

# Child labour: A universal problem from a Namibian perspective

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## Introduction

After World War I, the Treaty of Versailles mentioned common labour standards, including the right of association, wages for a reasonable standard of life, an eight-hour working day, the abolition of child labour, the equal remuneration of men and women, and equal rights for migrant workers. These calls for international workers' rights as well as the formation of the International Labour Organisation (ILO) were a response to the threat of the capitalist system posed by the Russian revolution and Bolshevism. Amongst other things, these calls reflected an understanding that labour was not a commodity, and in any country across the globe, children were one of the important components of the social structure needing protection against social injustice. Any undue influence on the child forcing or burdening him/her to work could cause a severe disruption of the social fabric, thereby disabling the future advancement of society. In this light, both national and international law put restrictions on the use of child labour.

An analysis of the issue of child labour brings one to the controversy of intersecting rights – socio-economic rights and the founding values of human dignity, equality and freedom – which reinforce one another at the point of intersection. For example, if there is a need to abolish child labour, there is a negative impact on family income in families that allow their children to be employed because of poverty; yet, at the same time, the welfare and dignity of the child is affected negatively by such employment.

## The universality of the child labour phenomenon

The ILO reports that more than 200 million children in the world today are involved in child labour, doing work that is damaging to their mental, physical and emotional development.<sup>1</sup> This is underlined by the International Programme on the Elimination of Child Labour (IPECL):<sup>2</sup>

One in every six children aged 5 to 17 worldwide is exploited by child labour in its different forms ... Many of these children are forced to risk their health and their lives and mortgage their future as productive adults.

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1 ILO (2009a).

2 IPECL (2003:v).

Children work because their survival and that of their families depend on it. Child labour persists even where it has been declared illegal, and is frequently surrounded by a wall of silence, indifference, and apathy. But that wall is beginning to crumble. While the total elimination of child labour is a long-term goal in many countries, certain forms of child labour must be confronted immediately. Nearly three-quarters of working children are engaged in the worst forms of child labour, including trafficking, armed conflict, slavery, sexual exploitation, and hazardous work. The effective abolition of child labour is one of the most urgent challenges of our time.

The use of child labour in the early phases of industrialisation in many countries has attracted special attention.<sup>3</sup> It is to be understood that child labour hampers the growth of human resources. It reduces not only the individual's educational achievements, but also the effect and quality of the education system. Furthermore, child labour has redistribution effects on the labour market.<sup>4</sup> In this light, the fight against child labour has gained international momentum during the last decade, and has become a major challenge for the Millennium Development Goals (MDGs).<sup>5</sup> A statement from the Children's Forum to the United Nations (UN) in May 2002 read as follows:<sup>6</sup>

We are the world's children. We are the victims of exploitation and abuse. We are street children. We are the children of war. We are the victims and orphans of HIV/AIDS. We are denied good quality education and health care. We are victims of political, economic, cultural, religious and environmental discrimination. We are children whose voices are not being heard: it is time we are taken into account. We want a world fit for children, because a world fit for us is a world fit for everyone.

This statement shows the predicament of children since time immemorial. After the Industrial Revolution and particularly after WWI, the ILO – set up in 1919 under the League of Nations – saw the need for international guidelines by which the employment of children under a certain age could be regulated in industrial undertakings.<sup>7</sup> It was then suggested that the minimum age of work be 12 years. During the Legislative Assembly debates, the question of raising the minimum age from 9 to 12 years had created a furore.<sup>8</sup>

The ILO Convention defines *child labour* as –

- the engagement in work done by all children below 18 in harmful occupations or work activities in the labour market or their own household
- all children undertaking work in the labour market or household interfering with their primary education

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3 Rena (2009:1–8).

4 (ibid.).

5 (ibid.).

6 Nienke (2007:1).

7 Ray (2009).

8 (ibid.). See also *MC Mehta v State of Tamil Nadu & Others*, AIR1997SC699.

- all children under 15 in full-time employment, and
- all children under 13 in part-time work.

Thus, *child labour* is defined not by the activity per se, but by the effect such activity has on the child.

The 2006 follow-up report to the ILO Declaration on Fundamental Principles and Rights at Work reveals that, globally, there were 317 million economically active children aged between 5 and 17 in 2004; of these, 218 million could be regarded as child labourers.<sup>9</sup> Of this latter number, 126 million were involved in hazardous work.<sup>10</sup> This shows that, generally speaking, child labour is found in every part of the world.

Although the figures for the number of child labourers vary, they are all significantly high if one considers that the child economic activity rate for 1980–1991 was 13.5% for males and 10.3% for females.<sup>11</sup> In comparison, other developing countries such as Malaysia and Sri Lanka had lower activity rates: 8.8% for males and 6.5% for females in Malaysia, and 5.3% for males and 4.6% for females in Sri Lanka.<sup>12</sup>

The traditional picture of child labour is of something that takes place in poverty-stricken less-developed countries. But the United Farm Workers' Union in the United States of America estimates that at least 800,000 children work in the fields of the US.<sup>13</sup> And when the urban sweatshops of the garment and other industries are accounted for, the total number of child labourers in that country runs even higher. In this light, it is estimated that some 250 million children between 5 and 14 have had their childhood stolen from them. That is because they have been forced to work – about half of them full-time. It is conceivable that, in the richest country in the world, these children will never know a childhood that does not include the stress, fatigue and cruelty of work.

The US's National Institute for Occupational Safety and Health (NIOSH), relying on reports by the Department of Labor's Bureau of Labor Statistics and the Current Population Survey, estimates that 2.78 million 16- and 17-year-olds were employed in 2000, as well as over 450,000 15-year-olds, for a total of 3.23 million youth workers.<sup>14</sup> The NIOSH report has no estimate for the number of youth workers under age 15. However, many children under this age do in fact work, as starkly evidenced by the Department of Labor's Bureau of Labor Statistics estimate that 134 children under age 15 were killed on the job during the period 1992–1998.<sup>15</sup> The Child Labour Coalition believes the US Government estimate of 3.23 million child labourers significantly under-

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9 UNICEF (2009).

10 (ibid.).

11 ILO (1995:113).

12 (ibid.).

13 Smith (2000:6–7).

14 NIOSH (2002:3).

15 US Department of Labor (2000:60).

represents the actual number of child labourers, especially in agriculture, as well as the number of children who may legally work under the age of 15.

In Germany, some 1.492 million children between 15 and 19 years of age were economically active in 2000.<sup>16</sup> A total of 1.434 million teenagers between 15 and 19 years of age are child labourers in Germany.<sup>17</sup> In 1995, there were 0 economically active children between the ages of 10 and 14.<sup>18</sup> In the German Army, there are also indications of under-18s as the minimum recruitment age is 17.<sup>19</sup> The minimum age for conscription is 18 years.<sup>20</sup>

In China, children are abundant. Thus, child labour is a common phenomenon despite it being outlawed. Child labour in China is far too multifaceted to be summarised in black and white terms, save to say that it is a huge problem, and that there is clear evidence that it is increasing. Although there is no official figure on the number of children working in China, it is estimated by many that of the 10 million children out of school, over 5 million work in factories.<sup>21</sup> There are some who even consider this a conservative estimate.<sup>22</sup> It was reported that, in Sichuan, China's most populated province, 85% of children who drop out of school work elsewhere. Even in some less populated rural provinces, over 20% of the work force is made up of children.<sup>23</sup> In some areas of China, children make up 10–20% of the work force.<sup>24</sup> Many companies prefer child labour because children are cheap, obedient and agile enough to manoeuvre in small, machine-cramped work areas.<sup>25</sup>

The Chinese Government sees child labour as one way to combat poverty and does little to enforce the laws against it.<sup>26</sup> Chinese companies are more interested in their economic investments than the status of their workers. So far, therefore, there have not been any convincing signs that the situation will improve or that the issue has become a government priority.<sup>27</sup>

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16 ILO (2001).

17 ILO (1999).

18 ILO (1995).

19 CSUCS (2001).

20 Goodwin-Gill & Cohn (1994).

21 Gilley (1996:159).

22 China Labour Bulletin (2009).

23 Gilley (1996:159).

24 (ibid.).

25 (ibid.).

26 Wang (1988:33, 42).

27 (ibid.). The 1971 census data showed an overall child work participation rate of 12.69% in 1961, and 7.13% by 1971. This data is misleading because the definitions of *child labour* are different in the two censuses: unpaid workers were not included in the 1971 census. Hence, a comparison cannot be completely valid. The data also shows that, in a span of 20 years (1961–1981), the proportion of children working in India has not changed significantly; but since comparisons with this data were not valid, this conclusion is questionable.

In India, the 1981 census reports show there were 13.6 million child labourers.<sup>28</sup> Indian Government extrapolations of this 1981 data place the current number of child labourers at between 17 and 20 million.<sup>29</sup> This extrapolation seems highly unlikely as –<sup>30</sup>

[t]he Official National Sample Survey of 1983 reports 17.4 million child labourers, while a study ... sponsored by the Labour Ministry, concluded that the child-labour force was 44 million.

The United Nations Children's Fund (UNICEF) cites –<sup>31</sup>

... figures ranging from seventy-five to ninety million child labourers under the age of fourteen.

A universal difficulty in obtaining accurate data is that individuals fail to report child labour participation during surveys for fear of persecution.

In South Africa, while the true extent of child labour is not known, estimates suggest that as many as 200,000 children are working.<sup>32</sup>

In Zimbabwe, children have been found working in the export-oriented mining sector.<sup>33</sup> No children are formally employed in mines, but children, working either for independent operators or through subcontractors, can be found mining chromium and gold. At present, Zimbabwe's labour legislation does not address child labour. While there is no minimum age set by the government, labour standards for the mining industry are determined by the industry-wide collective bargaining agreement developed by the National Employment Council for the Mining Industry (NEC), an incorporated body composed of representatives of labour and management. Under Zimbabwean law, the agreement concluded by the NEC is binding on all employers and employees in the industry, whether or not they are NEC members. Under the current NEC agreement, negotiated in 1990, no person under 17 is permitted to be employed in the mining industry.<sup>34</sup>

Like many other countries in sub-Saharan Africa, Zambia has seen an increase in cases of child labour in the last decade, due in part to HIV/AIDS. Fortunately, infections are on a downward trend, at 14.3% from 19%, according to the 2008 Zambia Demographic Survey.<sup>35</sup> The Child Labour Survey of 2005 showed that 895,246 children between the ages of 5 and 17 were engaged in work that was either hazardous or it involved long

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28 Government of India (1981; cited in Weiner 1991:20).

29 Human Rights Watch (1996:122).

30 Weiner (1991:20–21).

31 Human Rights Watch (1996:122).

32 IDEA (2000).

33 United States Department of Labor (2009).

34 (ibid.).

35 Kayaya (2008).

hours. Among these children, the ILO observes that 336,546 (38%) had lost either one or both parents to HIV/AIDS.<sup>36</sup> This shows not only that there is a link between child labour and HIV and AIDS, but also that HIV and AIDS are a product of poverty – as evidenced by the number of children living and working on the street. The said Zambian Demographic Survey showed that most of the street children had lost their parents to AIDS, and that they had resorted to employment as child labourers or engaged in the worst forms of child labour, such as prostitution, to earn a living.<sup>37</sup>

A rapid assessment of 173 children in the Lusaka and Chongwe Districts of Zambia revealed a worrying scenario regarding child labour. Of the 173 children interviewed, 149 (86%) were engaged in domestic work. Some 56% of this figure comprised girls who were engaged in the same work as their male counterparts.<sup>38</sup> The survey further revealed that 73% of children engaged in domestic work were female, while 27% were male. Some 61% of all children engaged in domestic work were in the age group 10–14 while a significant portion of children (140 children out of the sample of 149, which is about 94%), worked without pay.<sup>39</sup> Only five children were paid in cash, whereas four received only food as payment for their labour. The majority of children working in households (131 out of 149 in the sample) had never been to school. In another survey, data on 176 children aged between 5 and 17 was captured.<sup>40</sup> Results showed that more than 90% of the children in the latter survey worked for four or more hours.<sup>41</sup>

In Mozambique for the year 2000, the ILO reported that there were 791,000 economically active children, 328,000 girls and 462,000 boys between the ages of 10 and 14, representing 32.4% of this age group.<sup>42</sup> An estimated 8,000 children actively participated in the civil war between FRELIMO<sup>43</sup> and RENAMO.<sup>44</sup> There were credible reports that there was some trafficking in persons, primarily women and children, to South Africa and Swaziland.<sup>45</sup> Both countries apparently offered economic opportunities that attract poor women and children, who were sometimes victimised by traffickers.<sup>46</sup> Child prostitution appeared to be most prevalent in Maputo and Beira, although it might also exist in rural areas. Child prostitution was growing in the Beira, Maputo and Nacala areas, which have highly mobile populations and a large number of transport workers.<sup>47</sup>

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36 (ibid.).

37 (ibid.).

38 (ibid.).

39 (ibid.).

40 (ibid.).

41 (ibid.).

42 ILO (2000).

43 *Frente de Libertação de Moçambique*.

44 *Resistência Nacional Moçambicana*; ILO (2000).

45 (ibid.).

46 (ibid.).

47 (ibid.).

In response to these problems, Mozambique supported a “straight-18”<sup>48</sup> ban on military recruitment during negotiations on the Optional Protocol on the Involvement of Children in Armed Conflict. Mozambican law allows conscription from the age of 18, but this age limit may be lowered during times of war. There are concerns that former child soldiers, now of drafting age, might once again be liable for compulsory military service. This is because all Mozambican citizens between the age of 18 and 35 years are subject to compulsory military service and the military obligations that derive from it.<sup>49</sup> In time of war, the above ages for fulfilling these military obligations may be changed by law.

## Causes of child labour and international legal enlightenment

It appears that the cause of child labour in most countries across the globe is poverty and other related socio-economic problems. Indeed, child labour is a source of income for poor families the world over.<sup>50</sup> A study conducted by the ILO Bureau of Statistics found that –<sup>51</sup>

[c]hildren’s work was considered essential to maintaining the economic level of households, either in the form of work for wages, of help in household enterprises or of household chores in order to free adult household members for economic activity elsewhere.

Mitesh and Badiwala report that, in some cases, a child’s income accounted for between 34% and 37% of the total household income.<sup>52</sup> The study concludes that a child labourer’s income is important to the livelihood of a poor family.<sup>53</sup>

One aspect of this study is questionable, however. It was conducted in the form of a survey, and the responses were given by the child labourers’ parents.<sup>54</sup> Parents would

48 The ‘straight-18’ position defines *child* and *child soldier* in terms of the chronological age of 18. For instance, under the title *Who are child soldiers?*, Save the Children (2001) introduced the definition from the Cape Town Principles and explained the rationale of this definition by asserting that –

[t]he upper age of eighteen as defined in the Cape Town Principles corresponds to the threshold between childhood and adulthood defined in the Convention on the Rights of the Child.

Organisations that have played a predominant role in propagating this type of discourse include Amnesty International, Human Rights Watch, the Quaker United Nations Office, the International Save the Children Alliance, and the International Committee of the Red Cross. Many of these organisations also serve on the steering committee for the Coalition to Stop the Use of Child Soldiers. However, beyond the legal rationale, this explanation does not actually address why anyone under 18 should be considered to be a child and why military participation should be permitted to an 18-year-old while prohibited to a 17-year-old.

49 These are Law No. 4/78 (*Lei do servico militar obrigatorio*) and Decree No. 3/86 (*Regulamento basico do militar nas forcas armadas de Moçambique*). See Pan-African News Agency (1997).

50 Mitesh & Badiwala (2009).

51 Mehra-Kerpelman (1996:8).

52 Mitesh & Badiwala (2009).

53 (*ibid.*).

54 (*ibid.*).

be biased into being compelled to support their decision to send their children to work, by saying that it was essential. They are probably right: for most poor families in India, for example, alternative sources of income are close to nonexistent. There are no social welfare systems such as those in the West, nor is there easy access to loans. However, as Mitesh and Badiwala point out, —<sup>55</sup>

[w]hat is apparent is the fact that child labourers are being exploited, shown by the pay that they receive. For the same type of work, studies show that children are paid less than their adult counterparts ... Although 39.5% of employers said that child workers earn wages equal to adults, if the percentage of employers admitting that wages are lower for children are added up, a figure of 35.9% is found. This figure is significant when taking the bias of employers into account. Employers would have been likely to defend their wages for child workers, by saying that children earn the same wages as adults. The fact that no employers stated children earned more than adults, should also be noted. Other studies have also concluded that “children’s earnings are consistently lower than those of adults, even where there [are] two groups are engaged in the same tasks”.

In some countries, in the battle between industrial development and social upliftment, the socially and economically backward suffer and the children lose their childhood. In order to mitigate the surrounding incomparability to other children who are not in desperate situations, they fall victim to child labour by trying to secure two square meals a day.

The ILO’s worldwide endeavours in respect of child labour cover the following:

- The prohibition of children labour
- Protecting child labourers
- Attacking the basic causes of child labour
- Helping children to adapt to future work, and
- Protecting the children of working parents.

Lee says that the issue of trade and international labour standards predated the establishment of the ILO in 1919.<sup>56</sup> He notes a few salient features in terms of the historical developments underlying the debate on whether international trade has exacerbated the decline in labour standards and specifically the rise in child labour. Firstly, the ILO was established to undertake joint international action to improve labour conditions worldwide. The Preamble to the ILO Constitution captures this noble objective, and begins as follows:<sup>57</sup>

Whereas universal and lasting peace can be established only if it is based upon social justice; and whereas conditions of labour exist involving such injustice, hardships and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled ...; Whereas also *the failure of any nation to adopt humane conditions*

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55 (ibid.); the cited phrase is from Grootaert & Kanbur (1995:134, 187–201, 195).

56 Lee (1997:174).

57 ILO (1919; cited in Lee 1997:173–174).



*of labour is an obstacle in the way of their nations which desire to improve the conditions in their own countries; . . .* [Emphasis added]

Lee lists three motives behind the statements in the ILO Preamble:<sup>58</sup>

- Social justice and humanitarian concerns over the existence of conditions of labour that cause hardship and privation to large numbers of people
- To stave off unrest that would imperil the peace and harmony of the world, and
- The need to eliminate the negative cross-border externalities generated by countries that fail to observe humane conditions of labour.

In 2006, Namibia planned to put in place an action programme to address child labour in the country. The process, which started in 2004, involved extensive consultation with stakeholders at national and regional level. It was led by the Ministry of Labour and Social Welfare, and was assisted by the ILO programme entitled “Towards the Elimination of the Worst Forms of Child Labour” (TECL). Below is an exposition of the child labour phenomenon in Namibia.

## **Prevalence of child labour in Namibia**

The Namibian Child Activities Survey of 1999 found that children in the 6–18 age range who were working or looking for work comprised 16.3% of the 445,007 children in that age group.<sup>59</sup> This translated into 72,405 children working or wanting to work, with no fewer than 40,000 being under the minimum working age of 14 years. The overwhelming majority lived in rural areas, with about two-thirds working on communal farms. About one in ten of these children was in paid employment. Slightly more boys than girls were employed.<sup>60</sup>

The research process that paved the way for the Namibian Action Programme on the Elimination of Child Labour 2008–2012 established that many of the worst forms of child labour were being practised in Namibia. It was estimated that between 10 to 30 children in conflict with the labour law were forced or instigated by adults to work, and that the commercial sex exploitation of children occurred both in terms of children being prostituted and in terms of adults taking advantage of needy children by providing basic necessities in return for sex.<sup>61</sup> It seems that this situation is largely attributed to the high incidence of poverty, certain cultural practices, child labour, a lack of proper guidance for children, and a lack of resources in schools, amongst other things.

Furthermore, the Namibian Child Activities Survey concluded that children were being forced to work in the agricultural and domestic service sector, and that child trafficking

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58 (ibid.).

59 Ministry of Labour and Social Welfare (2008:2).

60 (ibid.).

61 (ibid.).

was indeed occurring within the country and across the border, albeit on a limited scale.<sup>62</sup> Around one million children are trafficked worldwide today,<sup>63</sup> and there is growing concern that the global economic crisis may further increase child vulnerability to trafficking – including in Namibia. This is a universal problem, and Namibia cannot solve its domestic occurrence alone. The ILO has been leading the fight against child trafficking, and is now taking the struggle to those best placed to help stop it through a new training package. ILO Convention No. 182 (1999) on the Worst Forms of Child Labour (WFCL) classifies *child trafficking* among “forms of slavery or practices similar to slavery” that are to be eliminated as a matter of urgency. Most trafficked children end up in child domestic labour, commercial sexual exploitation, agricultural work, drug couriership, organised begging, child soldiering, and exploitative or slavery-like practices in the informal economy.

There is no data in Namibia regarding where exactly most trafficked Namibian children end up, hence no specific data exists. However, within the territory, particularly in the small town of Outjo, a number of children were expelled from high school in 2007 after it was found that they were engaged in the commercial sex trade.<sup>64</sup> The school where they had been enrolled apparently felt that they would have a bad influence on fellow pupils. The expulsion of these children was deemed unfortunate, however, as they would now be in an even worse position than before, where they would have been subjected to ridicule and scorn if they had carried their pregnancy and attended school.<sup>65</sup>

In addition, children were engaged in hazardous work – making charcoal, tending livestock in isolated areas, and carrying heavy loads. Worldwide, children from poor households and from rural areas were most likely to be engaged in child labour; this was confirmed to be the case in Namibia as well, as the Ministry of Labour and Social Welfare reported.<sup>66</sup> Across the globe, those burdened with household chores are overwhelmingly girls. The millions of girls who work as domestic servants are especially vulnerable to exploitation and abuse.<sup>67</sup>

In Namibia, the work some children are expected to do includes getting involved in the sex trade for family members who act as pimps, and being made to work in the charcoal producing industry.<sup>68</sup> Some children move to the Outjo area from the Kavango Region with their parents in order to work as charcoal burners.<sup>69</sup> These children do not go to school; they live with their families in plastic, make-shift dwellings. Farmers generally make use of a loophole in the law to clear themselves of responsibility for

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62 (ibid.).

63 ILO (2009b).

64 Isaacs (2007).

65 (ibid.); note the comments by Ulfried Schwacke, the ILO consultant in Namibia, contained therein.

66 Ministry of Labour and Social Welfare (2008).

67 ILO (2009b).

68 Isaacs (2007).

69 (ibid.)

these children.<sup>70</sup> While all farm owners interviewed by the ILO consultant in Namibia denied that children worked for them in charcoal production, some apparently said that they did not know whether or not there were cases of children “helping their parents”.<sup>71</sup>

Another case reported how a Grade 5 learner had to leave school to graze his second cousin’s cattle at the Eheke village in the Uukwambi area in northern Namibia. At the time, his mother was worried that her son would never return to school as the responsibility to herd the cattle was placed solely on his shoulders. Shortly after the story was published in a popular newspaper<sup>72</sup> in the country, Chief Labour Inspectors of the Ministry of Labour and Social Welfare worked hard to make the parents and relatives understand that the situation violated the child’s rights. The child gained his freedom and was allowed to return to school.<sup>73</sup>

The Ministry’s action shows a commitment on the part of the government to honour its obligations under international law. At the same time, it indicates a significant break from an abusive past which was implemented by a bureaucracy hostile to fundamental rights and accountability. The new Constitution envisages the role and obligations of government quite differently.

## Namibian child labour law

### The international and national legal framework

As noted above, Namibia has ratified a number of international and regional instruments regulating child labour. Such instruments are relevant considerations because Article 144 of the Namibian Constitution incorporates all ratified conventions and customary international law<sup>74</sup> into Namibian law. Therefore, the international and regional instruments on the rights of the child provide a framework within which Article 15, and ultimately other statutory provisions, can be evaluated and understood.<sup>75</sup>

Namibia has ratified the following ILO Conventions:

- Forced Labour Convention, 1930<sup>76</sup>
- Freedom of Association and Protection of the Right to Organise Convention, 1948<sup>77</sup>

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70 (ibid.).

71 Likela (2009).

72 (ibid.).

73 (ibid.).

74 *Customary international law* are laws that derive their authority from constant and consistent practice by states rather than from formal expression in a treaty or legal text. Thus, such law arose from custom and usage, and is recognised and accepted as binding even though it is not codified; it is also known as *opinio iuris*.

75 This position was set out in *S v Makwanyane & Another*, 1995 (6) BCLR 665 (CC); 1995 (3) SA 391 (CC), paragraphs 34–35.

76 No. 29; ratified on 15 November 2000.

77 No. 87; ratified on 3 January 1995.

- Right to Organise and Collective Bargaining Convention, 1949<sup>78</sup>
- Abolition of Forced Labour Convention, 1957<sup>79</sup>
- Discrimination (Employment and Occupation) Convention, 1958<sup>80</sup>
- Minimum Age Convention, 1973<sup>81</sup>
- Tripartite Consultation (International Labour Standards) Convention, 1976<sup>82</sup>
- Labour Administration Convention, 1978<sup>83</sup>
- Termination of Employment Convention, 1982,<sup>84</sup> and
- Worst Forms of Child Labour Convention, 1999.<sup>85</sup>

Namibia also does not have an Act designed specifically for child labour in the country. However, Article 15 of the Constitution provides for the rights of the child, as follows:

- (1) Children shall have the right from birth to a name, the right to acquire a nationality and, subject to legislation enacted in the best interests of children, as far as possible the right to know and be cared for by their parents.
- (2) Children are entitled to be protected from economic exploitation and shall not be employed in or required to perform work that is likely to be hazardous or to interfere with their education, or to be harmful to their health or physical, mental, spiritual, moral or social development. For the purposes of this Sub-Article children shall be persons under the age of sixteen (16) years.
- (3) No children under the age of fourteen (14) years shall be employed to work in any factory or mine, save under conditions and circumstances regulated by Act of Parliament. Nothing in this Sub-Article shall be construed as derogating in any way from Sub-Article (2) hereof.
- (4) Any arrangement or scheme employed on any farm or other undertaking, the object or effect of which is to compel the minor children of an employee to work for or in the interest of the employer of such employee, shall for the purposes of Article 9 hereof be deemed to constitute an arrangement or scheme to compel the performance of forced labour.
- (5) No law authorising preventive detention shall permit children under the age of sixteen (16) years to be detained.

This is the key provision in Namibian law which regulates child labour. It is important to note that the Namibian Constitution does not prohibit child labour: rather, it prohibits the employment of children in environments which are likely to be hazardous to them or to interfere with their education, or that may harm their health or physical, mental, spiritual, moral or social development. Therefore, if there is no threat to a child in respect of the situations specified, then he or she can be employed.

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78 No. 98; ratified on 3 January 1995.  
79 No. 105; ratified on 15 November 2000.  
80 No. 111; ratified on 13 November 2001.  
81 No. 138; ratified on 15 November 2000.  
82 No. 144; ratified on 3 January 1995.  
83 No. 150; ratified on 28 June 1996.  
84 No. 158; ratified on 28 June 1996.  
85 No. 182; ratified on 15 November 2000.

Therefore, the child's right not to be exploited is guaranteed by the above constitutional provision. This guarantee, read together with the provisions of the CRC and the African Charter on the Rights of the Child (ACRWC) casts a duty upon the state to direct its policy towards securing that children are given opportunities and facilities to develop in a healthy manner under conditions of freedom and dignity, and that childhood and youth are protected against exploitation and against moral and material abandonment.

Under the above legal framework, Namibian courts are obliged to consider the effect that their decisions will have on the rights and interests of the child. The legal and judicial process must always be child-sensitive.<sup>86</sup> But, as was held in South Africa in the case of *S v M*—<sup>87</sup>

... the fact that the best interests of the child are paramount does not mean that they are absolute. Like all rights in the Bill of Rights their operation has to take account of their relationship to other rights, which might require that their ambit be limited.

Namibian statutes should be interpreted in a manner which favours protecting and advancing the interests of children, and courts should function in a manner which at all times shows due respect for children's rights. Courts are bound to give effect to the provisions of Article 15 in matters that come before them and which involve children. Indeed, Article 5 of the Constitution makes it plain that the Bill of Rights binds the legislature, the executive, the judiciary and all other organs of state.

The Constitution also imports the term *best interest of the child* from international conventions such as the CRC as a yardstick in the consideration of matters that affect children. It is neither necessary nor desirable to define with any precision the content of the right to have the child's best interests given paramount importance in matters concerning the child. It is, as it was put in the case of *Sonderup*, "an expansive guarantee" that a child's best interests would be paramount in all matters concerning the child.<sup>88</sup> Thus, this provision imposes an obligation on all those who make decisions concerning a child to ensure that the best interests of the child enjoy paramount importance in such decisions. Article 15 of the Constitution thus provides a benchmark for the treatment and the protection of children.

Article 3 of the CRC sets out the principle that the best interests of the child are a primary consideration in all actions concerning the child. This principle was introduced because children —<sup>89</sup>

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86 Convention 98, at para. 15.

87 *S v M* [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC) at para 26.

88 *Sonderup v Tondelli & Another*, [2000] ZACC 26; 2001 (1) SA 1171 (CC); 2001 (2) BCLR 152 (CC), at para. 2.

89 General Comment No. 7 (2005) of the UN Committee on the Rights of the Child, para 13.

[b]y virtue of their relative immaturity ... are reliant on responsible authorities to assess and represent their rights and best interests in relation to decisions and actions that affect them, while taking account of their views and evolving capacities.

Article 3 specifically refers to actions undertaken by “public or private social welfare institutions, courts of law, administrative authorities or legislative bodies”. The UN Committee on the Rights of the Child commented as follows on Article 3(1):<sup>90</sup>

The article refers to actions undertaken by “public or private social welfare institutions, courts of law, administrative authorities or legislative bodies”. The principle requires active measures throughout Government, parliament and the judiciary. Every legislative, administrative and judicial body or institution is required to apply the best interests principle by systematically considering how children's rights and interests are or will be affected by their decisions and actions – by, for example, a proposed or existing law or policy or administrative action or court decision, including those which are not directly concerned with children, but indirectly affect children.

The phrase “to be protected from economic exploitation and shall not be employed in or required to perform work that is likely to be hazardous or to interfere with their education, or to be harmful to their health or physical, mental, spiritual, moral or social development” in Article 15(2) of the Namibian Constitution was reproduced from Article 32 of the CRC.<sup>91</sup> Article 32 was also reproduced in Article 15 of the ACRWC.<sup>92</sup> Both Conventions bind Namibia and other states parties to take legislative, administrative, social and educational measures to ensure the implementation of the Articles concerned. To this end, and having regard to the relevant provisions of other international instruments, states parties of both Conventions are in particular bound to –<sup>93</sup>

- provide for a minimum age or minimum ages for admission to employment, and
- provide for appropriate regulation of the hours and conditions of employment.

It is important to note that, for the purpose of the Namibian Constitution, a *child* is a person below the age of 16 years. This definition differs from the one in the CRC and ACRWC, which put the age of a child at 18.<sup>94</sup> The fact that, for the purpose of the Namibian Constitution, a person can attain majority at the age of 17 is not a discrepancy with the CRC, since the latter has a proviso that, although 18 may be the intended international definition, states parties can enact laws where majority can be attained earlier than that. Under common law, a child in Namibia can attain majority even below the age of 16 if s/he marries or is emancipated. In contrast, section 1 of the Age of Majority Act<sup>95</sup> provides that 21 is the age at which majority is attained, with the proviso that the person applies

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90 General Comment No. 5 (2003) of the UN Committee on the Rights of the Child.

91 Ratified by Namibia on 30 September 1990.

92 Ratified by Namibia on 26 August 2004.

93 See Article 32 of the CRC and Article 15 of the Namibian Constitution.

94 Article 1 of the CRC and Article 2 of the ACRWC.

95 No. 57 of 1972.

to the High Court to be declared a major in terms of section 2 of the Act or enters into marriage.

In order to honour her obligations under these conventions and other binding international instruments, Namibia has included certain provisions specifically for children in the Labour Act.<sup>96</sup> Thus, section 3 of the Labour Act is entitled “Prohibition and restriction of child labour”, and provides as follows:

3. (1) A person must not employ or require or permit a child to work in any circumstances prohibited in terms of this section.
- (2) A person must not employ a child under the age of 14 years.
- (3) In respect of a child who is at least aged 14, but under the age of 16 years, a person –
  - (a) must not employ that child in any circumstances contemplated in Article 15(2) of the Namibian Constitution;
  - (b) must not employ that child in any circumstances in respect of which the Minister, in terms of subsection (5)(a), has prohibited the employment of such children;
  - (c) must not employ that child in respect of any work between the hours of 20h00 and 07h00; or
  - (d) except to the extent that the Minister by regulation in terms of subsection (5) (b) permits, must not employ that child, on any premises where –
    - (i) work is done underground or in a mine;
    - (ii) construction or demolition takes place;
    - (iii) goods are manufactured;
    - (iv) electricity is generated, transformed or distributed;
    - (v) machinery is installed or dismantled; or
    - (vi) any work-related activities take place that may place the child’s health, safety, or physical, mental, spiritual, moral or social development at risk.
- (4) In respect of a child who is at least aged 16 but under the age of 18 years, a person may not employ that child in any of the circumstances set out in subsection (3)(c) or (d), unless the Minister has permitted such employment by regulation in terms of subsection (5)(c).

Subsection 5 further provides for the powers of the Minister responsible for the Labour portfolio to make regulations prohibiting the employment of children between the ages of 14 and 16 at any place or in respect of any work, and permitting the employment of children between the ages of 14 and 16 in circumstances contemplated in subsection (3) (d), subject to any conditions or restrictions that may be contained in those regulations.

### **Criminal employers under Namibian child labour law**

In terms section 3(6) of the Labour Act of 2007, it is an offence for any person to employ a child, or require or permit a child to work in any circumstances prohibited under that section. Any person who is convicted of an offence under the said section is liable to a

96 No. 11 of 2007.

fine not exceeding N\$20,000 or to imprisonment for a period not exceeding four years, or to both such fine and imprisonment.

It seems that infringement of the fundamental right guaranteed by Article 15 is a delict which is actionable per se, that is, without proof of actual damage. Furthermore, consent by the child and/or his/her parents is no defence, considering that the right to education is a fundamental right. The state is equally liable to pay a fine should it be found that some arms of the state engage in child labour. A principle of law well settled is that no person should be condemned unheard. Therefore, before an employer is asked to pay the stipulated fine, s/he has to be given reasonable opportunity to be heard and to answer the case against the findings in the report submitted by the Labour Inspector. If convicted, the employer may be ordered to pay a fine of N\$20,000.

In Namibia, the constitutional provision found statutory precision in the Labour Act.<sup>97</sup> Therefore, violation of the Constitution triggers the sanction in the Labour Act and at the same time the aggrieved child can approach the court for violation of his or her rights. The infringement of a fundamental right or any other right conferred by the Constitution is a wrong under public laws<sup>98</sup> and it seems unjust, unduly harsh and oppressive on account of their poverty or disability or socially or economically disadvantageous position to require the person or persons affected by such infringements to initiate or pursue action in civil courts. It seems that section 3 of the 2007 Labour Act bars civil action for realisation of the compensation to be paid *to the child* whose rights are violated because it provides for only a criminal sanction: that of imprisonment or payment of a fine, as opposed to compensation. However, under the Constitution every person whose rights have been affected can approach the court to sue the person who has thus violated his/her rights.<sup>99</sup> There is no reason why an affected parent should be barred from suing the employer of his/her child – the constitutional right should always exist. Thus, section 3 of the Labour Act is perhaps worthy of a constitutional challenge. Furthermore, if one is acquitted under the Labour Act, an order of acquittal in a criminal charge under the Act should not bar one from instituting a civil or constitutional rights claim against the offender; nor should it forestall an action for realisation of child labour compensation according to the Indian case of *MC Mehta v State of Tamil Nadu*.<sup>100</sup> In this light, an order of conviction under the Labour Act can no doubt be legitimately used in the civil case to found civil liability for the payment of compensation.

In India, for example, the employer is not fined for violating a constitutional provision on the rights of the child, but is ordered to pay compensation. The employer will only be

97 No. 11 of 2007.

98 Those laws which regulate the structure and administration of the government, the conduct of the government in its relations with its citizens, the responsibilities of government employees and the relationships with foreign governments. Public law can be distinguished from private law, which regulates the private conduct between individuals, without the direct involvement of the government.

99 Article 18 of the Namibian Constitution.

100 AIR 1997 SC 699.



convicted of an offence if s/he violates the relevant statutory provisions on child labour. While, in India, the criminal liability of the employer of child labour arises in respect of a violation of the provisions of the relevant statutes, civil liability to pay compensation arises due to the violation of the fundamental right of the child not to be subjected to forced labour, as per the *MC Mehta* case, which has created new rights and obligations enforceable by law.

The imperative function of the Inspector appointed under section 124 of the Namibian Labour Act is to secure compliance with the provisions of the Act, and to see that, for each child employed in violation of the provisions of the Act, the employer concerned is prosecuted. The position of the Inspector qua the provisions set out in the Act is that of an enforcer, and it should not be expected of him or her to discharge the adjudicatory functions. It would have been ideal if the government had been proactive in framing the rules and procedure for the enforcement of rights and liabilities arising from large-scale infringement of children's fundamental rights as a result of failure to perform public law duty under the Constitution, which is of general application. A statute would be needed to cover specific issues encompassed in the broad provisions of the Constitution, and to cover the gaps in the Labour Act in respect of child labour.

In the adjudicatory process, it is important that courts follow the yardstick of the best interests of the child embedded in the Constitution as well as in international instruments on the protection of the child, in particular the CRC<sup>101</sup> and the ACRWC.<sup>102</sup> In a language substantially similar to Article 15 of the Namibian Constitution. Article 3(1) of the CRC proclaims that –

[i]n all actions concerning children, whether undertaken by public or private social institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child will be a primary consideration.

The ACRWC, in similar terms, proclaims that –<sup>103</sup>

... in all actions concerning the child undertaken by any person or authority, the best interests of the child shall be the primary consideration.

Namibia, as a state party to these instruments, and under Article 144 of its Constitution, is obliged to give effect to these instruments and to take all appropriate legislative and other measures to give effect, for example, to Conventions that embody the rights of the child.

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101 This Convention was adopted by the UN General Assembly on 20 November 1989 and entered into force on 2 September 1990.

102 This Charter entered into force on 29 November 1999. See also *S v M* at para. 16, and *Director of Public Prosecutions, KwaZulu-Natal v P*, 2006 (3) SA 515 (SCA); [2006] 1 All SA 446 (SCA), at para. 13.

103 Article 4(1).

## The way forward: Programmes and strategies

From the above exposition and due to data gaps and a lack of systematic studies, it is a rather intricate matter to ascertain with certainty what the exact causes of child labour in Namibia are. Usually, the causes for such labour are complex and include mainly economic, social, and cultural factors. The problem of child labour universally points at the overarching need to understand vulnerability – to move beyond ‘poverty’ and explore a range of vulnerability factors that have an impact on the level of risk for each child: at individual child, family, community, institutional and workplace levels; and in source communities and at recipient communities.<sup>104</sup> For example, in our responses to trafficking, we should be clear about which children are (most) vulnerable, who creates the demand for exploitation, and where such demand is created, and target our actions accordingly.<sup>105</sup>

Therefore, solutions need to be comprehensive and should involve the widest possible range of partners in each society across the globe and in specific countries, Namibia not excluded. In fact, a single agency like UNICEF or the World Health Organisation – or any other organisation on its own – cannot solve the child labour problem.<sup>106</sup> Hence, child labour that is triggered mainly by poverty needs to be confronted by all social agencies on all fronts. The social agencies need to attack both the problem and its causes. Public and private sectors, with the support of non-governmental organisations, should play an important role in minimising, if not completely eradicating, the child labour problem in Namibia.

Despite the fact that Namibia has an appreciable legal framework to tackle the problems of child labour, the problem persists. The major area of concern in Namibia may be the monitoring and enforcement of laws. In this context, therefore, the key to fighting child labour is to stop it from being profitable through strict law enforcement, confiscating traffickers’ profits, increasing protection for children and, hence, reducing their vulnerability.

Regarding the worst forms of child labour, like child trafficking, understanding risk and vulnerability factors and putting in place ways of recognising these in children and their families – and then working to reduce or eliminate their vulnerability – is an important way to protect children from trafficking.<sup>107</sup> The ILO says it is crucial that countries recognise the negative impact of the economic crisis on the weakest members of society, and that the crisis may unravel many years of progress in implementing the Global Action Plan target of eliminating the worst forms of child labour, including child trafficking, by 2016.<sup>108</sup>

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104 ILO (2009a).

105 (ibid.).

106 Rena (2009:1–8).

107 ILO (2009b).

108 (ibid.).

Namibia needs to improve its child protection policies and mitigate the effects of the economic crisis on labour markets and the education system. In line with the ILO approach, this can be done, for example, by reducing the cost of schooling through free uniforms, textbooks and school meals, and by easing the credit constraints of poor households. This explains why the ILO recommends that countries reprioritise their expenditure patterns to benefit the poor and vulnerable.<sup>109</sup>

There is also a need to strengthen institutions that work on the protection of children. Namibia's Action Programme on the Elimination of Child Labour reflects this approach, and it is very much appreciated. What may need to be focused on in this context is coordination of the tasks of such institutions, coupled with capacity-building and proper enforcement mechanisms for the institutions to work together effectively. Once in place, the coordination and protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide the necessary support for the child and for those who care for them, as well as provide for other forms of prevention and for identifying, reporting, referring, investigating, treating and following up instances of child maltreatment described earlier herein, and, as appropriate, provide for judicial involvement.

It should also be noted that labour often interferes with children's education. Ensuring that all children go to school and that their education is of good quality are key to preventing child labour.<sup>110</sup> The right to education should be given priority for all children, and schools should follow up on those who drop out of school. A lack of information on school attendance and child labour in Namibia indicates this gap in how schools monitor attendance. It should be emphasised that the purpose of schools is to minimise the aggregate costs of parental error since teachers at school nurture the minds of children and bring them to a general understanding of what the world expects them to be rather than necessarily what their parents want them to be. Thus, in legal circles, teachers are not only taken to be *parentis in loco*<sup>111</sup> but also *parens patriae*.<sup>112</sup> More importantly, while acting *in loco parentis*, school officials are legally taken to be representatives of the state. The family, from this point of view, becomes a little baby-making factory, whose purpose is to create children for the benefit of the state.<sup>113</sup> Schools should have a way of preventing parents from taking their children out of school so that they can be employed at home.

In light of the above, it may be that the problem would be taken care of to some extent by insisting on compulsory education. Indeed, Neera thinks that if there is at all a blueprint for taking on the problem of child labour, it is education.<sup>114</sup> Even if this were so, the

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109 (ibid.).

110 (ibid.).

111 Latin for "in the place of a parent" or "instead of a parent".

112 Latin for "the psychological parent".

113 Carter (1999:1082).

114 Neera [n.d.].

child of a poor parent would not receive education if it has to earn money to make ends meet for the family. Therefore, unless the family is assured of an income aliunde,<sup>115</sup> the problem of child labour has little hope of getting solved. It is this vital question which has received very little attention universally.

Since poverty and other related socio-economic problems were identified as the major causes of child labour in Namibia, it is recommended that child labour issues be mainstreamed in the Namibian Government's poverty reduction strategy, annual budgets, and development plans. It is recommended, however, that more funds be allocated to these programmes to support initiatives aimed at stopping or at least reducing child labour in Namibia.

## Conclusion

The above discussion has revealed that child labour is a universal problem, and in developing countries it poses a significant challenge for national development. The solution does not lie in a singular approach, but in one that is multidimensional and multifaceted. Hence, intervention at all levels of society is needed in order to alleviate problems affecting children. Such intervention includes achieving education for all children, reducing poverty, and eliminating child labour by enabling legislation, interventions and education efforts to work together to mobilise household and national resources. Together, these will accomplish much in curbing the prevalence of child labour.

It is incontrovertible that child labour does more than deprive children of their education and mental and physical development: their childhood is, in effect, stolen from them. Immature and inexperienced child labourers may be completely unaware of the short- and long-term risks involved in their work. They enjoy the short-term benefits and, with no oversight, they do not realise the long-term implications of their involvement in the labour market in their childhood. Working long hours, child labourers are often denied a basic school education, normal social interaction, personal development, and emotional support from their family. Besides these problems, children face many physical dangers – even death – from forced labour. There are alarming documented fatalities of child labourers. HIV/AIDS and some of the other sexually transmitted diseases are rife among the one million children forced into prostitution every year – something which is part of the worst forms of child labour across the globe. Under-age pregnancy, drug addiction and mental illness are also common among child prostitutes. Now is the time to rise, strongly and with the requisite determination, defend children's rights and stop child labour in all its forms.

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115 Latin for "from elsewhere", "from a different source".

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