law that only requires progressive implementation.²⁹⁰ This is true with regard to the implementation of the right to education and the right to be protected from economic exploitation. In this respect, India could argue that a law prohibiting children under the age of fourteen from working in hazardous occupations is in the spirit of Article 32 and is a step towards the Article's progressive implementation. Similarly, India's impressive educational and social policy adds weight to the argument that India is taking positive steps to eradicate the practice of child labor and to implement education programs.²⁹¹ In this sense, then, it is possible to say that India is complying with its international obligations.

However, despite having an impressive legislative and policy record, India does not have an impressive or effective implementation record. Human Rights Watch has stated:

When it comes to child labor, the Indian government has an impressive number of protective laws, government decrees and orders, national policies and projects, standing and special committees and commissions, and reports and recommendations. Unfortunately, the laws are rarely enforced and the recommendations are rarely carried out.²⁹²

Indeed, quite apart from the fact that the existing laws have loopholes, and attempts to implement them would not be effective,²⁹³ the real problem is India's apparent lack of will to enforce its national child labor laws. Human Rights Watch lists several obstacles to enforcement: apathy, caste and class bias, obstruction, corruption, lack of accountability, and lack of adequate enforcement staff.²⁹⁴ Ultimately, it appears that India does not have the political will to enforce and implement the extensive laws and policies it has developed. There is a strong argument that lack of will is largely due to entrenched cultural and religious beliefs about the "natural order of things." Child labor is thought to be inevitable in India—a status quo that

290. See *supra* Part II.C.2.c.

291. One of the goals of the United Front Government, articulated in their Common Minimum Programme is to make the right to free and compulsory elementary education a fundamental right to be enforced through statutory measures. See *Common Minimum Programme of the United Front Government*, *supra* note 288.

292. HUMAN RIGHTS WATCH, *THE SMALL HANDS OF SLAVERY*, *supra* note 190, at 118.

293. For a discussion on loopholes and inadequacies of the *Child Labor (Prohibition and Regulation) Act, 1986*, see HUMAN RIGHTS WATCH, *THE SMALL HANDS OF SLAVERY*, *supra* note 190, at 36-39.

294. See *id.* at 138-44.

cannot be changed by force.²⁹⁵ Whatever the reason, in failing to effectively implement its legislation, India has failed to meet its international obligation to progressively implement the child labor provisions of both the CRC and the ICESCR.

F. *The Impact of Child Labor Law on India*

India is a classic example of a country where international and national law on child labor has not had the impact that one would expect and desire. This cannot be entirely attributed to poverty and underdevelopment. To a significant degree, it is due to the belief system of Indian society. This belief system has an impact on the incidence and perpetuation of child labor. Accordingly, in India's case it is clear that economic development alone will not stop child labor. The government needs to be truly willing to implement change, to enforce existing laws, and, most importantly, to re-educate the population about the existing social order. Economic development and the eradication of poverty, standing alone, do not provide the impetus for these changes.

V. CONCLUSION

The purpose of this Article was to look at the development issues that arise out of a legal analysis of the international law of human rights relating to child labor. It was not within the scope or aim of this Article to provide solutions to these problems. Rather, its intention was to reflect on whether or not the right approach is being taken with regard to child labor now that renewed attention is being placed on developing ways to deal with the issue. Indications are that the current approach is not the right one. This conclusion is primarily supported by the fact that rates of child labor are rising. Indeed, the ILO has recently recognized the need for a multi-dimensional approach and is of the opinion that governments must now act on the "economic, social, educational and cultural fronts."²⁹⁶ One of the weaknesses in the present international framework is that it provides an "economic development" loophole, which effectively allows countries to resist implementing change while citing poor economic development and inadequate means in justification. Although in an ideal world countries would "do the right thing," and use all of their available means to implement whatever

295. *See id.* at 4-5.

296. *Combating the Most Intolerable Forms of Child Labour: A Global Challenge*, *supra* note 2, at 14.

change they could, the weakness of the present international framework is that it supplies an easy avoidance mechanism. The problem of child labor is not contained entirely within the bounds of economic development and should not be treated as if it is. While it may be true that child labor cannot be entirely eradicated until poverty is reduced and development occurs, significant inroads toward the solution can be made if the international community recognizes that child labor is a multi-faceted problem that warrants a multi-faceted approach.

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